

Written Testimony of

**Robert Weissman  
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before the

**The Subcommittee on the Constitution, Civil Rights, and Civil Liberties**

**Of the**

**House of Representatives Committee on the Judiciary**

**On**

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

February 6, 2020



Mr. Chairman and Members of the Committee,

Thank you for the opportunity to testify today on regulatory policy issues. I am Robert Weissman, president of Public Citizen. Public Citizen is a national public interest organization with more than 500,000 members and supporters. For nearly 50 years, we have advocated with some considerable success for government and corporate accountability.

For the entirety of our history, we have worked to make America live up to its democratic promise. We have campaigned for far-reaching democracy reform, including meaningful campaign finance measures, so that the our government will be responsive to We the People, rather than megadonors and the corporate class.

On January 21, 2010, the U.S. Supreme Court took the nation off course in our long march to become a more perfect union. In a monumental ruling that both intensified dangerous existing trends in modern campaign finance jurisprudence and represented a sharp break from 100 years of precedent, the Court issued its *Citizens United* decision.

*Citizens United* has empowered a very tiny class of individuals and corporations to dominate our elections and now stands as the defining judicial decision of the New Gilded Age. It both reflects and worsens the rigged political system that infuriates Americans of all political stripes – and the staggering wealth and income inequality that is the product of the rigged system.

The defining feature of the post-*Citizens United* campaign finance system is the sharp rise in election spending by unaccountable and often secretive outside organizations, which frequently spend more on election races than the candidates themselves. And the defining feature of the outside spending groups is that they are powered by an incredibly small number of donors. Our research shows that just 25 people are responsible for almost half of all Super PAC spending since *Citizens United* was handed down.

This state of affairs is utterly incompatible with democracy, reflective instead of an American Oligarchy.

It has given rise to growing social discontent and has helped drive a dangerous degree of political alienation. As more and more people perceive the system to be rigged and fundamentally corrupt – as polling shows to be the case – our government’s very democratic legitimacy is at stake. Without that democratic legitimacy, we face frightening prospects: oligarchic rule over an alienated and apathetic population, and/or demagogic appeals from an authoritarian leader that redirects people’s anger against the political system toward the weak and vulnerable among us.

The problem is not just people’s sense of alienation. Big Money dominance of our elections is concentrating political power among the political class and blocking the policy changes that the American people want and need. Consider just three examples:

**Drug Pricing:** With good reason, Americans are furious about the price of prescription drugs. Three in 10 Americans report skipping prescriptions because of cost.<sup>1</sup> The price gouging that underlies this tragedy is especially outrageous given the super-profitability of Big Pharma, the industry’s dependence on public research & development, and the fact that drug corporations can charge so much because they benefit from government-conferred monopolies. Not surprisingly, Americans of all political stripes are united in demanding aggressive measures to control drug prices. Taking action to lower prescription drug prices is Americans’ top domestic policy priority out of a list of 21 domestic policy issues.<sup>2</sup> Lowering prescription drug prices is Americans’ top health priority, with 94 percent of Democrats and 89 percent of Republicans stating it is an “extremely important priority” (92 percent overall).<sup>3</sup> Voters overwhelmingly support specific, aggressive measures to address excessive drug costs. Ninety-four percent of voters support having Medicare negotiate lower drug prices and 84 percent favor the government authorizing competition on high-priced drugs to allow production of lower-cost alternatives.<sup>4</sup>

This polling data – and it is roughly consistent across multiple polls – is astounding. Voters are clear that drug pricing reform is a top priority and that they favor aggressive action by staggering margins. Every Member of Congress hears constituent complaints about drug pricing on a consistent basis. Yet Congress and the executive branch – across administrations – have failed to take meaningful action. Everyone understands why: Big Pharma has serious political clout. Big Pharma is consistently, and by far, the biggest federal lobbyist,<sup>5</sup> with its lobbying power backed up by its substantial election-related spending and especially its readiness to throw massive amounts at Dark Money organizations that deliver its message and take on its political enemies.<sup>6</sup>

**Climate Catastrophe:** The climate crisis presents a challenge unlike any humanity has previously confronted. Even with aggressive measures at greenhouse gas emission reduction, we are on track for a significant warming and climate chaos, manifested in the form of more wildfires, more drought, more intense hurricanes, increased flooding, sea

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<sup>1</sup> Ashley Kirzinger, Lunna Lopes, Bryan Wu and Mollyann Brodie, “KFF Health Tracking Poll – February 2019: Prescription Drugs,” KFF, March 1, 2019, available at: <https://www.kff.org/health-costs/poll-finding/kff-health-tracking-poll-february-2019-prescription-drugs>.

<sup>2</sup> “Americans Health and Education Priorities for the New Congress in 2019,” Politico and Harvard T.H.Chan School of Public Health, January 2019, available at: <https://cdn1.sph.harvard.edu/wp-content/uploads/sites/94/2019/01/Politico-Harvard-Poll-Jan-2019-Health-and-Education-Priorities-for-New-Congress-in-2019.pdf>.

<sup>3</sup> “Americans Health and Education Priorities for the New Congress in 2019,” Politico and Harvard T.H.Chan School of Public Health, January 2019, available at: <https://cdn1.sph.harvard.edu/wp-content/uploads/sites/94/2019/01/Politico-Harvard-Poll-Jan-2019-Health-and-Education-Priorities-for-New-Congress-in-2019.pdf>.

<sup>4</sup> Hart Research and North Star Opinion Research, “Prescription Drug Prices: The Voters Speak,” March 2019, available at: [https://craftmediabucket.s3.amazonaws.com/uploads/AV-Summary-of-Polling-Project\\_052119\\_FINAL.pdf](https://craftmediabucket.s3.amazonaws.com/uploads/AV-Summary-of-Polling-Project_052119_FINAL.pdf).

<sup>5</sup> <https://www.opensecrets.org/federal-lobbying/industries>

<sup>6</sup> Karl Evers-Hillstrom, “Pharma Lobby Directed Millions to Conservative ‘Dark Money’ Groups Last Year,” Center for Responsive Politics, November 16, 2018, available at: <https://www.opensecrets.org/news/2018/11/pharma-directed-millions-to-conservative-dark-money>.

level rise, mass species extinction, severely increased heat stress, food and water shortages, mass displacement and, likely, increased military conflict over diminishing natural resources. All of that is if we take immediate and aggressive action. “Immediate reductions would provide the world with more space for cost-effective and sustainable mitigation and adaptation options. Immediate reductions would generate opportunities for investment in innovation and technologies for higher productivity in energy and resource use, in alternative technologies for a world free of human-caused greenhouse gas emissions, and for investment in know-how for achieving equitable transitions.”<sup>7</sup> By contrast, the consequences of inaction are too terrible to contemplate. But inaction is about all the United States, long the world leader in greenhouse gas emissions, has managed, at least at the federal level.

Faced with an existential crisis, why is our politics failing? There can be but little doubt that it is due to the political power of the Dirty Energy industry, expressed most pointedly through political contributions. Over the last decade, the oil and gas industry has pumped \$400 million into federal election spending.<sup>8</sup> That political investment, combined with substantial Dark Money spending, as well as other expressions of the industry’s political power, has taken serious measures to prevent climate catastrophe off the table. Rhode Island Senator Sheldon Whitehouse is not alone in tracing the gridlock on the climate crisis directly to *Citizens United* and increased political spending by the Dirty Energy industry.<sup>9</sup>

**Wall Street Reform:** After the 2008 financial crash and the Great Recession, public anger with Wall Street ran hot. It remains so. The public wants to protect the important but modest financial reform measures contained in the Dodd-Frank legislation – but it also wants more. Write bipartisan pollsters Celinda Lake, David Mermin, Sahil Mehrotra and Bob Carpenter: “Americans see the need for strong regulation of the financial services industry, tough enforcement of existing rules, and additional measures, even after hearing opposing arguments that stress a danger in the role of government. And they strongly support the changes made in the 2010 Dodd-Frank law that Congress passed in response to the financial crisis.”<sup>10</sup> Nine in 10 Americans say financial regulation is important; 70 percent of Americans support *more and stronger* regulations; by a margin of almost 7-1, Americans want Wall Street held further accountable for the financial crisis.<sup>11</sup>

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<sup>7</sup> Intergovernmental Panel on Climate Change Chair Hoesung Lee, Opening of Conference of Parties 25, December 2, 2019, available at: <https://www.ipcc.ch/site/assets/uploads/2019/12/IPCC-Chair-opening-COP25.pdf>.

<sup>8</sup> <https://www.opensecrets.org/industries/totals.php?cycle=2020&ind=e01>.

<sup>9</sup> Jennifer McDermott, “Sen. Whitehouse Targets Dark Money to Address Climate Change,” AP, April 11, 2019, available at: <https://apnews.com/2e0dcc1d50a54611a45b5ce883be9aa7>.

<sup>10</sup> Celinda Lake, David Mermin, Sahil Mehrotra and Bob Carpenter, “New Poll Shows Strong Early-State Support for Wall Street Reform,” Lake Research Partners and Chesapeake Beach Consulting, October 2019, available at: <http://ourfinancialsecurity.org/2019/10/afrcrl-poll-early-state-voters-support-continued-reform-wall-street>.

<sup>11</sup> Celinda Lake, David Mermin, Sahil Mehrotra and Bob Carpenter, “New Poll Shows Strong Early-State Support for Wall Street Reform,” Lake Research Partners and Chesapeake Beach Consulting, October 2019, available at: <http://ourfinancialsecurity.org/2019/10/afrcrl-poll-early-state-voters-support-continued-reform-wall-street>.

Needless to say, financial regulations are not being strengthened, nor aggressively enforced. Americans tie this failure – this disconnect with their overwhelming demand – to Wall Street’s political power, and correctly so. The situation disturbingly echoes the decade prior to the 2008 crash, which saw a massive series of deregulatory moves as Wall Street poured \$5 billion into campaign contributions and lobbying, including \$1.7 billion in campaign contributions.<sup>12</sup> The financial sector is by far the largest contributor to campaigns, as well as the overwhelming funder of Super PACs and outside spending groups. In the decade since *Citizens United*, finance has been responsible for just shy of \$4 billion on campaign spending. Notwithstanding Wall Street’s responsibility for the Great Recession, its political power remains unsurpassed. Immediately in the wake of the crisis, as the large banks defeated “cramdown” proposals which would have allowed bankruptcy judges to renegotiate mortgages to reflect the lowered values of homes, Senator Richard Durbin commented on the banks’ staggering political influence. “And the banks — hard to believe in a time when we’re facing a banking crisis that many of the banks created — are still the most powerful lobby on Capitol Hill. And they frankly own the place,” Durbin said.<sup>13</sup> Little has changed.

Similar stories could be told about a myriad of issues, from food safety to a living wage, from commonsense gun safety to expanded Social Security, from protecting consumers’ privacy to corporate taxes, from Pentagon spending to clean water, and on and on.

Ten years after *Citizens United*, the American people are in agreement: They are virtually unanimous in demanding fundamental change to our campaign spending rules and they want a constitutional amendment to overturn that decision and others that empower a small number of the superrich and corporations to overrun our democracy.

One positive thing happened on January 21, 2010. On that day, Public Citizen and others called for a constitutional amendment to reverse the damage we anticipated would follow from *Citizens United*. Since then, countless organizations and millions of people have joined that call, and a vibrant and growing pro-democracy movement has swept across the country. Millions have signed petitions calling for a constitutional amendment to overturn the decision. Hundreds of thousands have rallied across the country for the decision to be overturned. More than 800 cities and towns and 20 states have passed resolutions calling for a constitutional amendment.

Now it is time for Congress to act. This House has taken a first, vital step, with passage last March of H.R.1, the For the People Act, the most sweeping pro-democracy measure of the last 50 years. Now the House should follow by providing a two-thirds margin for the Democracy For All Amendment, which would overturn *Citizens United* and other decisions and restore the right of Congress and the states to set reasonable limits on the raising and spending of money by candidates and others to influence elections.

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<sup>12</sup> Robert Weissman and James Donahue, “Sold Out: How Wall Street and Washington Sold Out America,” Essential Information, March 2009, available at: [http://www.wallstreetwatch.org/reports/sold\\_out.pdf](http://www.wallstreetwatch.org/reports/sold_out.pdf).

<sup>13</sup> Ryan Grim, “Dick Durbin: ‘Frankly the Banks Own the Place,’” Huffington Post, May 30, 2009, available at: [https://www.huffpost.com/entry/dick-durbin-banks-frankly\\_n\\_193010](https://www.huffpost.com/entry/dick-durbin-banks-frankly_n_193010).

The balance of this testimony makes the case for that action. Section I highlights the trends in campaign spending since *Citizens United*. Section II analyzes the jurisprudential flaws of *Citizens United* and the other key decision of modern campaign finance law, *Buckley v. Valeo*. Section III discusses the imperative for legislative and constitutional remedies for the damage done by *Citizens United* and related decisions. It makes the case for the Democracy For All Amendment, rooting the argument not just in a revitalized anti-corruption principle but in concerns for political equality and ensuring that an economic elite cannot leverage their economic power into political dominance. Section IV concludes the testimony by reviewing polling and other indicators that show near-universal disgust with the current campaign finance system and overwhelming support for a constitutional amendment to overturn *Citizens United* and for other democracy measures.

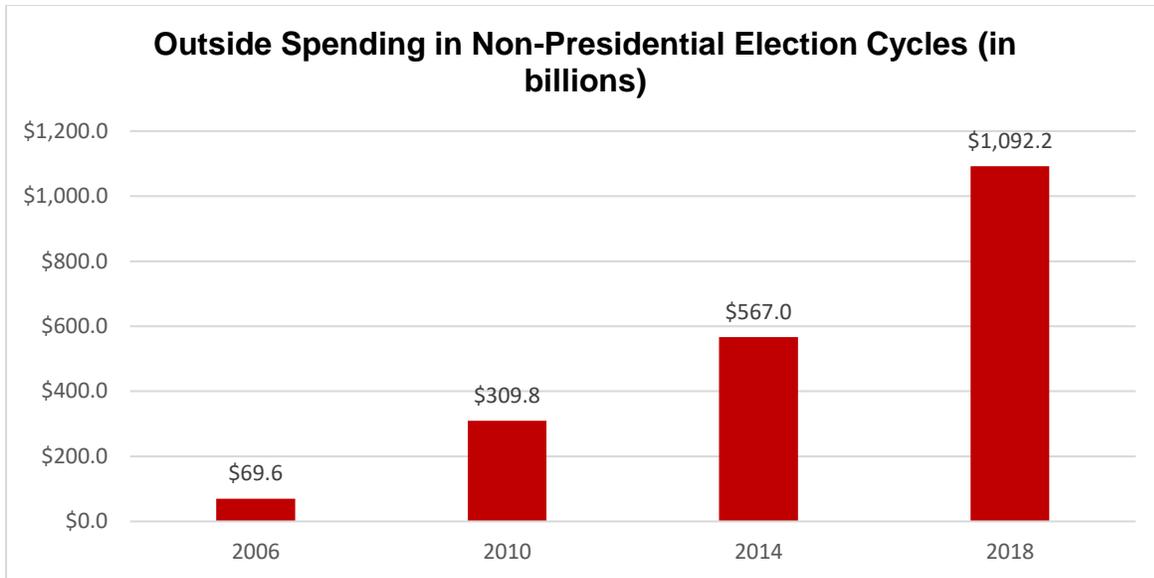
## **I. THE WORLD THAT *CITIZENS UNITED* MADE**

Make no mistake: American democracy was suffering before *Citizens United*. But *Citizens United* did transform the electoral landscape – exacerbating dangerous trends already underway and introducing a slew of new encroachments on democratic self-governance. In short, *Citizens United* has empowered a very tiny class of individuals and corporations to dominate our elections, exerting an outsized and undemocratic effect on who runs for office, how they campaign, what policies are debated, who wins, and what are considered the boundaries of legitimate policy debate by elected officials. Appreciating the totality of the damage inflicted at all levels of government requires considering its impact on multiple dimensions of modern-day politics.

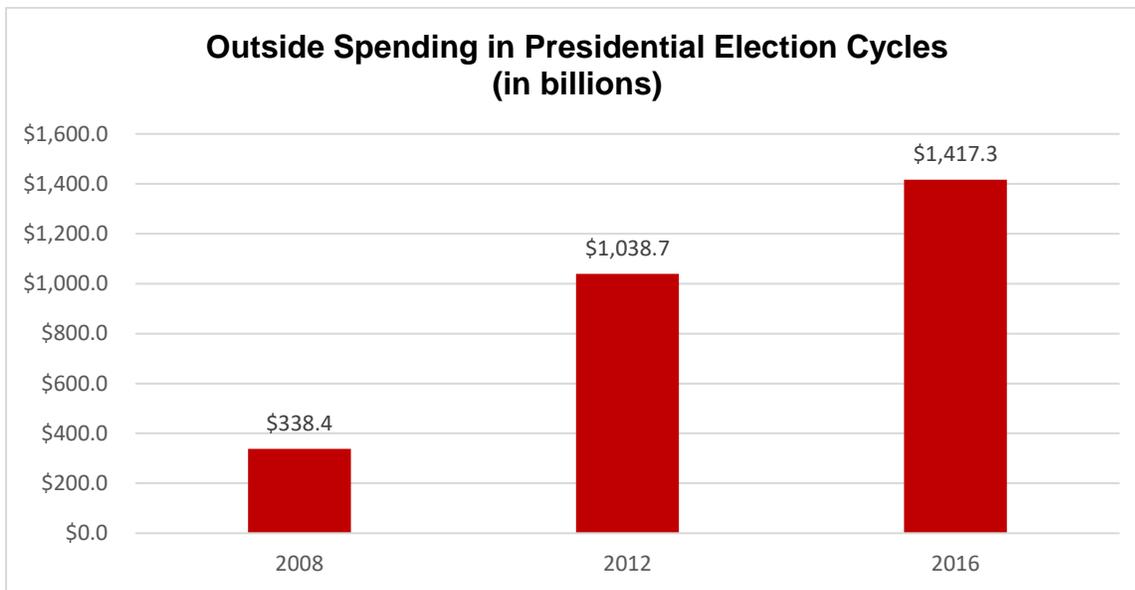
### **A. *Citizens United* Unleashed Torrents of Spending by Super PACs and Other Unaccountable Outside Political Groups**

*Citizens United* empowered unaccountable outside political organizations to raise and spend enormous sums of money to influence elections. The effect was immediate. Super PACs suddenly became a household word and dominant players in election contests.

Fueled by the superrich, outside spending in the first mid-term election following *Citizens United* rose by a factor of four (\$309.8 million versus \$69.6 million). It jumped three times in the first presidential election (\$1.038 billion versus \$338.4 million). And outside spending continues to skyrocket, with 2018 spending more than triple the level of 2010, the first post-*Citizens United* election.



Source: Center for Responsive Politics

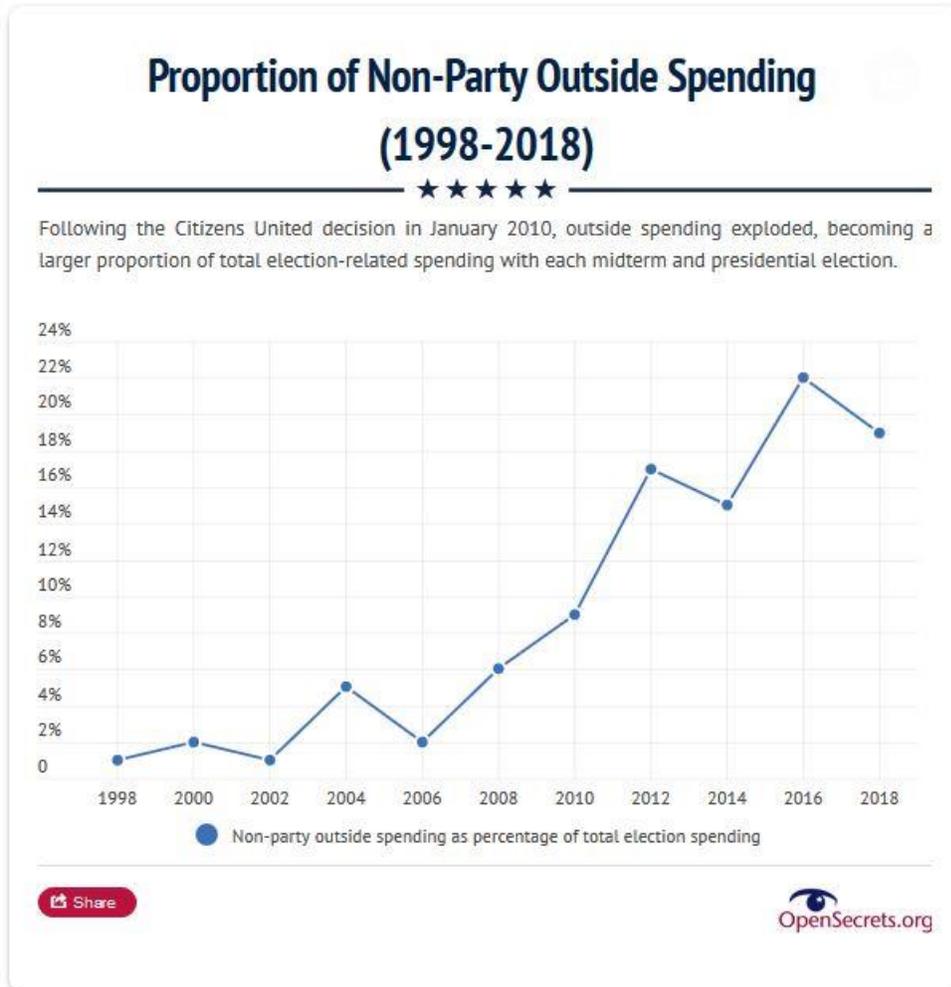


Source: Center for Responsive Politics

Altogether, the Center for Responsive Politics calculates, non-party outside groups have spent nearly \$4.6 billion influencing elections since the 2010 cycle, six times the previous two decades combined.<sup>14</sup>

<sup>14</sup> Karl Evers-Hillstrom, “More Money, Less Transparency: A Decade Under *Citizens United*,” Center for Responsive Politics,” January 14, 2020, available at: <https://www.opensecrets.org/news/reports/a-decade-under-citizens-united>.

Outside spending jumped from a relatively tiny portion of overall spending – 5 percent or less – to become a defining feature of the current campaign finance environment. In recent elections, outside spending has constituted roughly a fifth of overall campaign spending.<sup>15</sup>



Source: Center for Responsive Politics

As startling as these figures are, they understate the importance of outside spending. While candidates tend to raise and spend much more in closely contested races, candidate spending is spread to races across the country. By contrast, outside spenders focus like a laser exclusively on close races, allocating funds to where it will matter most. As a result, in an increasing number of cases, outside spending exceeds expenditures by candidates and parties. The Center for Responsive Politics documents outside spending surpassing candidate spending in 126 races

<sup>15</sup> Karl Evers-Hillstrom, “More Money, Less Transparency: A Decade Under *Citizens United*,” Center for Responsive Politics,” January 14, 2020, available at: <https://www.opensecrets.org/news/reports/a-decade-under-citizens-united>.

since *Citizens United* was decided. Prior to *Citizens United*, such spending patterns were rare, occurring just 15 times in the prior decade.<sup>16</sup>

In some cases, there is strong evidence that the outside groups coordinate closely with candidates – something that is supposed to be illegal and, as discussed below, contravenes a central premise of *Citizens United*. But where the outside groups are genuinely independent, by dint of their extraordinary spending, they threaten to wrest control of election debates and narratives from candidates. Indeed, individual or small groups of billionaires, such as Michael Bloomberg and the Koch network, are developing permanent political operations that rival the size, reach and sophistication of political parties.

Our democracy could perhaps somehow stomach this torrent of outsized spending if it was funded by small donations from a cross-section of voters. But, as described below, the opposite is the case. The funds come overwhelmingly from a very small, non-representative group of individuals.

### **B. *Citizens United* Created a De Facto American Oligarchy, Empowering a Tiny Number of Superrich Donors to Dominate Elections**

An extraordinarily small number of people is responsible for the bulk of outside spending. Given the centrality of outside spending in elections in the post-*Citizens United* era, this extreme donor concentration constitutes a very real drift to oligarchy and away from democracy.

A Public Citizen study found that just 25 ultra-wealthy donors have made up nearly half (47 percent) of all individual contributions to super PACs since 2010, giving \$1.4 billion of \$2.96 billion in individual super PAC contributions. Again: Just over two dozen individuals are responsible for roughly half of Super PAC contributions.

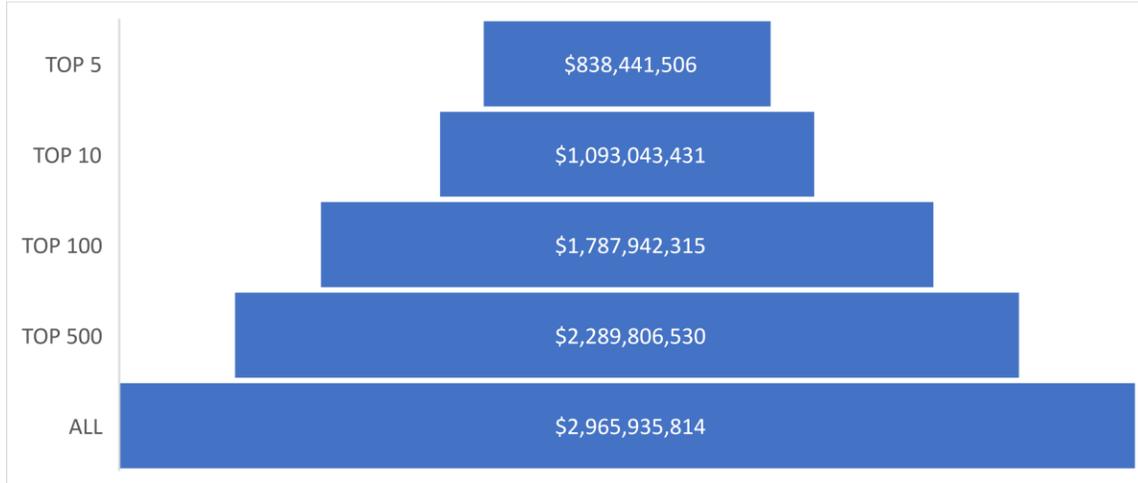
The top 100 donors are responsible for 60 percent of all Super PAC contributions.

The top five donors alone – Republican casino billionaire Sheldon Adelson and his wife Miriam; hedge fund billionaire Tom Steyer and former New York Mayor Michael Bloomberg, both of whom are Democratic presidential candidates; Richard and Elizabeth Uihlein, a Republican donor and president of a packaging company, and Fred Eychaner, a Democratic donor who owns a printing and media company – account for more than a quarter of all Super PAC contributions.

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<sup>16</sup> Karl Evers-Hillstrom, “More Money, Less Transparency: A Decade Under *Citizens United*,” Center for Responsive Politics, January 14, 2020, available at: <https://www.opensecrets.org/news/reports/a-decade-under-citizens-united>.

## Breakdown of Individual Super PAC Contributions (2010-2020)



Source: Public Citizen analysis of Federal Election Commission data

Unsurprisingly, given the extreme wealth and inequality of our era, Wall Street and financial sector moguls are the biggest contributors to Super PACs, as a separate Public Citizen analysis of the 2017-2018 election cycle concluded.<sup>17</sup>

## Sources of Wealth for the Top 100 Individual Donors to Outside Spending Groups

Source of Wealth	Donors	Pro-Republican	Pro-Democrat	Nonpartisan/Other	Total	Pct. of Total
Finance	36	\$76,912,554	\$264,383,175	\$2,455,736	\$343,751,465	49.8%
Gambling	4	\$127,290,000	\$0	\$0	\$127,290,000	18.5%
Technology	13	\$8,217,600	\$22,795,730	\$13,083,494	\$44,096,824	6.4%
Inheritance	11	\$12,160,000	\$29,875,580	\$101,000	\$42,136,580	6.1%
Industrial Supply/Distribution	4	\$41,138,468	\$0	\$0	\$41,138,468	6.0%

Source: Public Citizen analysis of Center for Responsive Politics data for the 2017-2018 election cycle.

This concentration of donors is intolerable on its face. What kind of democracy can we have with 100 individuals superpowered to exert influence by sheer willingness to spend gargantuan sums – money far beyond the reach of all but a tiny sliver of the population?

The situation only becomes marginally better if the scope of analysis is expanded beyond Super PACs to all federal election spending. While the Occupy movement focused attention on the top

<sup>17</sup> Alan Zibel, “Plutocrat Politics,” May 15, 2019, Public Citizen, available at: <https://www.citizen.org/wp-content/uploads/outsidetodonors.pdf>.

1 percent, it turns out that, when it comes to campaign finance, Occupy missed the mark. It's really the top 0.01 percent – the top 1 percent of the top 1 percent – who dominate campaign financing.

Stanford University Professor Adam Bonica and Jenny Shen point out that while the top .01 percent capture an astounding 4 percent of national income (more than double the portion from three decades earlier), they are responsible for more than 40 percent of all campaign contributions (more than double the share from three decades earlier).<sup>18</sup>

Arriving at slightly different numbers, the Center for Responsive Politics found that, in 2014, the top 0.01 percent – fewer than 32,000 individuals – were responsible for 29 percent of all federally disclosed political giving: “In the 2014 elections, 31,976 donors – equal to roughly one percent of one percent of the total population of the United States – accounted for an astounding \$1.18 billion in disclosed political contributions at the federal level.”<sup>19</sup> For 2018, the top .013 of donors – fewer than 44,000 – were responsible for 40 percent of all disclosed political giving.<sup>20</sup>

The problem of extreme concentration of political giving is compounded by the fact that the super-rich have very different policy views than average Americans. If super-rich policy preferences matched those of the general public, then the distorting effect of their political spending might be diminished. But those views veer far from the American mainstream, and they exert a powerful distorting effect on our political debate and policymaking.

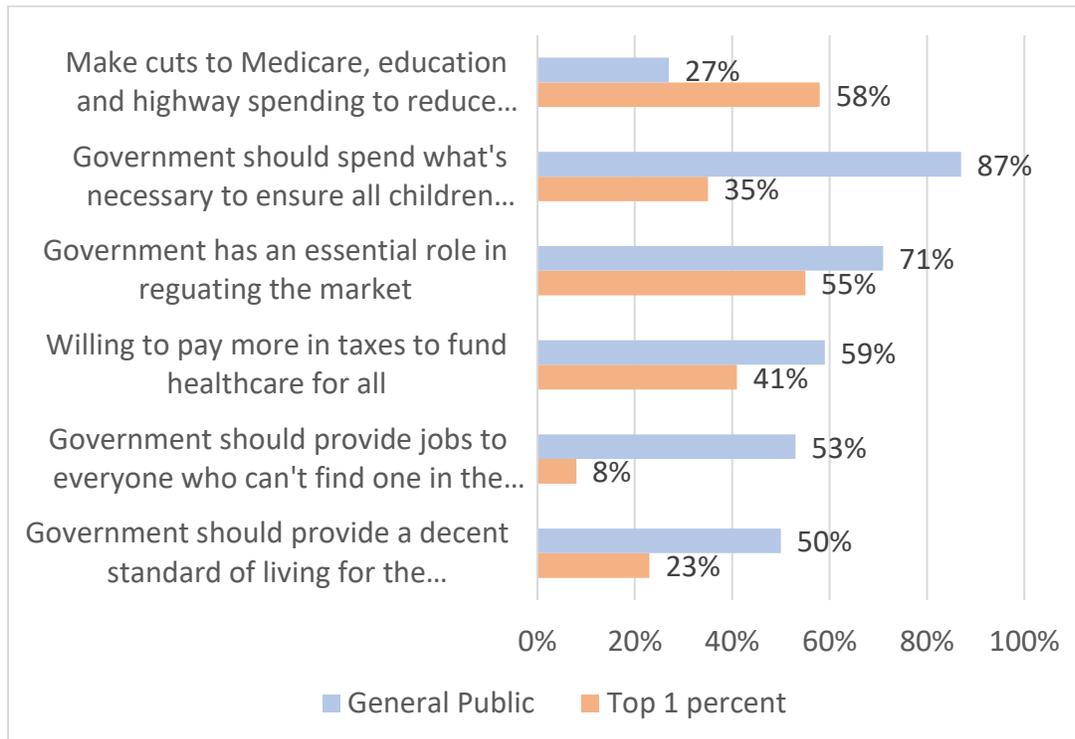
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<sup>18</sup> Adam Bonica and Jenny Shen, “The rich are dominating campaigns. Here’s why that’s about to get worse,” The Washington Post (April 23, 2014), <https://www.washingtonpost.com/news/monkey-cage/wp/2014/04/23/the-rich-are-dominating-campaigns-heres-why-thats-about-to-get-worse/>

<sup>19</sup> Peter Olsen-Phillips, Russ Choma, Sarah Bryner and Doug Weber, “The Political One Percent of the One Percent in 2014: Mega Donors Fuel Rising Cost of Elections,” OpenSecrets blog (April 30, 2015), <http://www.opensecrets.org/news/2015/04/the-political-one-percent-of-the-one-percent-in-2014-mega-donors-fuel-rising-cost-of-elections/>

<sup>20</sup> Public Citizen calculation based on Center for Responsive Politics data available at: <https://www.opensecrets.org/overview/donordemographics.php>.

## Political Views of the Top 1 Percent vs. The General Public



Source: Benjamin Page, Larry Bartels and Jason Seawright, "Democracy and the Policy Preferences of Wealthy Americans," *Perspectives on Politics*, Vol. 11 (March 2013).

### C. Empowering the Superrich Heightens Racial Disparities

Reflecting the enormous racial wealth gap in the United States, a political giving system that rewards and empowers the super-rich inevitably exhibits extreme racial disparities.

Even before the rise of Super PACs and unlimited donations, low-income, majority-minority districts were highly under-represented among campaign contributions. The biggest donors were highly concentrated in New York, Washington, D.C., Chicago and other big cities. For example, in the 2004 election cycle, the top contributing zip code to presidential campaigns was 10021, on Manhattan's exclusive Upper East Side. Contributors in that one zip code sent \$4.2 million to presidential candidates, according to a report by Public Campaign, the Fannie Lou Hamer Project and the William C. Velasquez Institute, which analyzed donations of over \$200.<sup>21</sup> That one elite zip code provided more presidential campaign money than the 377 zip codes with the largest proportion of African-Americans and the 365 zip codes with the largest proportion of Latino or Hispanic Americans.

<sup>21</sup> Public Campaign, the Fannie Lou Hamer Project and the William C. Velasquez Institute, "The Color of Money: Campaign Contributions, Race, Ethnicity and Neighborhood, 2004, available at: <https://www.colorofmoney.org/majorfindings.html>.

Another Public Campaign report analyzing the 2000 and 2002 election cycles found that nearly 90 percent of \$2 billion in contributions of more than \$200 came from zip codes that were majority non-Hispanic white.<sup>22</sup> By comparison, under 2 percent of all campaign funds came from majority Latino zip codes and 3 percent from majority African American zip codes. Public Campaign's analyses looked at itemized contributions above \$200.

A Demos study found that whites made up more than 90 percent of federal election donors in the 2012 and 2014 election cycles, and 94 percent of donors giving more than \$5,000 in the 2014 election cycle.<sup>23</sup>

*Citizens United* has supercharged the problem. Public Citizen's analysis of Super PAC donors in the 2017-2018 election cycle found that 97 out of the 100 largest individual donors to outside spending groups were white.<sup>24</sup> A recent Public Citizen analysis found that the vast majority of funding for Super PACs comes from majority-white zip codes.<sup>25</sup> Super PAC contributions from the top donating majority-white zip codes outpace those from the top donating majority-minority zip codes by more than 10-1.

The analysis found that from 2010 through 2018:

- Majority-white zip codes gave about \$7 billion to political campaigns – roughly 20 times the amount from majority-minority zip codes.
- Majority-white zip codes gave nearly \$2.8 billion to super PACs – more than 25 times the amount from majority-minority zip codes.
- The top 10 majority white zip codes for individual donations gave \$874 million to candidates, while the top 10 majority-white zip codes for super PAC donations gave \$977 million.
- The top 10 majority-minority zip codes for individual donations gave \$111 million to candidates, while the top 10 majority minority zip codes for super PAC donations gave \$68 million.

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<sup>22</sup> Public Campaign, "The Color of Money: Campaign Contributions, Race, Ethnicity and Neighborhood, 2003, available at: [https://www.colorofmoney.org/majorfindings\\_2003.html](https://www.colorofmoney.org/majorfindings_2003.html).

<sup>23</sup> Sean McElwee et. al., "Whose Voice, Whose Choice?," Demos, 2016, available at:

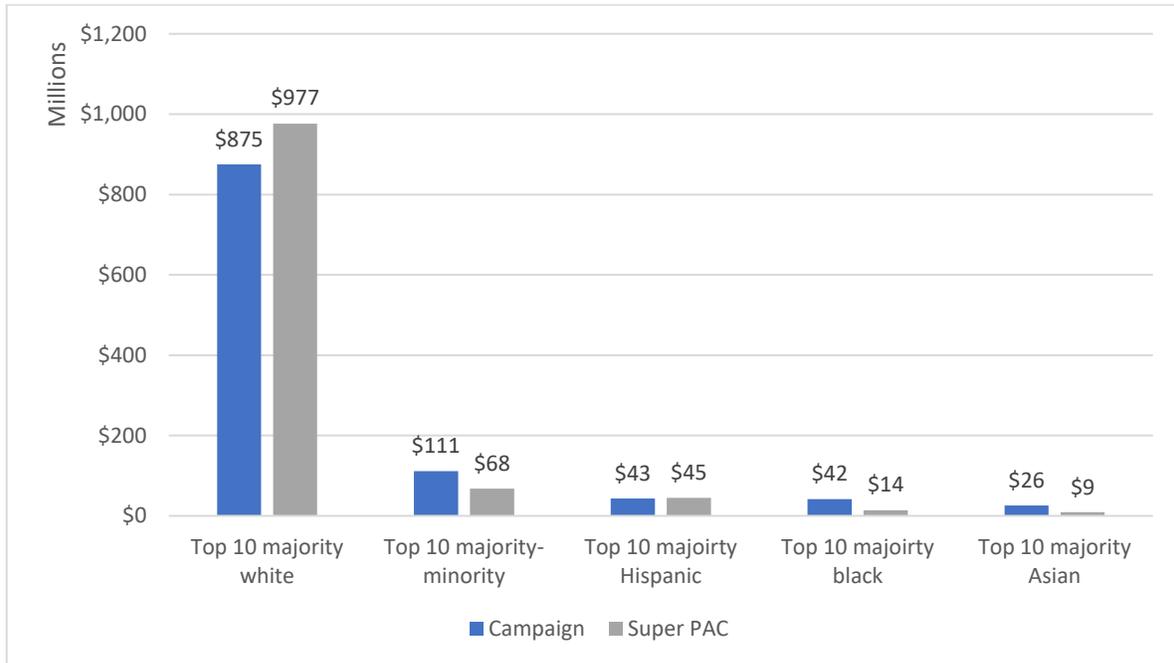
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<sup>24</sup> Alan Zibel, "Plutocrat Politics," May 15, 2019, Public Citizen, available at: <https://www.citizen.org/wp-content/uploads/outsidedonors.pdf>.

<sup>25</sup> Alan Zibel, "Oligarch Overload," Public Citizen, January 15, 2020, available at:

<https://www.citizen.org/article/oligarch-overload/?eType=EmailBlastContent&eId=33ce6cd2-22f1-49a4-bc83-d7f0ae5a1d41>>

## Donations from Top 10 Zip Codes For Campaign Contributions, By Majority Race/Ethnicity, 2010-2018



Source: Public Citizen analysis of data from Maplight (campaign contributions over \$200) Federal Election Commission (Super PAC contributions).

### **D. *Citizens United* Spurred a Massive Increase in Secret Political Spending, Including by Foreign Interests**

Facilitated by the Supreme Court’s 2007 decision in *Federal Election Commission v. Wisconsin Right to Life* which gutted the electioneering communications rules in the Bipartisan Campaign Reform Act and then supercharged by *Citizens United*, secret election spending has surged over the past decade. So-called Dark Money spending by groups that don’t disclose their donors since *Citizens United* totals just shy of \$1 billion (\$963 million) compared to \$129 million over the prior decade.<sup>26</sup>

Dark Money spending is the most unaccountable of all the outside spending enabled by *Citizens United* – victims of attacks from outside Dark Money groups are helpless even to defend themselves by identifying and criticizing the funders attacking them. Such spending is utterly incompatible with a functioning democracy.

Most such spending, however, is legal, at least under misguided Internal Revenue Service interpretations that permit 501(c)(4) social welfare and 501(c)(6) trade associations to direct up to half of their expenditures to election-related advertising and activities.

<sup>26</sup> Karl Evers-Hillstrom, “More Money, Less Transparency: A Decade Under *Citizens United*,” Center for Responsive Politics, January 14, 2020, available at: <https://www.opensecrets.org/news/reports/a-decade-under-citizens-united>.

However, thanks to an utterly dysfunctional Federal Election Commission and the inherent problems in trying to impose modest regulatory standards on a largely deregulated campaign finance environment, abuses – legal and illegal – are rampant. Money that should be disclosed is not; secret spending organizations devote impermissible portions of their spending to election-related activity; and foreign interests are able to contribute illegally to electioneering organizations:

- One tactic is for a 501(c) group to accept contributions from anonymous sources, then pass those contributions on to a super PAC which, in turn, reports the 501(c) group as its donor, thus evading the requirement for Super PACs to disclose their donors.<sup>27</sup>
- Another technique is to form a super PAC shortly before an election, such that reporting dates fall after the election. These have come to be known as “pop up” super PACs.<sup>28</sup>
- There is good reason to believe that many 501(c)(4) and (c)(6) organizations were established primarily to engage in electoral activity and impermissibly spend more than half of their budget on election activity. Public Citizen accused the Karl Rove-founded Crossroads GPS of such an abuse. The FEC’s general counsel recommended the agency move forward with a case on the matter but it stalled on a 3-3 deadlock at the commission level. Our litigation over the dispute remains ongoing.<sup>29</sup>
- In 2016, The Washington Post documented the phenomenon of ghost corporations, often limited liability corporations, contributing to super PACs. There is often no meaningful information about the people behind these LLCs, let alone the funders of them.<sup>30</sup>
- Shell companies, LLCs and money-sloshing arrangements provide easy opportunity for foreign companies, individuals and governments to finance U.S. election spending illegally. The Intercept in 2017 reported on four cases in which foreign national and foreign-controlled corporations contributed seven-figure sums to super PACs,<sup>31</sup> leading to FEC enforcement in one case. There is every reason to suspect such arrangements are far more commonplace; the rare occasion of FEC enforcement seems to be little more than a matter of luck. Lev Parnas and Igor Fruman, the former Rudy Giuliani associates

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<sup>27</sup> Karl Evers-Hillstrom and Yue Stella Yu, “Karl Rove-Linked ‘Dark Money’ Group Raised, Spent Big Ahead of 2018 Midterms,” November 21, 2019, Center for Responsive Politics, available at: <https://www.opensecrets.org/news/2019/11/dark-money-group-one-nation-2018/> and Karl Evers-Hillstrom, “‘Dark Money’ Groups Funneled Millions to Powerful Super PACs During 2018 Midterms, January 3, 2019, Center for Responsive Politics, available at: <https://www.opensecrets.org/news/2019/01/dark-money/>

<sup>28</sup> Ashley Balcerzak, “‘Pop-Up Pacs Are Spending Big in Election 2018’s Final Days – But They’re Hiding their Bankrollers,” Center for Public Integrity, November 2, 2018, available at: <https://publicintegrity.org/politics/pop-up-pacs-are-spending-big-in-election-2018s-final-days-but-theyre-hiding-their-bankrollers/>

<sup>29</sup> <https://www.citizen.org/litigation/public-citizen-v-fec/>

<sup>30</sup> Matea Gold and Anu Narayanswamy, “How ‘Ghost Corporations’ Are Funding the 2016 Election,” March 18, 2016, Washington Post, available at: [https://www.washingtonpost.com/politics/how-ghost-corporations-are-funding-the-2016-election/2016/03/18/2446e526-ed14-11e5-a6f3-21ccdbc5f74e\\_story.html](https://www.washingtonpost.com/politics/how-ghost-corporations-are-funding-the-2016-election/2016/03/18/2446e526-ed14-11e5-a6f3-21ccdbc5f74e_story.html).

<sup>31</sup> Jon Schwarz, “John Paul Stevens Was Right: *Citizens United* Opened the Door to Foreign Money in U.S. Elections,” July 18, 2019, available at: <https://theintercept.com/2019/07/18/john-paul-stevens-was-right-citizens-united-opened-the-door-to-foreign-money-in-u-s-elections/>

now indicted for making illegal foreign election donations, used exactly this technique, running \$325,000 through a just established LLC for a contribution to a Super PAC, allegedly on behalf of an anonymous foreign donor.<sup>32</sup>

**E. Supposedly Independent, Outside Spending Is In Fact Closely Coordinated with Candidates**

A huge portion of money raised and spent by Super PACs and outside groups is closely coordinated with candidates. This is an important fact because it eviscerates one of the central premises of *Citizens United* – that outside group spending is not coordinated with campaigns and therefore, by definition, cannot exert a corrupting influence. In practice, close coordination between outside spenders and candidates creates a vehicle for donors to circumvent campaign contribution limits – limits in place precisely to eliminate corruption.

Prior to the issuance of the *Citizens United* decision, outside entities likely did act in a largely independent fashion. That is because the rules governing the electioneering activities of outside entities were about the same as the rules governing candidate committees. But by permitting outside entities to receive unlimited contributions from an array of sources, *Citizens United* created a strong incentive for restricted entities – like candidates and political parties – to collaborate with outside entities.

The results were quickly evident. Public Citizen documented that almost two-thirds of campaign spending by outside groups in the 2012 election was conducted by entities tied to a single candidate or a single party.

The existence of single-candidate Super PACs is now a permanent feature of the electoral landscape, accounting for about 15 percent of Super PAC spending in mid-term elections and half of such spending in presidential election years.

**Single Candidate Super PAC spending**

Year	Single-candidate Super PAC spending	Overall Super PAC spending	Percentage of Single-candidate spending
2018	\$123,715,593	\$822,068,922	15 percent
2016	\$530,768,314	\$1,066,914,448	50 percent
2014	\$52,570,493	\$345,110,359	15 percent
2012	\$273,479,098	\$609,936,792	45 percent

Source: Public Citizen compilation analysis of Center for Responsive Politics data.

<sup>32</sup> U.S. Attorney’s Office, Southern District of New York, “Lev Parnas And Igor Fruman Charged With Conspiring To Violate Straw And Foreign Donor Bans,” October 10, 2019, available at: <https://www.justice.gov/usao-sdny/pr/lev-parnas-and-igor-fruman-charged-conspiring-violate-straw-and-foreign-donor-bans>.

There is no reason to believe that single-candidate Super PACs operate independently of the candidates they are supporting. Many of these single-candidate Super PACs are founded, funded and/or managed by friends, family, former staff and political allies of the candidate they support.<sup>33</sup> The House and Senate majority and minority leaders, or their campaign committees, each have associated Super PACs.<sup>34</sup>

For example: In a Washington state primary campaign, a Super PAC called “Progress for Washington” mailed attack literature targeting Rep. Suzan DelBene of Washington. Laura Ruderman, one of DelBene’s challengers in the Democratic primary, professed having no knowledge of the PAC’s origins. Then Federal Election Commission filings revealed that the source of Progress for Washington’s money was Ruderman’s mother, Margaret Rothschild, and that vendors in charge of producing the mailing had past political ties to Ruderman. The Super PAC was quickly dubbed the “mamaPAC” and Ruderman soon denounced its activities.<sup>35</sup>

But family ties aren’t needed to make a mockery of no-coordination rules. “Candidates and parties have exposed the countless loopholes in coordination rules over the last decade,” notes the Center for Responsive Politics. “One of the more ridiculous episodes of coordination took place in 2014, when the two major parties communicated with outside groups in code in public Twitter posts to concoct their ad buying strategy. The effort abused FEC rules that allow outside groups to use information from candidates or parties that is distributed on a public forum.”<sup>36</sup>

Recent news events make clear how candidate-coordinated Super PACs enable the super-rich to be super-connected and super-influential. An audio recording made by Lev Parnas, the Rudy Giuliani associate, at a private dinner meeting with President Trump at the Trump International Hotel in Washington, D.C. is especially revealing. The meeting was organized by a pro-Trump super PAC, America First Action. Parnas and his associate Igor Fruman gained access to the dinner by pledging \$1 million to the group, \$325,000 of which they ultimately donated through a corporation that federal prosecutors allege was a “straw man” to funnel illegal contributions from an unidentified person.<sup>37</sup> Also present at the dinner was Barry Zekelman, the Canadian CEO of Zekelman Industries, a steel tube manufacturer that in 2018 gave \$1.75 million to America First Action and has lobbied over steel policy.<sup>38</sup>

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<sup>33</sup> Taylor Lincoln, “Super Connected (2014),” Public Citizen, January 14, 2015, available at: <https://www.citizen.org/wp-content/uploads/super-connected-2014-citizens-united-outside-groups-report-updated.pdf>.

<sup>34</sup> Karl Evers-Hillstrom, “More Money, Less Transparency: A Decade Under *Citizens United*,” Center for Responsive Politics, January 14, 2020, available at: <https://www.opensecrets.org/news/reports/a-decade-under-citizens-united>.

<sup>35</sup> Joel Connelly, *Ruderman and Mom: High Road and Low Road*, Seattle Post-Intelligencer, July 16, 2012, available at: <http://bit.ly/TdxRTf>.

<sup>36</sup> Karl Evers-Hillstrom, “More Money, Less Transparency: A Decade Under *Citizens United*,” Center for Responsive Politics, January 14, 2020, available at: <https://www.opensecrets.org/news/reports/a-decade-under-citizens-united>.

<sup>37</sup> U.S. Attorney’s Office, Southern District of New York, “Lev Parnas And Igor Fruman Charged With Conspiring To Violate Straw And Foreign Donor Bans,” October 10, 2019, available at: <https://www.justice.gov/usao-sdny/pr/lev-parnas-and-igor-fruman-charged-conspiring-violate-straw-and-foreign-donor-bans>.

<sup>38</sup> <https://www.opensecrets.org/orgs/summary.php?id=D000023239&cycle=2018>

“During the dinner,” reports the New York Times, “attendees fawned over Mr. Trump and seemed to revel in their ability to ask him for direct help with business issues. ... The donors competed for time to walk through their sometimes conflicting issues, one by one, pitching the president to take up their causes almost as if they were on ‘Shark Tank,’ the reality television show, looking for investors in their ideas.”<sup>39</sup>

Zekelman pushed for specific policies related to cheap steel imports from Asia and federal safety rules limiting how many hours truck drivers can be on the road.<sup>40</sup>

Others at the meeting also made very parochial pitches, including for support for a 500-mile stretch of highway.<sup>41</sup>

These remarkable instances offer insight into the profoundly corrupting nature of single-candidate Super PACs, as well as the corrupting nature of Big Money in politics more generally.

Crucially, there is every reason to suspect these examples are commonplace. What’s unique about this case is merely that one of the participants recorded the conversation and is under indictment, and so decided to make the recording public. But this kind of pay-to-play special access is a practically inescapable feature of a Big Money-dominated electoral system, and certainly one in which unlimited expenditures to single-candidate entities are permitted and normalized.

## **F. *Citizens United* Facilitated A Surge in Corporate Spending on Elections**

The bulk of money flowing into Super PACs and outside spending entities post-*Citizens United* has come from the superrich – but corporations also have made enormous contributions, much of it obscured by their reliance on Dark Money conduits. A Public Citizen analysis found that, since the 2010 *Citizens United* decision, corporations at minimum have spent more than half a billion dollars to influence elections. More than 2,200 corporations reported \$310 million on election-related spending, primarily contributions to Super PACs. Additionally, 30 corporate trade groups, which do not disclose their donors, have spent \$226 million for the purpose of influencing elections. That totals to more than \$536 million in political spending – a figure that is almost surely an undercount, because it does not count corporate contributions to Dark Money 501(c)(4) social welfare organizations.<sup>42</sup>

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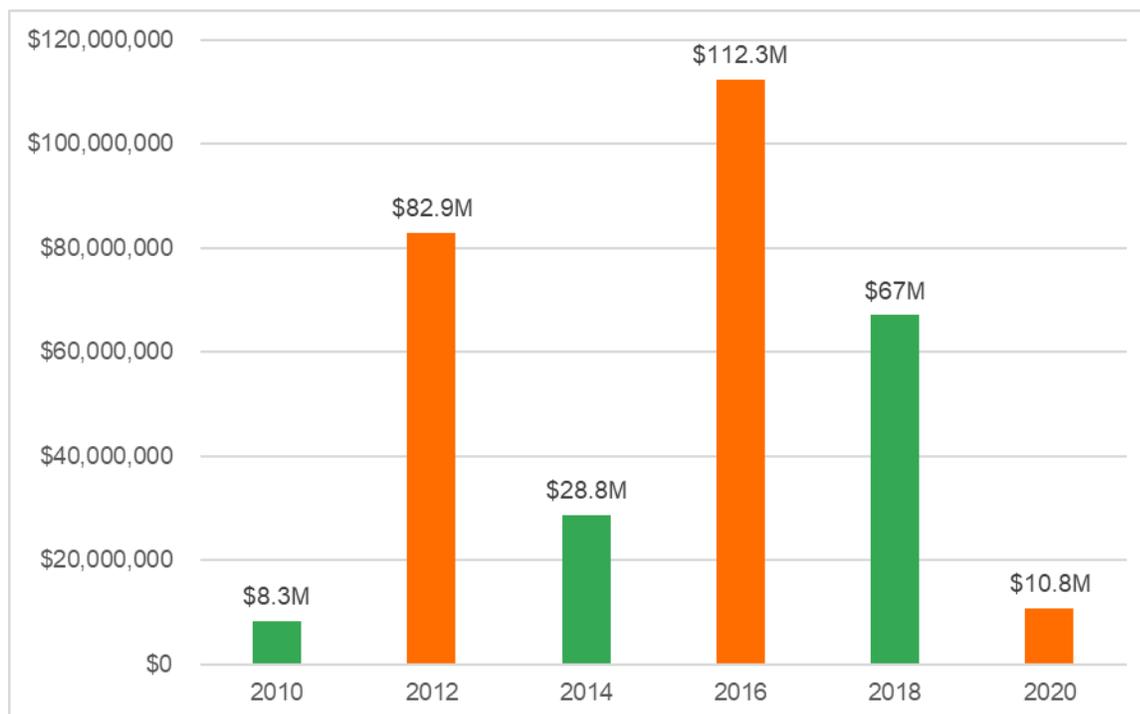
<sup>39</sup> Kenneth Vogel and Ben Protess, “Tape Made Public of Trump Discussing Ukraine with Donors,” New York Times, January 26, 2020, available at: <https://www.nytimes.com/2020/01/25/us/politics/trump-ukraine-donors.html?searchResultPosition=6>.

<sup>40</sup> Kenneth Vogel and Ben Protess, “Tape Made Public of Trump Discussing Ukraine with Donors,” New York Times, January 26, 2020, available at: <https://www.nytimes.com/2020/01/25/us/politics/trump-ukraine-donors.html?searchResultPosition=6>.

<sup>41</sup> Kenneth Vogel and Ben Protess, “Tape Made Public of Trump Discussing Ukraine with Donors,” New York Times, January 26, 2020, available at: <https://www.nytimes.com/2020/01/25/us/politics/trump-ukraine-donors.html?searchResultPosition=6>.

<sup>42</sup> Rick Claypool, “Corporations United,” Public Citizen, January 15, 2020, available at: <https://www.citizen.org/article/corporations-united-citizens-united-10-years-report/?eType=EmailBlastContent&eId=33ce6cd2-22f1-49a4-bc83-d7f0ae5a1d41>.

## Disclosed corporate election spending by electoral cycle, 2010-2020



Source: Public Citizen, “Corporations United.”

As with individual contributions, a small number of corporate contributors are responsible for a disproportionate amount of total spending. The top 20 corporate donors account for \$118 million – more than a third – of corporate donations reported to the FEC, and the entities donated exclusively to Super PACs that back Republicans. Only four of these top corporate donors are publicly traded. Three are energy corporations – Chevron, NextEra Energy and Pinnacle West Capital – and the fourth is a subsidiary of British American Tobacco. Twenty of the top corporate donors have executives, chairpersons or other top figures who also have donated generously to political campaigns.

The U.S. Chamber of Commerce is by far the most consequential of the nondisclosing corporate trade groups. It has spent \$143 million – nearly two-thirds of the total election-related spending by corporate trade associations.

### G. Big Money Inundates the Airwaves with Negative Attack Ads

Negative campaigning traces back to the nation’s earliest days, but *Citizens United* has supercharged negative campaigning in the modern period. Since *Citizens United*, real debate has been displaced by misleading, personal attacks, with the overwhelming share of Super PAC and outside money devoted to attack ads. Eighty-five percent of unregulated independent expenditures made by the top 12 non-party outside groups in the 2018 election cycle financed negative messages, a Public Citizen analysis finds. This proportion of negative campaigning has remained roughly consistent since *Citizens United*.

Outside groups are spending money on attack ads because they work. Although the ads may seem over-the-top and so ominous as to be self-discrediting, people in fact do not tune them out.<sup>43</sup> In fact, the stark messaging and frightening emotional appeals draw in viewers and activate heightened attention levels.<sup>44</sup> Sufficiently repeated, the ads do work to shift voter perception of targeted candidates, and evidence suggests they have influence even on sophisticated voters and those both trustful and distrustful of government.<sup>45</sup>

While the academic research on negative advertising is not uniform, there is a near absolute consensus among practitioners. “Those of us who make our livelihoods doing this [political consultants] know that it can be the best strategy for getting to the magic number that means victory,” writes political consultant Andrew Ricci.<sup>46</sup> Explains Ricci: “At the beginning of an election cycle, coming out early to define your opponent before they can define themselves can be instrumental in running their campaign off the rails before it has a chance to even begin.” Early negative advertising, he writes, “can substantially cut a rival campaign’s legs out from underneath it.” But negative ads retain powerful impact in the later stages of an electoral contest, as well, both dampening support for the opponent and energizing base supporters. “And even though most voters will remark on how tired they are of all the negative ads, the characterizations resonate with voters far more than positive pieces do.”

While candidates are reluctant to run attack ads because voters may hold them accountable for the tone of their campaign, outside groups are not so deterred.<sup>47</sup> Outside groups’ lines of accountability run only to their donors, who have every reason to favor attack ads due to their efficacy. Similarly, outside groups have greater freedom to exaggerate, mischaracterize and mislead. In 2018, for example, a fact checker for The Washington Post assessed six randomly selected advertisements sponsored by the Congressional Leadership Fund, the super PAC that is

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<sup>43</sup> John Henderson and Alexander Theodoridis, “Seeing Spots: An Experimental Examination of Voter Appetite for Partisan and Negative Campaign Ads, July 2015, available at:

<[https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2629915](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2629915)>.

<sup>44</sup> Pénélope Daignault et. al., “The Perception of Political Advertising During an Election Campaign: A Measure of Cognitive and Emotional Effects,” *Canadian Journal of Communication*, 2013, available at:

<https://www.cjc-online.ca/index.php/journal/article/view/2566/2723> (“Negative televised election ads generate heightened attention levels and a higher level of physiological activation in individuals when compared with positive or mixed messages.”)

<sup>45</sup> Justin Ewers, “Hate Negative Political Ads All You Want. They Work.,” *Notre Dame News*, October 23, 2006, available at: <https://news.nd.edu/news/hate-negative-political-ads-all-you-want-they-work>; Stephen Craig and Paulina Rippere, “Political Cynicism and Negative Campaigns,” *APSA 2012 Annual Meeting Paper*, July 15, 2012, available at: [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2108115](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2108115) (“Our findings overall suggest that a relevant, hard-hitting negative ad can influence the choices of many voters regardless of their underlying feelings about government.”)

<sup>46</sup> Andrew Ricci, “The dirty secret about negative campaign ads — they work,” *The Hill*, November 3, 2016, available at: <https://thehill.com/blogs/pundits-blog/presidential-campaign/304141-the-dirty-secret-about-negative-campaign-ads-they>.

<sup>47</sup> Dowling, Conor M.; Wichowsky, Amber. “Attacks Without Consequence? Candidates, Parties, Groups, and the Changing Face of Negative Advertising,” *American Journal of Political Science*, March 12, 2014, available at: <https://onlinelibrary.wiley.com/doi/abs/10.1111/ajps.12094>. (“We find that candidates can benefit from having a party or group ‘do their dirty work,’ but particularly if a group does.”). Studies have confirmed that voters are less likely to penalize candidates for attack ads issued by unknown groups. See Deborah Jordan Brooks and Michael Muroy, “Assessing Accountability in a Post-*Citizens United* Era,” *American Politics Research*, April 23, 2012, available at: <https://journals.sagepub.com/doi/abs/10.1177/1532673x11414791>.

allied with the Republican House leadership. “For all six ads, we found that the Congressional Leadership Fund took a sliver of accurate information and spun it in a misleading way,” The Post reporter wrote. “Even by modern mudslinging standards, these ads by the Congressional Leadership Fund stand out for their dark tone and their strained relationship with the facts.”<sup>48</sup>

There is no doubt an appropriate role for negative campaigning in drawing distinctions and providing information about political rivals. No one is suggesting restrictions on negative ads. At the same time, it would be hard to find a voter who believes American politics have an appropriate balance of negative and positive advertising messages, and it is basic common sense that the deluge of negative ads grows political cynicism and diminishes democratic legitimacy. That these ads are powered by outside groups that air them in such proportions precisely because they are not accountable strongly suggests something has gone seriously awry. “Super PACs are the drone missiles of the political scene,” said Robert Zimmerman, a major Democratic donor who will not contribute to them. “Their mission is a destructive one, by definition.”<sup>49</sup>

That the ads are powered by outside groups who rely on a very tiny number of donors suggests that these political “drone missiles” are deployed unilaterally by the superrich and the corporate class against everyone else.

## **H. Thanks to *Citizens United*, Local and State Elections Are Increasingly Overrun by Outside and Corporate Money**

Because *Citizens United* was rooted in a misinterpretation of the First Amendment, it applies as well to cities, counties and states, many of which were forced to repeal restrictions on corporate spending. The same kind of outside spending organizations that are polluting federal politics have cropped up at the local and state level as well.

The National Institute on Money in Politics tallies more than \$500 million in independent expenditures in state races in 2017-2018, roughly triple the amount in the period before *Citizens United*.<sup>50</sup> “Some states have experienced exponential growth,” the Institute notes. “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.”

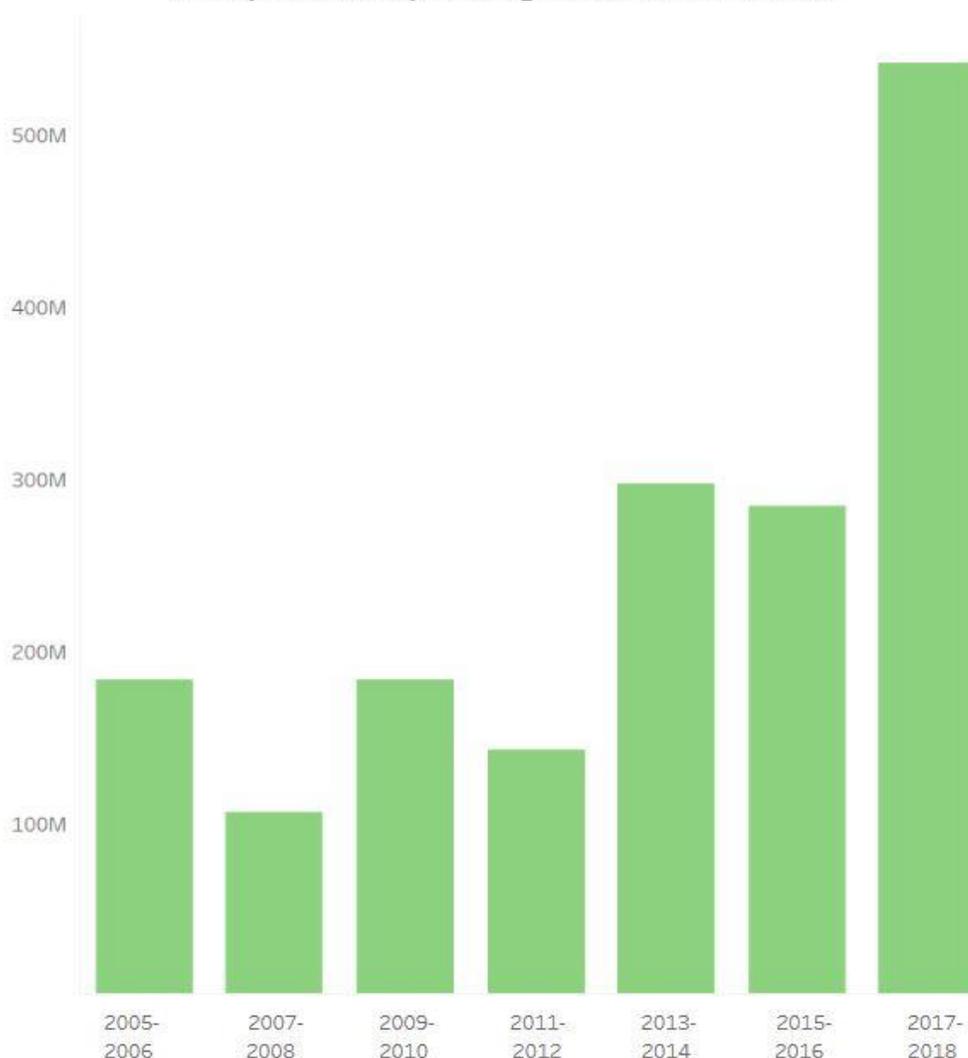
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<sup>48</sup> Salvador Rizzo, “Fact-Checking Republican Attack Ads In Tight House Races,” Washington Post, August 31, 2018, available at: <https://www.washingtonpost.com/politics/2018/08/31/fact-checking-republican-attack-ads-tight-house-races/>.

<sup>49</sup> David Freedlander, “Super PACs Will be Back in 2016,” The Daily Beast, updated July 14, 2017, available at: <https://www.thedailybeast.com/super-pacs-will-be-back-in-2016>.

<sup>50</sup> Stacy Montemayor, “10 Years After *Citizens United*: State races transformed by explosive growth in independent spending,” National Institute on Money in Politics, January 21, 2020, available at: <https://www.followthemoney.org/research/institute-reports/10-years-after-citizens-united-state-races-transformed-by-explosive-growth-in-independent-spending>.

## Independent Spending in State Elections



Source: National Institute on Money in Politics

At the local level and in many state contexts, where campaigns are usually run at modest financial scale, corporations can have an outsized impact spending relatively small sums. As a result, cities and states across the country are finding their elections hijacked by corporations.

**Oklahoma City:** Before the *Citizens United* ruling, the state of Oklahoma prohibited corporate election spending. The year after the ruling, the impact of the invalidation of the state's laws was demonstrated in dramatic fashion,<sup>51</sup> when Oklahoma City's 2011 City Council election was beset by an unprecedented Dark Money campaign. A 527 group called Committee for Oklahoma City Momentum appeared and, over the course of a month, spent more than \$400,000 in a series of

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<sup>51</sup> Clifton Adcock, "Out of Compliance," Oklahoma Gazette, June 7, 2011, available at: <https://www.okgazette.com/oklahoma/out-of-compliance/Content?oid=2967280>

aces where total spending was just over \$1 million.<sup>52</sup> The group mostly succeeded in reshaping the eight-seat Council, whose members are paid \$12,000 a year.<sup>53</sup> The group backed four City Council candidates and attacked two others.<sup>54</sup> Only one candidate, a physician named Ed Shadid, who ran a modest self-funded campaign as a progressive, went on to defeat his Momentum-backed opponent,<sup>55</sup> a BancFirst vice president and registered lobbyist named Charlie Swinton.<sup>56</sup>

Swinton told the Oklahoma City Gazette he did not know who was funding the group supporting him and claimed to “detest” such outside spending, but also seemed to express resignation that this sort of Dark Money spending is “something we have to live with.” He continued, “I think it’s an influence that we wish didn’t happen, but the Supreme Court (in the *Citizens United* case) has ruled and it’s part of the democratic process.”<sup>57</sup>

Campaign finance records revealed only that Momentum received \$415,000 from a nonprofit called A Better Oklahoma City Inc. – hardly an insightful revelation, as this other group had been formed just a week before Momentum started its political activities.<sup>58</sup> Subsequent disclosures showed the sole director of Better Oklahoma City was the treasurer of at least three business-related political action committees.<sup>59</sup> The nonprofit’s contributions, its director said, came from the “Oklahoma City business and civic community.”<sup>60</sup>

The Greater Oklahoma City Chamber reportedly voluntarily disclosed that the nonprofit was funded in part by its Forward OKC IV program,<sup>61</sup> but resisted making further disclosures.<sup>62</sup> A list of corporations that support the Chamber program included both Oklahoma-based businesses such as BancFirst and Devon Energy and multinationals such as AT&T and JPMorgan Chase.<sup>63</sup>

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<sup>52</sup> Clifton Adcock, “Losing Momentum,” Oklahoma Gazette, April 12, 2011, available at: <https://www.okgazette.com/oklahoma/losing-momentum/Content?oid=2961061>.

<sup>53</sup> Dana Hertneky, “Group Spends Nearly Half Million Dollars On City Council Election,” News On 6 (CBS affiliate), March 31, 2011, available at: <https://www.newson6.com/story/14362725/group-spends-nearly-half-million-dollars-on-city-council-election/>

<sup>54</sup> Clifton Adcock, “Losing Momentum,” Oklahoma Gazette, April 12, 2011, available at: <https://www.okgazette.com/oklahoma/losing-momentum/Content?oid=2961061>.

<sup>55</sup> Michael Baker, “Oklahoma elections: Ed Shadid wins Oklahoma City Council Ward 2 seat,” The Oklahoman April 5, 2011, available at: <https://oklahoman.com/article/3555775/oklahoma-elections-ed-shadid-wins-oklahoma-city-council-ward-2-seat?page=1>.

<sup>56</sup> Clifton Adcock, “Runoff rundown,” Oklahoma Gazette, March 22, 2011, available at: <https://www.okgazette.com/oklahoma/runoff-rundown/Content?oid=2957514>.

<sup>57</sup> Clifton Adcock, “Runoff rundown,” Oklahoma Gazette, March 22, 2011, available at: <https://www.okgazette.com/oklahoma/runoff-rundown/Content?oid=2957514>.

<sup>58</sup> Michael Baker, “Special interest groups top Oklahoma City election spending,” The Oklahoman, March 29, 2011, available at: <https://oklahoman.com/article/3552574/special-interest-groups-top-oklahoma-city-election-spending>.

<sup>59</sup> Clifton Adcock, “Losing Momentum,” Oklahoma Gazette, April 12, 2011, available at: <https://www.okgazette.com/oklahoma/losing-momentum/Content?oid=2961061>.

<sup>60</sup> Clifton Adcock, “Losing Momentum,” Oklahoma Gazette, April 12, 2011, available at: <https://www.okgazette.com/oklahoma/losing-momentum/Content?oid=2961061>.

<sup>61</sup> Clifton Adcock, “Losing Momentum,” Oklahoma Gazette, April 12, 2011, available at: <https://www.okgazette.com/oklahoma/losing-momentum/Content?oid=2961061>.

<sup>62</sup> Clifton Adcock, “Losing Momentum,” Oklahoma Gazette, April 12, 2011, available at: <https://www.okgazette.com/oklahoma/losing-momentum/Content?oid=2961061>.

<sup>63</sup> Clifton Adcock, “Losing Momentum,” Oklahoma Gazette, April 12, 2011, available at: <https://www.okgazette.com/oklahoma/losing-momentum/Content?oid=2961061>.

Shadid defeated Swinton in part through focusing on his opponent's Dark Money support. After his victory, Shadid said, "The people have sent a strong message that they want anonymous money out of their elections [...] They want the elections decided between the candidates and the voters on policy issues and not on fear and fear tactics."<sup>64</sup>

**Arizona:** Electric utility giant Arizona Public Service Co. (APS) and its parent company Pinnacle West Capital Corp. used Dark Money political spending to attack some candidates and support others for the Arizona commission that oversees utilities. Transparency ultimately prevailed, but so did the utility, which secured a \$95 million rate hike<sup>65</sup> from commissioners it helped elect.

In 2014, political spending by state-based anti-tax advocacy group Arizona Free Enterprise Club jumped to more than \$1 million, up from \$185,000 in 2012.<sup>66</sup> In addition to campaigning for legislators, the club focused on candidates for the Arizona Corporation Commission, a five-member board that oversees the state's utilities, securities regulations, and railroad and pipeline safety.<sup>67</sup> Another 501(c)(4) group, Save Our Future Now, joined the fray, resulting in combined spending of more than \$3 million.<sup>68</sup> The second group shared an address with a trade group, the Home Builders Association of Central Arizona.<sup>69</sup>

News reports at the time speculated that the spending might be tied to APS, the state's largest electric utility, because the groups focused their support on Tom Forese and Doug Little, two Republican candidates for the Corporation Commission, the utility's primary regulator.<sup>70</sup>

The campaigns were seen as a proxy battle between "pro-solar" Democrats and "pro-utility" Republicans. Wall Street financial analyst Moody's noted prior to the election that the growth of rooftop solar was affecting APS's bottom line.<sup>71</sup>

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<sup>64</sup> Michael Baker, "Oklahoma elections: Ed Shadid wins Oklahoma City Council Ward 2 seat," *The Oklahoman*, April 5, 2011, available at: <https://oklahoman.com/article/3555775/oklahoma-elections-ed-shadid-wins-oklahoma-city-council-ward-2-seat?page=1>.

<sup>65</sup> Howard Fischer, "Arizona Corporation Commission approves APS rate hike, electric company will collect \$95 million," *Arizona Daily Star*, August 15, 2017, available at: [https://tucson.com/business/arizona-corporation-commission-approves-aps-rate-hike-electric-company-will/article\\_295f0670-cbe1-543a-8c4d-92848fa6bd18.html](https://tucson.com/business/arizona-corporation-commission-approves-aps-rate-hike-electric-company-will/article_295f0670-cbe1-543a-8c4d-92848fa6bd18.html).

<sup>66</sup> Mary Jo Pitzl, "Tax group doles out Big Money in '14 races," *The Arizona Republic*, August 2, 2014, available at: <https://www.azcentral.com/story/news/arizona/politics/2014/08/03/arizona-free-enterprise-money-election-season/13537793/>.

<sup>67</sup> Arizona Corporation Commission website, available at: <https://azcc.gov/divisions>.

<sup>68</sup> Kristena Hansen, "'Dark Money' Clouds Contentious Arizona Corporation Commission Race," *KJZZ*, October 16, 2014, available at: <https://kjzz.org/content/56247/dark-money-clouds-contentious-arizona-corporation-commission-race>.

<sup>69</sup> Ryan Randazzo, "Republicans Forese, Little win Arizona Corporation Commission race," *The Arizona Republic*, November 4, 2014, available at: <https://www.azcentral.com/story/money/business/2014/11/04/arizona-corporation-commission-election-night/18427899/>.

<sup>70</sup> Mary Jo Pitzl, "Tax group doles out Big Money in '14 races," *Arizona Republic*, August 2, 2014, available at: <https://www.azcentral.com/story/news/arizona/politics/2014/08/03/arizona-free-enterprise-money-election-season/13537793/>.

<sup>71</sup> Kristena Hansen, "'Dark Money' Clouds Contentious Arizona Corporation Commission Race," *KJZZ*, October 16, 2014, available at: <https://kjzz.org/content/56247/dark-money-clouds-contentious-arizona-corporation-commission-race>.

The APS-supported candidates won their 2014 race, buttressed by more than \$1.3 million in negative ad spending against the Democratic commissioner candidates by the outside groups, whose true funder – APS – would not be fully confirmed<sup>72</sup> until 2019.<sup>73</sup>

In the meantime, shareholders called on APS’s parent corporation, Pinnacle West Capital Corp., to disclose its political spending<sup>74</sup> and an investigation by the watchdog group Checks and Balances Project revealed Republican Corporation Commission member Bob Stump had been texting with APS and Arizona Free Enterprise Club staff, fueling allegations the independent expenditure groups were in fact coordinating with commissioner political campaigns.<sup>75</sup> A judge ruled the texts were not subject to public records requests.<sup>76</sup>

In 2016, APS once again intervened in elections, spending more than \$4 million to help elect some Corporation Commission members and defeat others. A spokesperson for the utility justified the expenditure by calling 2016 “a challenging political year.”<sup>77</sup>

In 2018, APS and its parent company spent \$38 million to defeat a ballot initiative that would have required the utility to get at least half of its energy supply from renewables by 2030.<sup>78</sup> That same year, Democratic commissioner Sandra Kennedy campaigned on a promise to subpoena APS to get to the bottom of its political spending, and won.<sup>79</sup> The corporation is also reportedly under investigation by the FBI and the U.S. Attorney’s Office for the District of Arizona for its political activities.<sup>80</sup>

Not until 2019 did the utility and its parent corporation disclose the extent of its political spending in response to a subpoena. The disclosures revealed the corporation spent not \$3

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<sup>72</sup> Ryan Randazzo, “Republicans Forese, Little win Arizona Corporation Commission race,” The Arizona Republic, November 4, 2014, available at: <https://www.azcentral.com/story/money/business/2014/11/04/arizona-corporation-commission-election-night/18427899/>.

<sup>73</sup> Howard Fischer, “APS admits spending \$10.7 million in 2014 to elect two regulators of its choice,” Arizona Daily Star, March 30, 2019, available at: [https://tucson.com/news/local/aps-admits-spending-million-in-to-elect-two-regulators-of/article\\_bc6636af-c128-5765-8906-482b92a1bf20.html](https://tucson.com/news/local/aps-admits-spending-million-in-to-elect-two-regulators-of/article_bc6636af-c128-5765-8906-482b92a1bf20.html).

<sup>74</sup> Laurie Roberts, “Shareholders seek disclosure of APS’s political spending,” Arizona Daily Star, April 23, 2015, available at: <https://www.azcentral.com/story/laurieroberts/2015/04/23/pinnacle-west-shareholders-propose-disclosure-dark-money/26202343/>.

<sup>75</sup> Robert Anglen and Ryan Randazzo, “AZ utility regulators won’t turn over phone,” Arizona Daily Star, June 26, 2015, available at: <https://www.azcentral.com/story/money/2015/06/27/arizona-utility-regulators-refuse-phone-texts-case/29381683/>.

<sup>76</sup> Howard Fischer, “APS admits spending \$10.7 million in 2014 to elect two regulators of its choice,” Arizona Daily Star, March 30, 2019, available at: <https://www.azcentral.com/story/money/business/energy/2019/03/29/arizona-public-service-admits-spending-millions-2014-corporation-commission-races/3317121002/>.

<sup>77</sup> Howard Fischer, “Arizona Public Service details how it spent \$10 million on elections,” The Arizona Republic, March 19, 2017, available at: [https://tucson.com/business/tucson/arizona-public-service-details-how-it-spent-million-on-elections/article\\_48c41a28-c67d-58a1-bbbb-6951b4131769.html](https://tucson.com/business/tucson/arizona-public-service-details-how-it-spent-million-on-elections/article_48c41a28-c67d-58a1-bbbb-6951b4131769.html).

<sup>78</sup> Ryan Randazzo, “Republicans Forese, Little win Arizona Corporation Commission race,” The Arizona Republic, November 4, 2014, available at: <https://www.azcentral.com/story/money/business/2014/11/04/arizona-corporation-commission-election-night/18427899/>.

<sup>79</sup> Robert Walton, “Newly-elected Arizona commissioner prepares to subpoena APS over political spending,” Utility Dive, February 28, 2019, available at: <https://www.utilitydive.com/news/newly-elected-arizona-commissioner-prepares-to-subpoena-aps-over-political/549374/>.

<sup>80</sup> Jonathan J. Cooper, “New utility chief: No spending on election of regulators,” Associated Press, January 14, 2020, available at: <https://apnews.com/823cbe289096c02c3d9b38ce4fe18c98>.

million, as initially reported, but more than \$12 million that year, including \$10 million to influence the Corporation Commission race.<sup>81</sup>

After a new CEO was hired to run Pinnacle West, the corporation announced in January 2020 that it would cease all election spending activities. “Under my leadership, Pinnacle West and APS and any of our affiliates will neither directly nor indirectly participate in any election of any corporation commissioner through either financial or in-kind support,” said CEO Jeff Guldner,<sup>82</sup> who also pledged to steer the company toward 100 percent renewable energy by 2050.<sup>83</sup>

**Seattle:** The spectacular attempt by technology behemoth Amazon to reshape the City Council in its hometown of Seattle may be the most dramatic example of a big corporation using its financial muscle to strong-arm local democracy.

In 2019, Amazon contributed \$1.5 million to the Seattle Metropolitan Chamber of Commerce’s super PAC – more than half of the total the super PAC raised during the cycle<sup>84</sup> – to support the “pro-business” candidates the super PAC backed. Drawing Amazon’s wrath was a \$275 per employee tax for corporations with more than \$20 million in annual earnings, designed to pay for affordable housing.<sup>85</sup> Before the tax’s passage, Amazon engaged in negotiations with Seattle’s government, lowering the tax from \$500 per employee to \$275,<sup>86</sup> an amount that reportedly would cost the corporation more than \$10 million a year.<sup>87</sup>

Despite Amazon’s involvement in negotiating a lower tax, soon after the Council passed it into law, the tech giant gave \$25,000 to No Tax On Jobs, a referendum campaign organized to repeal the tax. The campaign also received \$25,000 each from Starbucks, Kroger, Albertson’s, and Vulcan.<sup>88</sup> “Frankly, Amazon signaled they were OK with it, and within 48 hours, reneged on that,” Seattle Council member Teresa Mosqueda told The Atlantic.<sup>89</sup>

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<sup>81</sup> Howard Fischer, “APS admits spending \$10.7 million in 2014 to elect two regulators of its choice,” Arizona Daily Star, March 30, 2019, available at: <https://www.azcentral.com/story/money/business/energy/2019/03/29/arizona-public-service-admits-spending-millions-2014-corporation-commission-races/3317121002/>.

<sup>82</sup> Jonathan J. Cooper, “New utility chief: No spending on election of regulators,” Associated Press, January 14, 2020, available at: <https://apnews.com/823cbe289096c02c3d9b38ce4fe18c98>.

<sup>83</sup> <https://www.greentechmedia.com/articles/read/arizona-public-service-carbon-free-power-2050>.

<sup>84</sup> Gregory Scruggs, “Amazon’s \$1.5 million political gambit backfires in Seattle City Council election,” Reuters, NNov. 10, 2019), available at: <https://www.reuters.com/article/us-usa-election-seattle/amazons-15-million-political-gambit-backfires-in-seattle-city-council-election-idUSKBN1XL09B>.

<sup>85</sup> Alana Semuels, “How Amazon Helped Kill a Seattle Tax on Business,” The Atlantic, June 13, 2018, available at: <https://www.theatlantic.com/technology/archive/2018/06/how-amazon-helped-kill-a-seattle-tax-on-business/562736/>.

<sup>86</sup> Alana Semuels, “How Amazon Helped Kill a Seattle Tax on Business,” The Atlantic, June 13, 2018, available at: <https://www.theatlantic.com/technology/archive/2018/06/how-amazon-helped-kill-a-seattle-tax-on-business/562736/>.

<sup>87</sup> Mike Baker, “Amazon Tests ‘Soul of Seattle’ With Deluge of Election Cash,” The New York Times, October 30, 2019, available at: <https://www.nytimes.com/2019/10/30/us/seattle-council-amazon-democracy-vouchers.html>.

<sup>88</sup> Alana Semuels, “How Amazon Helped Kill a Seattle Tax on Business,” The Atlantic, June 13, 2018, available at: <https://www.theatlantic.com/technology/archive/2018/06/how-amazon-helped-kill-a-seattle-tax-on-business/562736/>.

<sup>89</sup> Alana Semuels, “How Amazon Helped Kill a Seattle Tax on Business,” The Atlantic, June 13, 2018, available at: <https://www.theatlantic.com/technology/archive/2018/06/how-amazon-helped-kill-a-seattle-tax-on-business/562736/>.

A pro-tax campaign formed, but only raised \$30,000. Public conflicts between the campaigns soured public opinion on the proposal, and the City Council repealed the tax itself.<sup>90</sup>

Then came city council elections, in which the Amazon-backed Chamber of Commerce endorsed seven candidates, including only one incumbent, for election to the nine-seat Council.<sup>91</sup> The apparent objective was to take revenge on city council members for their pro-tax vote by replacing almost every single one with a more corporate-friendly member.

Amazon General Counsel David Zapolsky, who also personally contributed to the Chamber super PAC, made it clear to the New York Times that he hoped the campaign would discipline the city council: “There’s a level of invective, and what I think is an unfortunate tone of some of the dialogue, that just makes it impossible to engage productively.”<sup>92</sup>

Pouring more than \$1 million into the Chamber’s super PAC also upended reforms the city had enacted to reduce the influence of money in politics.<sup>93</sup> Seattle’s Democracy Vouchers program offers public funds to candidates who meet certain thresholds of support – as long as those candidates agree to abide by strict limits on campaign spending. Candidates can opt out when their opposition has so much money that the public funds would be insufficient for running a competitive campaign. In 2019, the Amazon money forced 11 out of 12 candidates that previously participated in the voucher program to opt out.<sup>94</sup>

A prime target for Amazon’s spending was Kshama Sawant, who joined Mosqueda as the only two votes on the nine-member Council to preserve the tax.<sup>95</sup> On Election Day, Fox Business ran a headline about the too-close-to-call race, declaring, “Far-left candidates appear to flop in Seattle city council race after Amazon dumps dollars.”<sup>96</sup>

Ultimately, Sawant prevailed. Only two of the candidates Amazon endorsed succeeded, including the incumbent.<sup>97</sup> Soon after the election, Council members proposed legislation to

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<sup>90</sup> Alana Semuels, “How Amazon Helped Kill a Seattle Tax on Business,” The Atlantic, June 13, 2018, available at: <https://www.theatlantic.com/technology/archive/2018/06/how-amazon-helped-kill-a-seattle-tax-on-business/562736/>.

<sup>91</sup> Daniel Beekman and Paul Roberts, “‘This is a change election’: Amazon-backed Seattle Chamber endorses City Council candidates,” The Seattle Times (June 19, 2019), available at: <https://www.seattletimes.com/seattle-news/politics/this-is-a-change-election-amazon-backed-seattle-chamber-endorses-city-council-candidates/>.

<sup>92</sup> Mike Baker, “Amazon Tests ‘Soul of Seattle’ With Deluge of Election Cash,” The New York Times, October 30, 2019, available at: <https://www.nytimes.com/2019/10/30/us/seattle-council-amazon-democracy-vouchers.html>.

<sup>93</sup> Seattle Democracy Voucher Program website <https://www.seattle.gov/democracylvoucher>.

<sup>94</sup> Mike Baker, “Amazon Tests ‘Soul of Seattle’ With Deluge of Election Cash,” The New York Times, October 30, 2019, available at: <https://www.nytimes.com/2019/10/30/us/seattle-council-amazon-democracy-vouchers.html>.

<sup>95</sup> Mike Baker, “Amazon Tests ‘Soul of Seattle’ With Deluge of Election Cash,” The New York Times, October 30, 2019, available at: <https://www.nytimes.com/2019/10/30/us/seattle-council-amazon-democracy-vouchers.html>.

<sup>96</sup> Evie Fordham, “Far-left candidates appear to flop in Seattle city council race after Amazon dumps dollars,” Fox Business, November 6, 2019, available at: <https://www.foxbusiness.com/technology/amazon-city-council-seattle-election-results>.

<sup>97</sup> Gregory Scruggs, “Amazon’s \$1.5 million political gambit backfires in Seattle City Council election,” Reuters November 10, 2019, available at: <https://www.reuters.com/article/us-usa-election-seattle/amazons-15-million-political-gambit-backfires-in-seattle-city-council-election-idUSKBN1XL09B>.

place new limits on corporate election spending.<sup>98</sup> In January, Sawant announced a new ballot initiative campaign, Tax Amazon 2020, with the goal of raising between \$200 million and \$500 million in revenue.<sup>99</sup>

## **I. Big Money Determines the Boundaries of “Serious” Policy Debate**

As shocking, depressing and anti-democratic as are these and other analytic snapshots of the world *Citizens United* made, they still understate the scale of the problem. That Big Money donors have an inordinate, undemocratic effect on which individuals win and lose elections is important, but secondary. That’s because, in very real terms, the World *Citizens United* made is one for the corporate class of heads I win, tails you lose.

Thanks to *Citizens United* and the Supreme Court’s campaign finance jurisprudence, the corporate donor class is superpowered to frame political debates. Outside groups define the tone of the campaigns, often establish the terms of debate, and affect the entire national race in ways not easily quantified (for example, by forcing opponents to spend limited resources on races that otherwise would be safe). The need for candidates to raise extraordinary sums forces them to spend lots of time with the ultra-wealthy, and less time with regular people; most importantly, it also makes them more accountable to donors and less to everyone else. Thus does Big Money have an outsized impact irrespective of whether it backs winners or losers.

Big Money exerts a permanent chilling effect on candidates and elected officials, limiting the boundaries of what are considered “serious” policy proposals. Candidates backed by corporations and the wealthy are of course likely to carry the water for their backers. Even more important is this: Candidates who won despite running against Big Business will know that the same entities will try to defeat them next time. These politicians know that they cannot afford to sidestep, much less actively challenge, corporate interests when it could mean being targeted by those with infinitely deep pockets.

As a result, no matter who wins, the Big Money spenders obtain massively enhanced power to set the national policy agenda – including by taking popular measures off the table. As one House of Representatives staffer asked during a congressional briefing shortly after *Citizens United* was handed down, “How do I say ‘no’ to a deep-pocketed corporate lobbyist who now has all the resources necessary to defeat my boss in the next election?”

Former Senator Bob Kerrey spoke clearly about the chilling effect of Big Money, post-*Citizens United*. The issue wasn’t explicit threats, he emphasized, because “you’re already threatened.” He explained: “If I vote to raise the minimum wage, I know the Chamber [of Commerce] is coming in here. I know. I don’t have to be told. They don’t have to threaten me.” The overall effect, Kerrey explained, is a kind of self-censorship that goes far deeper than what Big Money

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<sup>98</sup> Gabe Cohen, “Amazon faces backlash from Seattle Council over campaign spending,” KOMO News (ABC affiliate), November 12, 2019, available at: <https://komonews.com/news/local/seattle-candidates-opposed-by-amazon-backed-pac-will-vote-on-future-of-election-funding>.

<sup>99</sup> Nathalie Graham, “Kshama Sawant Lays Out a Bill—And Ballot Measure—To Tax Amazon,” The Stranger, January 14, 2020, available at: <https://www.thestranger.com/slog/2020/01/14/42558765/kshama-sawant-lays-out-a-bill-and-ballot-measure-to-tax-amazon>.

donors could do directly: “I’m afraid to do what I think is right. Or I persuaded myself: I’m already doing what I think is right, and they’re just supporting me because of it. Either way, now it might be a situation where you actually believe that, and therefore, they’re supporting you for it.”<sup>100</sup>

Our democracy can’t survive this.

## **II. THE LOGICAL FLAWS THAT MADE *CITIZENS UNITED* AND THE SUPREME COURT’S MODERN CAMPAIGN FINANCE JURISPRUDENCE**

*Citizens United* is destined to go down in American history as one of the Supreme Court’s worst decisions. Its flaws start with the extraordinarily aggressive handling of the case by the Supreme Court’s majority. *Citizens United* rose through the courts as an important but narrow challenge to elements of the Bipartisan Campaign Reform Act (BCRA). After the case was briefed and argued, the majority reframed the question presented and asked for reargument. In doing so, it transformed the case into a sweeping expansion of corporate claims to First Amendment rights. The ultimate decision overturned basic principles of campaign finance law in place for 100 years and directly overturned in whole or part two recent decisions.

More fundamental than the Court’s extremely aggressive procedural planning of the case and its disregard for principles of *stare decisis* are the constitutional and intellectual foundations of the decision, including those novel to *Citizens United* and those that trace back to the Court’s 1976 decision *Buckley v. Valeo*. Justice Stevens’ masterful dissent in *Citizens United* dissects many of the missteps, inconsistencies and logical fallacies of the majority’s decision. Here I want to focus on those fundamental elements that drive the Court’s unfortunate decision and wrongly constrain the ability of federal, state and local governments to adopt sensible, appropriate, pro-democracy campaign spending rules – and that necessitate a corrective constitutional amendment. Four of these constitutional and practical defects are:

- The notion that corporations should be afforded the same rights as natural persons (colloquially: “corporations are people”);
- The belief that independent expenditures, by definition, cannot exert a corrupting influence;
- The assertion that the only permissible rationale for limiting campaign spending and contributions is a cramped conceptualization of corruption; and
- The claim that spending money on elections constitutes a pure form of political speech (colloquially: “money equals speech”).

### **A. Corporations Are Not People**

It is not obvious that any constitutional protections should apply to corporations. The landmark case standing for the proposition that the Bill of Rights and other constitutional protections

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<sup>100</sup> Quoted in Daniel Tokaji and Renata Strause, “The New Soft Money: Outside Spending in Congressional Elections,” *Election Law @ Moritz*, Ohio State University Moritz College of Law, 2014, available at: <https://moritzlaw.osu.edu/thenewsoftmoney/wp-content/uploads/sites/57/2014/06/the-new-soft-money-WEB.pdf>.

should apply to for-profit corporations is the 1886 decision *Santa Clara County v. Southern Pacific Railroad Co.*<sup>101</sup> The decision itself does not state that corporations should be treated as persons for purposes of constitutional protections, but a header to the case note makes this claim explicitly, and the decision has stood for this general proposition.<sup>102</sup>

Although the Supreme Court has extended the Bill of Rights and other constitutional protections to for-profit corporations since *Santa Clara*, the Court has only gradually and episodically extended specific constitutional protections. With the exception of First Amendment protections for the media, it is only recently that the Court has decided that for-profit corporations should be afforded First Amendment speech protections.

The language of the First Amendment makes no mention of corporations, of course, but nor does it mention persons. It specifies only that “Congress shall make no law ... abridging the freedom of speech, or of the press.” There is no evidence that the Framers intended this language to apply to corporate speech, as Justice Stevens argues at length in *Citizens United*.<sup>103</sup> In his concurrence, Justice Scalia argues to the contrary, but he is effectively reduced to arguing that the absence of affirmative proof that the Framers intended to exclude corporations from First Amendment coverage shows that they intended the amendment to apply to corporate speech.<sup>104</sup> Justice Stevens, however, convincingly shows that:

The Framers thus took it as a given that corporations could be comprehensively regulated in the service of the public welfare. Unlike our colleagues, they had little trouble distinguishing corporations from human beings, and when they constitutionalized the right to free speech in the First Amendment, it was the free speech of individual Americans that they had in mind.<sup>105</sup>

For most of U.S. history, corporations did not enjoy First Amendment speech protections (except for freedom of press protections). In the 1970s, the Court developed two lines of cases that changed this state of affairs.

In 1976, in *Virginia State Pharmacy Board v. Virginia Citizens Consumer Council*, the Supreme Court first established that the commercial speech of for-profit corporations should be afforded First Amendment protection.<sup>106</sup> The logic of this decision was rooted in the idea that consumers

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<sup>101</sup> *Santa Clara County v. Southern Pacific R. Co.*, 118 U.S. 394 (1886).

<sup>102</sup> Morton Horwitz, “Santa Clara Revisited: The Development of Corporate Theory,” *West Virginia Law Review*, 88 W. Va. Rev. 173 (1985); Thom Hartmann, *Unequal Protection: How Corporations Became “People” - And How You Can Fight Back*, San Francisco: Berrett-Koehler Publishers, 2010.

<sup>103</sup> *Citizens United v. Federal Election Commission*, 558 U.S. 310 (2010) (Stevens, J. dissenting). (“[T]here is not a scintilla of evidence to support the notion that anyone [among those who drafted and ratified the First Amendment] believed it would preclude regulatory distinctions based on the corporate form. To the extent that the Framers’ views are discernible and relevant to the disposition of this case, they would appear to cut strongly against the majority’s position.”)

<sup>104</sup> *Citizens United v. Federal Election Commission*, 558 U.S. 310 (2010) (Scalia, J., concurring).

<sup>105</sup> *Citizens United v. Federal Election Commission*, 558 U.S. 310 (2010) (Stevens, J. dissenting).

<sup>106</sup> *Virginia State Pharmacy Board v. Virginia Citizens Consumer*, 425 U.S. 748 (1976) The case itself actually involved advertising by professionals (pharmacists), but the holding concerned advertisers generally, and neither the case nor any subsequent ones distinguished the application of commercial speech protections between individuals and corporations.

have a right to information; thus the Court struck down a state law that prohibited pharmacies from advertising the price of prescription drugs.<sup>107</sup> Within a short period, however, the right of consumers to receive information was transmogrified into a right of corporations to advertise.<sup>108</sup>

Meanwhile, the Court in 1978, in *First National Bank of Boston v. Bellotti*, first ruled that for-profit corporations were entitled to political speech protections beyond those afforded to the media. Finding a First Amendment right for corporations to contribute to state referenda campaigns, the Court argued, “If the speakers here were not corporations, no one would suggest that the State could silence their proposed speech. It is the type of speech indispensable to decisionmaking in a democracy, and this is no less true because the speech comes from a corporation rather than an individual. The inherent worth of the speech in terms of its capacity for informing the public does not depend upon the identity of its source, whether corporation, association, union, or individual.”<sup>109</sup>

Yet while upholding corporate political speech rights, the line of cases following *Bellotti* recognized that corporations are different than individuals. This was primarily true in the area of campaign spending, where the Court recognized the disproportionate power of corporations, and their unique ability to dominate election spending if left unregulated. In *Austin v. Michigan Chamber of Commerce*, the Court held that the government can limit for-profit corporations to the use of political action committees (PACs) to fund express electoral advocacy.<sup>110</sup> And in *McConnell v. Federal Election Commission*, the Court applied that principle to uphold the constitutionality of the McCain-Feingold law’s restrictions on “electioneering communications” – corporate funding of election-eve broadcasts that mention candidates and convey unmistakable electoral messages.<sup>111</sup>

Against this backdrop, *Citizens United* was simultaneously a continuation of a trend of affording First Amendment rights to corporations, and a sharp break with long-established precedent that recognized the manifold legitimate public purposes and constitutional rationale for treating corporations differently from people, especially in the area of political speech.

The core holding of *Citizens United* is that corporations are entitled to the same First Amendment protections, including in the core area of election-related speech, as real, live human beings.

In reaching this conclusion, the Court emphasized the cases in which corporations have been granted First Amendment political speech protections over the past several decades, while asserting that cases upholding limits on corporate speech, particularly in the area of election spending, were outliers and inconsistent with the otherwise consistent doctrine of the Court.<sup>112</sup>

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<sup>107</sup> *Virginia State Pharmacy Board v. Virginia Citizens Consumer Council*, 425 U.S. 748, 757 (1976) (“More recently, in *Kleindienst v. Mandel*, 408 U. S. 753, 408 U. S. 762-763 (1972), we acknowledged that this Court has referred to a First Amendment right to ‘receive information and ideas,’ and that freedom of speech ‘necessarily protects the right to receive.’”)

<sup>108</sup> *Central Hudson Gas & Electric Corp. v. Public Service Commission of New York*, 447 U.S. 557, 556 (1980).

<sup>109</sup> *First National Bank of Boston v. Bellotti*, 435 U.S. 765, 777 (1978).

<sup>110</sup> *Austin v. Michigan Chamber of Commerce*, 494 U.S. 652 (1990)

<sup>111</sup> *McConnell v. Federal Election Commission*, 540 U.S. 93 (2003)

<sup>112</sup> *Citizens United v. Federal Election Commission*, 558 U.S. 310 (2010).

The *Citizens United* majority's review of First Amendment cases involving corporate speech rights suffered from several failures. First, as noted above, it neglected to acknowledge that corporate political speech rights are a recent invention of the Court. Thus the implication of longstanding and settled rules in this area – favoring corporate speech rights – is misleading. Second, and more pointedly, the Court's dismissal of corporate speech-limiting cases as aberrations failed to address seriously the well-reasoned rationale for those limitations and the fact that the corporate speech-granting cases themselves recognized the need for balance and limits. Even as it recognized corporate political speech rights, the Court until *Citizens United* recognized the special problems posed by corporate spending in the election arena, where by dint of size, resources and single-minded purpose, corporations could distort and corrupt the political process. Recognizing these special problems, the Court until *Citizens United* agreed on the need for, and constitutionality of, limits on corporate speech rights.<sup>113</sup>

The *Citizens United* majority did offer a conceptual rationale for why corporations should be afforded speech protections as extensive as those afforded human beings. The Court argued that it was constitutionally impermissible to differentiate speech protections based on the category of speaker.<sup>114</sup>

The problem with this rationale is that it is utterly unconvincing, as a matter of law and common sense. The law is replete with differential standards of speech protections for different categories of speakers. Justice Stevens noted numerous such examples<sup>115</sup> and Temple University Professor David Kairys has catalogued a long list of such instances.<sup>116</sup> Among the most notable of these differential standards is the denial in many states of voting rights for felons – and the fact that corporations cannot vote.

The commonsense critique of the majority position turns not on the general matter of differing levels of speech protection for different categories of speaker, but on the more specific matter at issue in *Citizens United*: differing levels of speech protection for human beings and corporations. The majority simply “elided” the obvious point that corporations are not people, as Justice Stevens noted in his stinging dissent.<sup>117</sup>

This led to strange and illogical twists of logic in the majority decision. The majority waxed eloquently on the importance of the First Amendment in protecting the expressive rights of disfavored persons. But the disfavored persons they described aren't persons at all; they are corporations. Thus came the bizarre spectacle of the majority describing the importance of discriminated against corporations being given the right to express their feelings, views and aspirations, and of speech protections affording every person in a democracy the right to speak

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<sup>113</sup> *Citizens United v. Federal Election Commission*, 558 U.S. 310 (2010) (Stevens, J. dissenting).

<sup>114</sup> *Citizens United v. Federal Election Commission*, 558 U.S. 310 (2010). (“Prohibited, too, are restrictions distinguishing among different speakers, allowing speech by some but not others.”)

<sup>115</sup> *Citizens United v. Federal Election Commission*, 558 U.S. 310 (2010) (Stevens, J. dissenting)..

<sup>116</sup> David Kairys, The Contradictory Messages of Speech Law, Temple University Legal Studies Research Paper No. 2010-19, July 18, 2010, available at: [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1635319](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1635319).

<sup>117</sup> *Citizens United v. Federal Election Commission*, 558 U.S. 310 (2010) (Stevens, J. dissenting).

and affect policy.<sup>118</sup> It is hardly plausible to consider the corporate sector a discriminated against minority, both because corporations have so much political power and because they don't have the attributes of persons necessitating that they be protected against "discrimination."

These bizarre applications of the Court's invented no-differentiation doctrine reflected the most dramatic oversight and damaging component of the Court's decision: the simple fact that corporations are not people.

While they are staffed, managed and owned by real people, corporations are legal entities separate and apart from the people who make them up. For-profit corporations possess features that distinguish them from humans, giving them enormous ability to influence politics, but leading them to operate without the richness of human motivations and concerns:

- Corporations don't breathe, drink or eat, meaning they have no human-like interest in clean air, clean water and safe food.<sup>119</sup>
- They don't get sick and they have perpetual life, meaning they have no human-like interest in ensuring the availability of affordable, quality health care, avoiding injury or preventing illness.
- They have no conscience, feelings, belief, capacity to love or concern for community, meaning they do not have human-like interests in family, community and society.
- They can't be imprisoned and have no sense of shame, meaning that they are immune to key forms of punishment and social sanction.

Corporations also have many superhuman powers that give them the ability to exercise social, political and economic power vastly disproportionate to humans. For example, corporations have the ability to be in more than one place simultaneously, and to combine, split apart and create unlimited numbers of progeny (subsidiaries). Most crucially, corporations are driven by a single objective – pursuit of profit,<sup>120</sup> and they agglomerate unparalleled amounts of wealth.

Their single-minded purpose – a psychotic trait in humans<sup>121</sup> – makes them singularly ill-suited to participate in the electoral and political process; and their wealth accumulation capacity gives them the ability to overrun a democratic process that is supposed to express rule by the people.

No, corporations are not people, and their special features require that they be treated differently than humans – most especially in the area of election spending.

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<sup>118</sup> *Citizens United v. Federal Election Commission*, 558 U.S. 310 (2010) ("By taking the right to speak from some and giving it to others, the Government deprives the disadvantaged person or class of the right to use speech to strive to establish worth, standing, and respect for the speaker's voice.")

<sup>119</sup> To be sure, they may have business interests in these outcomes, but that is precisely the point. Any such interest is derivative of their overriding interest in profit maximization, which is quite qualitatively different than humans.

<sup>120</sup> It is an overstatement to assert that corporations have a legal duty to maximize short-term profits – but that is not far from the existing practice at least of publicly traded corporations. In practice, the markets punish publicly traded corporations that fail to deliver strong short-term (typically quarterly) results. Companies that do not show strong short-term results see their stock prices fall. Top executives at companies with falling share prices will eventually be fired. As a result, executives pay attention to the daily ups-and-downs of their companies' share price.

<sup>121</sup> Joel Bakan, *The Corporation: The Pathological Pursuit of Profit and Power*, New York: Free Press, 2004.

## B. Independent Expenditure Can In Fact Be Corrupting

A second key, flawed premise of *Citizens United* is that corporate spending on elections – so long as it is not coordinated with candidates – poses no risk of corruption nor can even give rise to a perception of corruption. The anti-corruption interest had permeated Court decisions dating back to *Buckley v. Valeo*.<sup>122</sup> Even as the Court after *Buckley* continued to expand rights for individuals and corporations to spend money on elections, it had maintained a consistent concern about the potentially corrupting influence of such expenditures; and that concern underlay its upholding of a variety of campaign spending limits.

In *Citizens United*, the majority reasoned that independent expenditures – campaign spending not coordinated with a campaign – definitionally cannot involve *quid pro quo* corruption, nor would it be reasonable for any member of the public to perceive such an arrangement as corrupting.

*Buckley* had proffered a similar theory:

Unlike contributions, such independent expenditures may well provide little assistance to the candidate's campaign, and indeed may prove counterproductive. The absence of prearrangement and coordination of an expenditure with the candidate or his agent not only undermines the value of the expenditure to the candidate, but also alleviates the danger that expenditures will be given as a *quid pro quo* for improper commitments from the candidate.<sup>123</sup>

*Buckley*'s verbiage was less than categorical and more speculative than *Citizens United*. By *Citizens United*, however, the Court adopted an absolute statement that independent expenditures cannot be corrupting as a core holding: "[We] now conclude that that independent expenditures, including those made by corporations, do not give rise to corruption or the appearance of corruption."<sup>124</sup>

On its face, this argument is utterly illogical, even accepting the Court's extremely narrow conception of corruption. Consider the most inarguable definition of corruption: payment of a bribe. If a donor wants to pay a bribe to a candidate in exchange for a specific favor, there is no reason that the donor should pay the bribe to the candidate's campaign committee rather than an independent expenditure organization, so long as the independent expenditure committee will spend the funds to advance the candidate's interest. To the contrary, there are obvious reasons why the independent expenditure may be preferable. As noted in the discussion above about the impacts of *Citizens United*, Super PACs and independent expenditure organizations are better positioned to run attack ads than candidates, so they serve a purpose of unique benefit to candidates. Even more importantly, of course, campaign contributions are limited; potential bribers under the Supreme Court's jurisprudence can spend unlimited amounts to benefit a candidate.

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<sup>122</sup> *Buckley v. Valeo*, 424 U.S. 1 (1976).

<sup>123</sup> *Buckley v. Valeo*, 424 U.S. 1, 39 (1976).

<sup>124</sup> *Citizens United v. Federal Election Commission*, 558 U.S. 310 (2010).

Importantly, all of this is true even for Dark Money expenditures. While the public does not know and cannot learn the identities of secret donors to Dark Money organizations, there is nothing to prevent donors from telling candidates that they have made such contributions. Indeed, for a potential briber, there is an obvious benefit of making a contribution through a Dark Money organization (and/or using an LLC where the backers cannot be identified): there is less possibility for law enforcement agencies to uncover and prosecute a bribe when those agencies are not able to identify contributors.

Former U.S. Court of Appeals Judge Richard Posner explained this point well: It “is difficult to see what practical difference there is between super PAC donations and direct campaign donations, from a corruption standpoint,” Posner wrote in April 2012. “A super PAC is a valuable weapon for a campaign . . .; the donors to it are known; and it is unclear why they should expect less *quid pro quo* from their favored candidate if he’s successful than a direct donor to the candidate’s campaign would be.”<sup>125</sup>

Making the *Citizens United* majority’s rationale on independent expenditures even more strikingly unreasonable was that the Court in the very same term had recognized the corrupting influence of independent expenditures. In *Caperton v. A.T. Massey Coal*, the Court ruled in a case which Don Blankenship, the CEO of Massey Coal, had spent \$3 million on independent expenditures (\$2.5 million to a 527 organization and \$500,000 on a direct independent expenditure) in a successful effort to defeat a West Virginia state Supreme Court justice.<sup>126</sup> The state Supreme Court justice who benefited from that expenditure – which totaled more than that spent by the candidate himself – then participated in a decision involving Blankenship before the West Virginia Supreme Court. The U.S. Supreme Court held that the justice had a duty to recuse himself. In the context of *Citizens United*, *Caperton* seemed to highlight exactly how large expenditures could give rise to the appearance of corruption. Yet Justice Kennedy – who wrote the majority opinion in *Caperton* as well as *Citizens United* – asserted that there was no conflict between the two cases: “The remedy of recusal was based on a litigant’s due process right to a fair trial before an unbiased judge. *Caperton*’s holding was limited to the rule that the judge must be recused, not that the litigant’s political speech could be banned” (internal citations removed).<sup>127</sup> What Kennedy failed to acknowledge is that the judge must be recused – that the litigant’s right to a fair trial was in jeopardy – precisely because of the corrupting effect of independent expenditures, or at least the appearance of such corruption.

The Court’s theorizing about the inherently innocent nature of independent expenditures was particularly bizarre and misplaced in a case involving corporations rather than individuals. Corporations don’t spend money on politics to express their inner feelings – they don’t have any – but to advance their economic agenda. Simply from a theoretical standpoint, the heavy presumption must be that large corporations, and especially publicly traded corporations, spend money on elections precisely because they expect something in return. There is a great deal of confirming evidence for this theoretical starting point, including the practice of many large corporations of contributing substantial sums to both major political parties for conventions,

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<sup>125</sup> Richard Posner, “Unlimited Campaign Spending—A Good Thing?” The Becker-Posner Blog, April 8, 2012, available at: <http://bit.ly/S1c8xU>.

<sup>126</sup> *Caperton v. A.T. Massey Coal*, 556 U.S. 868 (2009).

<sup>127</sup> *Citizens United v. Federal Election Commission*, 558 U.S. 310 (2010).

associated political organizations and, through corporate PACs, to candidates and party committee.

Illogical on its face, the Court’s theory that independent expenditures cannot be corrupting has been proved preposterous by a decade’s worth of post-*Citizens United* experience. In fact, as noted above, single-candidate Super PACs are prevalent. From a corruption standpoint, there is virtually nothing to distinguish a contribution to a candidate from a donation to a single-candidate Super PAC – except that donations to Super PACs may be far more corrupting than candidate contributions because there is no cap on the size of such contributions. It might be argued that candidate contributions are still more valuable than those to Super PACs because the candidate controls their own campaign but not the operation of the Super PAC. But whatever modest force this argument may have is eviscerated by the fact, also as noted above, that Super PACs closely coordinate with candidates and party leaders.

Remember this account from the New York Times of Trump’s meeting Super PAC donors: “During the dinner, attendees fawned over Mr. Trump and seemed to revel in their ability to ask him for direct help with business issues. ... The donors competed for time to walk through their sometimes conflicting issues, one by one, pitching the president to take up their causes almost as if they were on ‘Shark Tank,’ the reality television show, looking for investors in their ideas.”<sup>128</sup>

The *Citizens United* claim that independent expenditures do not, and cannot, give rise to corruption or even the appearance of corruption, is comically out of touch with reality. Genuinely tragic consequences have flowed from that jurisprudential blunder.

### **C. Corruption Is Not Just Bribery**

*Citizens United* and the follow-on 2014 Supreme Court decision in *McCutcheon v. FEC* decreed that the *only* legitimate governmental interest in regulating election spending is to eliminate corruption or the appearance of corruption – and then enshrined an incredibly narrow understanding of what constitutes corruption.

Corruption as the key legitimate rationale for regulating election spending traces back to *Buckley*. But as with the Court’s analysis of independent expenditures, *Citizens United* hijacked, transformed and sharply restricted the understanding of the concept of corruption. *Buckley* established corruption or the appearance of corruption as *a* but not necessarily *the only* permissible rationale for regulating campaign contribution. And it used a general discussion of *quid pro quo* discussion as illustrative of the problem of corruption:

To the extent that large contributions are given to secure a political *quid pro quo* from current and potential office holders, the integrity of our system of representative democracy is undermined. Although the scope of such pernicious practices can never be reliably ascertained, the deeply disturbing examples surfacing after the 1972 election demonstrate that the problem is not an illusory one.

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<sup>128</sup> Kenneth Vogel and Ben Protess, “Tape Made Public of Trump Discussing Ukraine with Donors,” New York Times, January 26, 2020, available at: <https://www.nytimes.com/2020/01/25/us/politics/trump-ukraine-donors.html?searchResultPosition=6>.

Of almost equal concern as the danger of actual *quid pro quo* arrangements is the impact of the appearance of corruption stemming from public awareness of the opportunities for abuse inherent in a regime of large individual financial contributions.<sup>129</sup>

In fact, *Buckley* specifically enumerated that bribery or near bribery was only one illustration of the kind of corruption that could constitutionally justify campaign contribution limits: “But laws making criminal the giving and taking of bribes deal with only the most blatant and specific attempts of those with money to influence governmental action.”<sup>130</sup>

In *Citizens United*, the Court veered sharply away from a more commonsense, expansive understanding of corruption toward a narrow one centered on *quid pro quo* arrangements and affirmatively excluding concerns about campaign-spending-bought influence or access. The *Citizens United* court contended that its conception was merely a restatement of *Buckley*, but it plainly was a sharp departure:

When *Buckley* identified a sufficiently important governmental interest in preventing corruption or the appearance of corruption, that interest was limited to *quid pro quo* corruption. . . . Reliance on a “generic favoritism or influence theory . . . is at odds with standard First Amendment analyses because it is unbounded and susceptible to no limiting principle.”

*Citizens United* went further, presenting an argument littered with illogic that the public could not possibly believe that independent expenditures caused corruption. First, the Court claimed, “The appearance of influence or access, furthermore, will not cause the electorate to lose faith in our democracy.” It’s hard to imagine anyone believes this; and it is empirically untrue, as described later in this testimony. Second, it resorted to its circular claim, debunked above, that independent expenditures could not possibly cause corruption because “[b]y definition, an independent expenditure is political speech presented to the electorate that is not coordinated with a candidate.” Third, it claimed that “[t]he fact that a corporation, or any other speaker, is willing to spend money to try to persuade voters presupposes that the people have the ultimate influence over elected officials.” One hardly knows what to say about this last statement. It is in very rare cases that the corrupting benefit afforded to candidates is that they can put contributions in their pocket; the thing that is being offered is assistance getting elected. That doesn’t remove it from the realm of corruption – not in *quid pro quo* cases, and not more generally.

Four years later, in *McCutcheon*, the Court stated all these principles in even more absolutist terms:

This Court has identified only one legitimate governmental interest for restricting campaign finances: preventing corruption or the appearance of corruption. We have consistently rejected attempts to suppress campaign speech based on other legislative objectives. No matter how desirable it may seem, it is not an acceptable governmental

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<sup>129</sup> *Buckley v. Valeo*, 424 U.S. 1, 26-27 (1976).

<sup>130</sup> *Buckley v. Valeo*, 424 U.S. 1, 28 (1976).

objective to “level the playing field,” or to “level electoral opportunities,” or to “equaliz[e] the financial resources of candidates.” The First Amendment prohibits such legislative attempts to “fine-tun[e]” the electoral process, no matter how well intentioned (internal citations removed).

Moreover, while preventing corruption or its appearance is a legitimate objective, Congress may target only a specific type of corruption—“quid pro quo” corruption.<sup>131</sup>

This narrow focus on *quid pro quo* corruption is unmoored from historic jurisprudence, constitutional values or text, common sense and democratic imperatives.

First, although *Citizens United* and *McCutcheon* aimed to portray their cramped reading of corruption as in line with longstanding precedent, it is just not so. *Citizens United* required overturning a recent prior decision, *Austin v. Michigan Chamber of Commerce*, that expanded the concept of corruption to include “distortion:” the notion that the special attributes of corporations, including especially their unique capacity to aggregate wealth, give them power to distort the political process to an extent that may merit limits on their spending.<sup>132</sup> As noted, *Buckley* itself invoked a more expansive conception of corruption that included but was not limited exclusively to quid pro quo corruption.

Second, even if there were a straight line from *Buckley* to *McCutcheon*, there is nothing in the Constitution that suggests preventing corruption is the only permissible basis for regulating campaign spending. There are many other constitutional values, including distortion, political equality, and democratic functioning and legitimacy, among others. Although the Court consistently rejects the idea of equality or “leveling the playing field” as inconsistent with the First Amendment, it has failed to articulate a reason why. On occasion, it has argued that equalization must be rejected because it is a principle without boundaries. But what exactly is the harm from an unbounded conception of equality, a core constitutional value? Why must it be accorded no weight at all in considering legitimate rationales for campaign spending regulation? And why must it be considered a principle without boundaries? After all, the law is all about drawing lines, often in hard cases.

Third, leaving aside precedent, there is every practical reason to define corruption more broadly than *quid pro quo*. “There are threats of corruption that are far more destructive to a democratic society than the odd bribe,” wrote Justice Stevens in his dissent. “Yet the majority’s conception of corruption would leave lawmakers impotent to address all but the most discrete abuses.”<sup>133</sup> The Court has arbitrarily decreed that paying for influence and access does not amount to a corrupting influence sufficient to merit regulating campaign spending. Why not?

There is very little doubt that a great deal of campaign spending occurs precisely to gain special influence and access. It is precisely the sort of arrangement that most Americans have in mind when they say the system is corrupt. What is the First Amendment rationale for protecting the right of individuals to pledge \$1 million to a Super PAC in exchange for extended time with the

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<sup>131</sup> *McCutcheon v. Federal Election Commission*, 572 U.S. 185 (2014).

<sup>132</sup> *Austin v. Michigan Chamber of Commerce*, 494 U.S. 652 (1990).

<sup>133</sup> *Citizens United v. Federal Election Commission*, 558 U.S. 310 (2010) (Stevens, J. dissenting).

president of the United States to pitch and lobby for specific regulatory and policy changes to benefit their business and financial interests? And, as Justice Breyer pointedly wrote in his *McCutcheon* dissent and as discussed in more detail later in this testimony, isn't there a crucial First Amendment imperative in ensuring that every person's voice counts in the democracy and is not effectively rendered mute by paid-for access and influence?

More generally, isn't there a problematic and anti-democratic corrupting influence exerted when candidates must spend all of their time socializing with superrich people in order to solicit direct and indirect contributions?

Again, the Court has sometimes said the reason that paid-for access and influence cannot provide a rationale for campaign spending limits is that the principle is not self-limiting, as Justice Kennedy argued in *Citizens United*. But also again, this claim fails to stand up to scrutiny. The courts draw lines all the time. If the Court comes to believe that a legislature has gone "too far" in trying to reduce improper influence and access due to campaign contributions, it can elucidate factors that create appropriate boundaries. It makes no sense to prohibit consideration of undue influence and access altogether when in fact this is the fundamental corrupting impact of campaign spending, and widely understood to be so. Indeed, the line-drawing problem is inescapable in campaign finance regulation. As the Court commented in *McCutcheon*, "The line between *quid pro quo* corruption and general influence may seem vague at times, but the distinction must be respected." Line-drawing cannot be avoided; the problem is that the Court has arbitrarily, and wrongly, decided where to draw those lines.

Fourth, the Court in *Citizens United* and *McCutcheon* improperly conflates criminal standards for bribery with the relevant definition of corruption for campaign finance law. As Fordham University law professor Zephyr Teachout notes, they are not two sides of the same coin. Campaign spending rules aim for prophylactic effect and to advance important democratic objectives; whether or not they involve First Amendment considerations, they properly can and should take into account broader considerations than those implicated by criminal bribery statutes – and even state bribery rules and jurisprudence historically have not invoked or relied upon *quid pro quo* concepts.<sup>134</sup> In ruling these broader considerations as constitutionally invalid or irrelevant – that is, in saying that such considerations provide no justification at all for campaign spending rules and limits – the Court has erred as a matter of logic, practical impact and constitutional values.

#### **D. Spending Money Is Not the Same As Speech**

*Buckley* is notorious for standing for the proposition that "money equals speech" or, more precisely, that campaign spending constitutes speech itself and must be accorded the highest degree of First Amendment protection:

A restriction on the amount of money a person or group can spend on political communication during a campaign necessarily reduces the quantity of expression by restricting the number of issues discussed, the depth of their exploration, and the size of the audience reached. This is because virtually every means of communicating ideas in

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<sup>134</sup> Zephyr Teachout, *Corruption in America*, Cambridge, MA: Harvard University Press, 2014, p. 238-41.

today's mass society requires the expenditure of money. The distribution of the humblest handbill or leaflet entails printing, paper, and circulation costs. Speeches and rallies generally necessitate hiring a hall and publicizing the event. The electorate's increasing dependence on television, radio, and other mass media for news and information has made these expensive modes of communication indispensable instruments of effective political speech.<sup>135</sup>

In many ways, this declaration constitutes the cardinal sin of the Supreme Court's modern campaign finance jurisprudence.

Campaign spending surely facilitates speech, but it is not speech itself or, at most, has a minimally expressive component. In some ways, the *Buckley* court recognized this itself before becoming lost in an illogical analytic knot that aimed to sharply distinguish campaign contributions and campaign expenditures. *Buckley* upheld campaign contribution limits on the grounds that they contained minimal expressive component: "A contribution serves as a general expression of support for the candidate and his views, but does not communicate the underlying basis for the support. The quantity of communication by the contributor does not increase perceptibly with the size of his contribution, since the expression rests solely on the undifferentiated, symbolic act of contributing."<sup>136</sup> The understanding that spending money by itself has, at most, a minimally expressive component should have led the Court to distinguish between spending on independent electioneering communications and those electioneering communications themselves. Unfortunately, it did not.

In dissent in *Buckley*, Justice White pointed out the logical fallacy of equating conduct that facilitates speech with speech itself:

As an initial matter, the argument that money is speech and that limiting the flow of money to the speaker violates the First Amendment proves entirely too much. Compulsory bargaining and the right to strike, both provided for or protected by federal law, inevitably have increased the labor costs of those who publish newspapers, which are, in turn, an important factor in the recent disappearance of many daily papers. Federal and state taxation directly removes from company coffers large amounts of money that might be spent on larger and better newspapers. The antitrust laws are aimed at preventing monopoly profits and price-fixing, which gouge the consumer. It is also true that general price controls have from time to time existed, and have been applied to the newspapers or other media. But it has not been suggested, nor could it be successfully, that these laws, and many others, are invalid because they siphon off or prevent the accumulation of large sums that would otherwise be available for communicative activities.<sup>137</sup>

As University of Virginia Law School Professor Deborah Hellman succinctly explains: "Money facilitates and incentivizes the exercise of most rights, including speech. But this fact alone does

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<sup>135</sup> *Buckley v. Valeo*, 424 U.S. 1, 19 (1976).

<sup>136</sup> *Buckley v. Valeo*, 424 U.S. 1, 21 (1976).

<sup>137</sup> *Buckley v. Valeo*, 424 U.S. 1, 262-3 (1976) (White, J. dissenting).

not show that restrictions on giving and spending money to exercise a right constitute restrictions on that right.”<sup>138</sup>

The *Buckley* Court got this proposition upside down: “The expenditure of money simply cannot be equated with such conduct as destruction of a draft card. Some forms of communication made possible by the giving and spending of money involve speech alone, some involve conduct primarily, and some involve a combination of the two. Yet this Court has never suggested that the dependence of a communication on the expenditure of money operates itself to introduce a nonspeech element or to reduce the exacting scrutiny required by the First Amendment.”<sup>139</sup> It is surely correct that a governmental regulation related to the expenditure of money is not automatically removed from First Amendment consideration. But it is also true that regulation of the spending of money intertwined with expressive activities should not automatically be subject to First Amendment scrutiny, let alone the most exacting of First Amendment standards. That the spending of money would result in “more” speech does not bootstrap regulation of such spending into First Amendment protection.

That there can be a sharp distinction between constitutionally protected rights and the spending of money to obtain or facilitate “more” of those rights is illustrated very clearly by voting. Voting rights are constitutionally protected against discrimination on the basis of race, gender, poll tax or age above 18. Yet it is illegal to spend money to buy a vote, either to influence how a vote is cast or whether it is cast at all.<sup>140</sup> It would be surprising indeed if anyone considered this restriction constitutionally deficient, even though independent expenditures to pay people surely could generate more voting.

In the years since *Buckley*, the Court’s struggle for an analytic framework to distinguish between contribution and spending limits has increasingly faded, replaced more and more with a totemic concept that money is speech itself. Surely this has been the practical impact. It is not just independent expenditures themselves that are unregulated, it is contributions to independent expenditure entities – Super PACs and 501(c)(4) and (c)(6) organizations – that are unregulated. Few donors air electioneering advertisements or buy online electioneering advertisements themselves. And few donors – let alone the broader American public – would recognize the notion that their contributions for independent expenditures have an expressive component distinguishable or superior to contributions to candidates. The mere articulation of the idea conveys its utter disconnect from the reality of campaigns and elections.

The *Buckley* Court should have concluded that campaign spending is conduct that either does not merit First Amendment protection or, perhaps, limited protection as First Amendment facilitative conduct. The embrace of the notion that money equals speech has not furthered First Amendment, let alone democratic, values. Put simply, it has instead functioned as the foundation of a system that has enabled the superrich and the corporate class to gain undue access to candidates and elected officials and to exert orders of magnitude more influence over the political process than everyday Americans, including those who care passionately about elections and political affairs but are not able to write million-dollar checks to Super PACs.

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<sup>138</sup> Deborah Hellman, “Money Talks But It Isn’t Speech,” *Minnesota Law Review*, 95:953, 981 (2011).

<sup>139</sup> *Buckley v. Valeo*, 424 U.S. 1, 16 (1976).

<sup>140</sup> 18 U.S.C. § 597 (2006).

### III. UNMAKING THE WORLD THAT *CITIZENS UNITED* MADE: THE IMPERATIVE OF A CONSTITUTIONAL AMENDMENT AND LEGISLATIVE REMEDIES

#### A. Legislative Remedies

Against the backdrop of the Supreme Court’s ruinous campaign spending jurisprudence, there is still a great deal that Congress can do to repair our democracy. H.R. 1, the For the People Act, which this House passed last March, is the most sweeping, transformative pro-democracy legislation of the last half century. Along with vital measures related to voting rights, gerrymandering and ethics, it contains aggressive campaign finance measures to redress some of the worst abuses of *Citizens United* politics and to dramatically shift power away from the superrich and toward everyday people.

Its most crucial campaign finance component would create a publicly financed, small-donor matching campaign system. For candidates who opt into the matching system, individuals’ contributions up to \$200 would be matched 6-1 by public funds. These candidates would be restricted from accepting contributions above \$1,000 or contributing more than \$50,000 of their own funds to their campaigns. This approach is based on the system in New York City and other jurisdictions where small-donor matching programs have proven to expand the pool of donors, reduce candidate reliance on the superrich, incentivize a more diverse pool of candidates and end Big Money donors’ vice grip over policymaking.<sup>141</sup> Adoption of such a system at the federal level would have a huge impact on reducing the excessive influence of Big Money over our elections and policymaking.

H.R.1 contains the DISCLOSE Act, which would eliminate or at least drastically reduce secret spending in elections. The DISCLOSE Act provisions would require Super PACs and 501(c)(4), 501(c)(6) and other organizations engaged in electioneering to disclose all donors above \$10,000. It also would eliminate inter-organizational transfers designed to cloak the identity of contributors. Other provisions of the legislation would remove policy riders that block the Securities and Exchange Commission from issuing a rule requiring publicly traded corporations to disclose their election-related spending and that block the federal government from requiring government contractors to disclose their election-related spending.

Additionally, H.R.1 contains an entire subtitle that establishes standards to prohibit coordination between campaigns and Super PACs.

If the Senate were to follow the House in approving H.R.1 and the president were to sign it into law, the campaign finance provisions of the bill alone would go a very long way to revitalize our democracy. Immediate approval and enactment of H.R.1 is absolutely imperative. There is no more urgent task to reduce the Big Money dominance of our politics and advance democratic accountability and responsiveness.

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<sup>141</sup> See, for example, Angela Migally and Susan Liss, “Small Donor Matching Funds: The NYC Experience,” Brennan Center, 2010, available at: [https://www.brennancenter.org/sites/default/files/2019-08/Report\\_Small-Donor-Matching-Funds-NYC-Experience.pdf](https://www.brennancenter.org/sites/default/files/2019-08/Report_Small-Donor-Matching-Funds-NYC-Experience.pdf).

## B. The Constitutional Amendment Imperative

Yet even with this most aggressive of legislative campaign finance fixes, serious problems would remain thanks to the pernicious effect of *Citizens United* and other Supreme Court rulings. H.R. 1 itself recognizes this, including findings that the constitution should be amended to overturn *Citizens United* and other decisions. A constitutional amendment must be presented in separate form than legislation so the amendment itself could not be incorporated into H.R. 1.

The American people do not want to live under an oligarchy, in whole or part. That means a wholesale replacement of the Supreme Court's misguided, anti-democratic campaign finance jurisprudence. Until that jurisprudence is replaced:

- We will still live with the scourge of unlimited outside spending, the defining feature of modern campaigns and the central feature of present-day American oligarchy.
- Corporations will remain free to spend unlimited sums from their treasuries to influence election outcomes.
- Although H.R. 1 would end covert coordination between Super PACs and candidates, the corrupting element of outside spending would barely diminish – Big Money donors could still make million-dollar contributions to single-candidate Super PACs, for example – and make sure the candidates know about it.
- It will be impossible to impose limits on the aggregate amount of individuals' campaign contributions (thanks to *McCutcheon*).
- Small-donor matching and other public finance systems will be threatened on multiple fronts:
  - Publicly financed candidates may be overwhelmed by outside spenders.
  - Publicly financed candidates may be overwhelmed by competitors who opt out of the system; under the Court's jurisprudence, public financing cannot be made mandatory, and in one particularly extreme decision, the Supreme Court has ruled that public financing systems cannot increase allocations to opt-in candidates in order to counterbalance opt-out competitors who rely on Big Money donors to blow past the funds available to opt-in candidates.<sup>142</sup>
  - Under *Buckley*, no limits are permitted on self-financing candidates, a problem that is likely to grow worse alongside worsening wealth concentration – there is a growing number of individuals of extraordinary means with the ability to spend outrageous sums in order to get themselves elected.
- Corporations will retain the right to spend unlimited sums for or against state and local referenda, thanks to the Court's 1978 *Bellotti* decision, undermining our democracy and casting doubt on the public's ability to make effective use of this long-standing American democratic institution.<sup>143</sup> A recent Public Citizen report found that corporate-backed groups engaged in eight initiative and referendum campaigns in 2016 outraised grassroots reform advocates by as much as 24-to-1, on average raising 10 times as much as grassroots advocates.<sup>144</sup>

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<sup>142</sup> *Arizona Free Enterprise Club's Freedom Club PAC v. Bennett*, 564 U. S. 721 (2011).

<sup>143</sup> *First National Bank of Boston v. Bellotti*, 435 U.S. 765 (1978).

<sup>144</sup> Rick Claypool, "Big Business Ballot Bullies: In 2016 State Ballot Initiative Races, Corporate-Backed Groups' Campaign War Chests Outmatch Their Opposition by an Average of 10-to-1," Public Citizen, September 2016,

Moreover, given dicta in recent Supreme Court decisions and the overall trend of the Court's campaign finance jurisprudence, there is reason to believe that the reforms in H.R.1, as well as other campaign spending limits and rules, may be threatened in the not-distant future:

- **Contribution limits:** *McCutcheon* declined an invitation to revisit *Buckley*'s distinction between expenditures and contributions. But the narrowing of the rationale for campaign contribution limits to a narrow conception of *quid pro quo* corruption (in *Citizens United* and *McCutcheon*, potentially informed by *McDonnell v. United States*'s narrow conception of what constitutes an "official act" for purposes of bribery and related crimes<sup>145</sup>) sets the table for a conclusion that the amount of money a person may contribute to a candidate is irrelevant to its corrupting influence (bribes may involve small amounts of money as well as large). Moreover, the reality of individuals spending gargantuan sums on outside spending will almost inevitably boomerang to pose the question: If that unlimited spending, known to candidates and often closely coordinated with their campaigns, is not corrupting – as the Court has illogically said is definitionally true – then why would unlimited direct contributions be?
- **Direct corporate contributions to candidates:** There is nothing in *Citizens United* to suggest why, if corporations are permitted to make independent expenditures, they should not equally be able to make contribution to candidates. The misguided *Citizens United* maxim that it is impermissible to discriminate based on the identity of the speaker – i.e., that corporations have the same campaign spending rights as human beings – would seem to mandate a corporate right to make donations to candidates.
- **Matching funds and vouchers:** Given the Court's extraordinary holding in *Arizona Free Enterprise Club 's Freedom Club PAC v. Bennett* (striking down a public finance program that gave extra money to candidates that opted into a public financing system if their opponents opted out and raised huge sums of private money), it is entirely imaginable that it might rule – against all common sense – that matching fund programs or vouchers (with each voter given a voucher worth, say, \$100 exclusively to disseminate to candidates) impermissibly "burden" the speech of supporters of opt-out candidates, given that their contributions are not matched by an equivalent public match.<sup>146</sup>

Indeed, given how aggressive the Court has been in inventing justifications for striking down campaign spending rules and limits, one cannot speak with confidence about the safety of any such rules, up to and including campaign spending disclosure requirements.

There is no reason that we, the American people, should tolerate these incursions on our democratic rights. Our democracy is broken. Our government is failing to meet urgent and vital

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available at: <https://www.citizen.org/news/corporations-spent-nearly-140-million-in-eight-state-ballot-initiative-races-crushing-the-opposition-by-as-much-as-24-to-1>.

<sup>145</sup> *McDonnell v. United States*, 579 U.S. \_\_\_\_ (2016) ("In sum, an 'official act' is a decision or action on a 'question, matter, cause, suit, proceeding or controversy.' The 'question, matter, cause, suit, proceeding or controversy' must involve a formal exercise of governmental power that is similar in nature to a lawsuit before a court, a determination before an agency, or a hearing before a committee. It must also be something specific and focused that is 'pending' or 'may by law be brought' before a public official.")

<sup>146</sup> Professor Richard Hasen raises precisely this concern. See Richard Hasen, *Plutocrats United*, New Haven, CT: Yale University Press, 2012, pp. 89-90.

demands to address rising wealth and income inequality, avert climate catastrophe, ensure health care for all and more. The American people – across party lines – believe the system is rigged and public confidence in government is at dangerous, all-time lows. These crises are tied directly to *Citizens United* and the Supreme Court’s campaign finance jurisprudence. We have to do something about it.

### **C. Amending the Constitution: The Democracy for All Amendment**

Unfortunately, there is little likelihood of the Supreme Court course correcting on its own. That leaves the singular solution of a constitutional amendment. Amendments are difficult to pass, appropriately and by design. Some significant restraint is appropriate in consideration of amendments. But reversing *Citizens United* and related decisions is of such consequential importance and so relates to core democratic principles that an amendment is appropriate – and imperative.

Many amendments have been offered to address *Citizens United*. Public Citizen supports many of these efforts, including the We the People Amendment, H.J.Res. 48, introduced by Rep. Pramila Jayapal.

My comments here focus on H.J.Res. 2, the Democracy for All Amendment, introduced by Rep. Ted Deutch. This amendment has more than 200 co-sponsors and we urge this body to bring to vote and pass it quickly.

The text of the Democracy for All Amendment is simple and straightforward:

Section 1. To advance democratic self-government and political equality, and to protect the integrity of government and the electoral process, Congress and the States may regulate and set reasonable limits on the raising and spending of money by candidates and others to influence elections.

Section 2. Congress and the States shall have power to implement and enforce this article by appropriate legislation, and may distinguish between natural persons and corporations or other artificial entities created by law, including by prohibiting such entities from spending money to influence elections.

Section 3. Nothing in this article shall be construed to grant Congress or the States the power to abridge the freedom of the press.

The amendment would afford Congress and the states the freedom they need to appropriately regulate campaign contributions and spending, including to distinguish between rights and privileges afforded to human beings and corporations. It would solve all of the Supreme Court-created, improper restrictions on campaign finance regulation elucidated above and prevent from coming to fruition hypothesized future problems. It would, in fact, ensure democracy for all, by empowering legislative bodies to end Big Money’s dominance of our elections.

One important corrective of the Democracy for All amendment is its establishment of a much richer framework to explain the need for campaign finance regulation. Having previously criticized the Court’s increasingly cramped understanding of *quid pro quo* corruption, it’s worth evaluating the Democracy for All Amendment’s expansive, pro-democracy rationale for campaign regulation: “To advance democratic self-government and political equality, and to protect the integrity of government and the electoral process.” This approach is inclusive of a much more robust anti-corruption rationale, the distortion analysis of *Austin*, advancement of the core value of political equality and a serious reckoning with the need to maintain democratic legitimacy. These compelling state interests have overlapping boundaries, embodying related but distinct concepts – each crucial to protect our democracy and appropriate to justify campaign spending regulation.

## 1. Anti-Corruption

The Democracy for All Amendment’s purpose of “protecting the integrity” of our government involves a lot more than preventing narrowly defined *quid pro quo* arrangements. It means active measures to limit undue influence and access – with undue access here defined as that purchased by large campaign contributions and expenditures.

This is a restoration of historic understandings unmoored by *Citizens United*, and *Buckley* before it. In a remarkable passage, *Citizens United* equates “favoritism and influence” with “democratic responsiveness.” As Teachout notes, in doing so, the decision “took that which had been named corrupt for over two hundred yeas and renamed it legitimate and the essence of responsiveness.”<sup>147</sup>

Teachout suggests an “anticorruption principle” premised on the idea that “those in government are concerned on a daily basis with the well-being of the public.” In this conception,

Corruption is ‘abuse of public power for private benefit’ or ‘those acts whereby private gain is made at public expense,’ or when private interest excessively overrides public or group interest in a significant and meaningful exercise of political power. An act or system is corrupt when it leads to excessive private interest in the exercise of public power.<sup>148</sup>

What is vital to emphasize about this conception is that it focuses on systemic abuses. There is a legitimate and vital public interest in preventing the hijacking of governmental institutions and powers to serve narrow private considerations at the expense of the public. There is a legitimate and overriding public interest in establishing campaign finance rules to prevent this kind of corruption. Whether and how individuals are judged “corrupt” in a criminal sense may or may not rely on similar conceptions. But when it comes to the systemic considerations, this approach should control.

Professor Lawrence Lessig similarly writes of a concern with “dependent corruption.” “Thus the charge that our government suffers from ‘dependence corruption is the claim that it either,

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<sup>147</sup> Zephyr Teachout, *Corruption in America*, Cambridge, MA: Harvard University Press, 2014, pp. 232-33.

<sup>148</sup> Zephyr Teachout, *Corruption in America*, Cambridge, MA: Harvard University Press, 2014, pp. 276-77.

strictly speaking, has become ‘dependent’ upon an influence other than ‘the people,’ or, less strictly, that it has become dependent upon an influence that is inconsistent with a dependence upon the people.”<sup>149</sup>

In his *McCutcheon* dissent, Justice Breyer eloquently explained that the anti-corruption interest extends far beyond *quid pro quo* considerations to protection of government integrity – and that the concern with government integrity is itself a core First Amendment value and consideration. The anti-corruption interest, he wrote, “is an interest in maintaining the integrity of our public governmental institutions.”<sup>150</sup>

Corruption undermines a core purpose of First Amendment-protected communication: that the people can speak to their representatives – and be heard:

[Corruption] derails the essential speech-to-government-action tie. Where enough money calls the tune, the general public will not be heard. Insofar as corruption cuts the link between political thought and political action, a free marketplace of political ideas loses its point. That is one reason why the Court has stressed the constitutional importance of Congress’ concern that a few large donations not drown out the voices of the many.

Breyer’s insight was that it is not that campaign spending rules must be balanced against First Amendment values, but that they *advance* First Amendment values. The anti-corruption consideration is not a government value to be weighed against First Amendment considerations –

Rather, they are interests rooted in the First Amendment itself. They are rooted in the constitutional effort to create a democracy responsive to the people—a government where laws reflect the very thoughts, views, ideas, and sentiments, the expression of which the First Amendment protects. Given that end, we can and should understand campaign finance laws as resting upon a broader and more significant constitutional rationale than the plurality’s limited definition of “corruption” suggests. We should see these laws as seeking in significant part to strengthen, rather than weaken, the First Amendment.<sup>151</sup>

With the Democracy for All amendment, these considerations – that government be responsive to the people rather than the corrupting influence of Big Money contributors – will again be given the constitutional standing they deserve.

## 2. Anti-Distortion

In overturning *Austin*, the *Citizens United* majority dismissed that case’s distortion rationale out of hand. *Citizens United* makes slippery slope arguments about distortion; since the doctrine might justify either regulating books published by corporations, or limiting the speech rights of

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<sup>149</sup> Lawrence Lessig, “A Reply to Professor Hasen,” Harvard Law Review, December 20, 2012, 126 Harv. L. Rev.. F 61. See also, more generally, Lawrence Lessig, *Republic, Lost*, New York: Twelve, 2012.

<sup>150</sup> *McCutcheon v. Federal Election Commission*, 572 U.S. 185 (2014) (Breyer, J. dissenting).

<sup>151</sup> *McCutcheon v. Federal Election Commission*, 572 U.S. 185 (2014) (Breyer, J. dissenting).

media corporations, the majority reasoned, it is self-evidently illegitimate.<sup>152</sup> These arguments prove too much, as slippery slope arguments often do; one may draw lines. There is an obvious differential impact between spending hundreds of millions of dollars on TV attack ads and publishing books; one may reasonably choose to afford more protections to the latter activity than the former. So too might one distinguish between the publishing efforts of media corporations and campaign spending by other corporations (as BCRA did); the Court alleged there is no history of such distinctions, but in fact First Amendment speech protections did not attach to corporations – other than freedom of press – until the 1970s. So, while the distinction may not have been stated as a matter of principle, it was reflected in First Amendment doctrine for the first 200 years of U.S. history.

The more substantive majority rationale for dismissing distortion was the claim that distortion aimed at "equalizing" speech, while the Court had held in *Buckley* that there was no legitimate government interest "in equalizing the relative ability of individuals and groups to influence the outcome of elections."<sup>153</sup> Yet this is a stunted and flawed reading of distortion. The underlying concern is not to ensure that everyone may participate equally in democracy – a vital objective, as discussed below, but a separate one – but that the democracy is not fundamentally undermined by uniquely powerful, nonhuman interests in the case of corporations, or by super-rich individuals who can tilt the political playing field by dint of their enormous wealth.

In seeking to “advance democratic self-government” and “protect the integrity of government and the electoral process,” the Democracy for All Amendment rescues and restores the anti-distortion principle, taking on directly the gravest threats created by Big Money dominance of the political process. These extend far beyond *quid pro quo* arrangements and provision of favors and access to those who make independent expenditures, even in the absence of a formal agreement. They include the ability of the super-rich and corporations to make implicit or even explicit threats against officials that oppose their interests; the financial targeting of officials who champion initiatives injurious to Big Money donors; the systemic chilling of officials from opposing corporate interests and the overall slanting of the political process to benefit a corporate sector that has the ability to overrun the electoral process; the Big Money dominance of political debate – primarily via television ads – measured simply in airtime, and the resulting construction of a political dialogue that is framed by corporate-determined boundaries; and the impact on politicians’ views and attitudes as a result of spending so much time with very rich people in order to fundraise.

As Justice Stevens noted,

When citizens turn on their televisions and radios before an election and hear only corporate electioneering, they may lose faith in their capacity, as citizens, to influence public policy. A Government captured by corporate interests, they may come to believe, will be neither responsive to their needs nor willing to give their views a fair hearing. The predictable result is cynicism and disenchantment: an increased perception that large

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<sup>152</sup> *Citizens United v. Federal Election Commission*, 558 U.S. 310 (2010) (“If *Austin* were correct, the Government could prohibit a corporation from expressing political views in media beyond those presented here, such as by printing books.”)

<sup>153</sup> *Buckley v. Valeo*, 424 U.S. 1, 48 (1976).

spenders “call the tune” and a reduced “willingness of voters to take part in democratic governance.” To the extent that corporations are allowed to exert undue influence in electoral races, the speech of the eventual winners of those races may also be chilled. Politicians who fear that a certain corporation can make or break their reelection chances may be cowed into silence about that corporation (internal citations removed).<sup>154</sup>

There is nothing theoretical about any of this. The mechanisms and pervasiveness of Big Money distortion are well known and widely acknowledged in Washington. In his 2006 *Audacity of Hope*, then-Senator Barack Obama eloquently described one familiar aspect of the problem, even in the pre-*Citizens United* era, of candidates affording more access and influence for the super-rich and spending less time rubbing elbows with regular folk:

Increasingly I found myself spending time with people of means — law firm partners and investment bankers, hedge fund managers and venture capitalists. As a rule, they were smart, interesting people, knowledgeable about public policy, liberal in their politics, expecting nothing more than a hearing of their opinions in exchange for their checks. But they reflected, almost uniformly, the perspectives of their class: the top 1 percent or so of the income scale that can afford to write a \$2,000 check to a political candidate. They believed in the free market and an educational meritocracy; they found it hard to imagine that there might be any social ill that could not be cured by a high SAT score. They had no patience with protectionism, found unions troublesome, and were not particularly sympathetic to those whose lives were upended by the movements of global capital. Most were adamantly pro-choice and anti-gun and were vaguely suspicious of deep religious sentiment.

And although my own worldview and theirs corresponded in many ways — I had gone to the same schools, after all, had read the same books, and worried about my kids in many of the same ways — I found myself avoiding certain topics during conversations with them, papering over possible differences, anticipating their expectations. On core issues I was candid; I had no problem telling well-heeled supporters that the tax cuts they’d received from George Bush should be reversed. Whenever I could, I would try to share with them some of the perspectives I was hearing from other portions of the electorate: the legitimate role of faith in politics, say, or the deep cultural meaning of guns in rural parts of the state.

Still, I know that as a consequence of my fund-raising I became more like the wealthy donors I met, in the very particular sense that I spent more and more of my time above the fray, outside the world of immediate hunger, disappointment, fear, irrationality, and frequent hardship of the other 99 percent of the population — that is, the people that I’d entered public life to serve. And in one fashion or another, I suspect this is true for every senator: The longer you are a senator, the narrower the scope of your interactions. You may fight it, with town hall meetings and listening tours and stops by the old neighborhood. But your schedule dictates that you move in a different orbit from most of the people you represent.

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<sup>154</sup> *Citizens United v. Federal Election Commission*, 558 U.S. 310 (2010) (Stevens, J. dissenting).

And perhaps as the next race approaches, a voice within tells you that you don't want to have to go through all the misery of raising all that money in small increments all over again. You realize that you no longer have the cachet you did as the upstart, the fresh face; you haven't changed Washington, and you've made a lot of people unhappy with difficult votes. The path of least resistance — of fund-raisers organized by the special interests, the corporate PACs, and the top lobbying shops — starts to look awfully tempting, and if the opinions of these insiders don't quite jibe with those you once held, you learn to rationalize the changes as a matter of realism, of compromise, of learning the ropes. The problems of ordinary people, the voices of the Rust Belt town or the dwindling heartland, become a distant echo rather than a palpable reality, abstractions to be managed rather than battles to be fought.<sup>155</sup>

Former Rep. Steve Israel, the former chair of the Democratic Congressional Campaign Committee, put the matter more bluntly: “This is your democracy. But as the bidding grows higher, your voice gets lower. You're simply priced out of the marketplace of ideas. That is, unless you are one of the ultra wealthy.”<sup>156</sup>

The fact that Big Money distortion of elections and the political process has been normalized does not validate it; it commands that we take action to remedy the problem. That is precisely what the Democracy for All Amendment does.

### 3. Political Equality

Since the inception of modern campaign finance jurisprudence, with *Buckley*, the Supreme Court has categorically rejected the idea that there is a compelling governmental interest in “equalizing the relative ability of individuals and groups to influence the outcome of elections.” This is purportedly because “the concept that government may restrict the speech of some elements of our society in order to enhance the relative voice of others is wholly foreign to the First Amendment.”<sup>157</sup>

It is not at all obvious why the Court latched onto this formulation. Advancing political equality is a core constitutional value – and its roots in American history precede even the adoption of the Constitution. “We hold these truths to be self-evident, that all men are created equal,” proclaims the Declaration of Independence. The constitutional concern with equality is manifested in the equal protection clauses in the Fifth and Fourteenth Amendments. Promoting equality in voting is manifested in the Fifteenth (right to vote shall not be abridged on basis of race), Nineteenth (right to vote shall not be abridged on basis of sex/gender), Twenty-Fourth (no poll tax), Twenty-Sixth (right to vote shall not be abridged on basis of age above 18). Equality concerns are also rooted in the First Amendment, which aims to ensure that every person has equal rights to influence government decisions.<sup>158</sup>

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<sup>155</sup> Barack Obama, *Audacity of Hope: Thoughts on Reclaiming the American Dream*, New York: Crown, 2006.

<sup>156</sup> Steve Israel, “Steve Israel: Confessions of a Congressman,” *New York Times*, January 8, 2016, available at: <https://www.nytimes.com/2016/01/09/opinion/steve-israel-confessions-of-a-congressman.html>.

<sup>157</sup> *Buckley v. Valeo*, 424 U.S. 1, 48-49 (1976).

<sup>158</sup> Adam Lioz, “Breaking the Vicious Cycle: How the Supreme Court Helped Create the Inequality Era and Why a New Jurisprudence Must Lead Us Out,” *Seton Hall Law Review*, Vol. 43: 1228, 1257 (2013).

Then-Professor and now-Rep. Jamin Raskin and John Bonifaz (currently president of Free Speech for People) elaborated in a seminal law review article that the Court has in fact recognized a political equality principle, including in cases striking down poll taxes and excessive filing fees to declare one's candidacy for electoral office. They find in these cases "the principle that neither wealth nor poverty may be used to block meaningful participation by a group of citizens in the electoral process. When the costs of running for office interfere with political candidacy and meaningful participation on the basis of wealth, equal protection requires close judicial scrutiny of the arrangement."<sup>159</sup>

But the Court has refused to import this analysis into its campaign finance jurisprudence, with a reflexive refusal to credit measures to "level the playing field" as valid exercises of government power, at least if they interfere with Big Money donors' First Amendment claims.

It is hard to overstate the damage done. "The tyranny of private money corrupts the democratic relationship of one person/one vote," Raskin and Bonifaz correctly noted more than a quarter century ago – long before the damage inflicted by *Citizens United*.<sup>160</sup> What they call the "wealth primary," "impermissibly uses access to wealth as both an obstacle to meaningful political candidacy for nonaffluent citizens and as a proxy for political seriousness. In so doing, it systematically degrades the influence of poor and working people in the political process."<sup>161</sup>

In the world that *Citizens United* has made, as shown earlier in this testimony, "the tyranny of private money" is dramatically more severe than when Raskin and Bonifaz wrote.

What has emerged, notes Adam Lioz of Demos, is "a classic vicious cycle. Wealthy donors capturing control of the political system leads to economic policies that benefit the already-rich. This concentrates income at the top, facilitating further political capture. Both political equality and economic opportunity are compromised, and a nation that was once the international symbol of equal opportunity regardless of station has become both less equal and less mobile economically."<sup>162</sup>

All of this should have long ago been evident to the Supreme Court. By now, this analysis is widely shared. What remains is a decision about whether the government may adopt campaign finance regulations to do anything about it, including through means that the Court has (wrongly) held impinge Big Money donors' First Amendment interests. Rooted in both originalist and

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<sup>159</sup> Jamin Raskin and John Bonifaz, "Equal Protection and the Wealth Primary," *Yale Law and Policy Review*, Vol. 11 : 273, 287 (1993). (See also at page 300: "The principal constitutional defect of the wealth primary is that it equates the money that a candidate has, or is able to raise, with her political seriousness. But the equation of wealth with political seriousness was condemned in *Bullock* [the filing fee case] precisely because it presumes the seriousness of the rich and the frivolousness of the poor. It is far more likely that the ability to raise money reflects either accidents of birth or the candidate's ideological compatibility with the elite economic interests that dominate the wealth primary.")

<sup>160</sup> Jamin Raskin and John Bonifaz, "Equal Protection and the Wealth Primary," *Yale Law and Policy Review*, Vol. 11 : 273, 277 (1993).

<sup>161</sup> Jamin Raskin and John Bonifaz, "Equal Protection and the Wealth Primary," *Yale Law and Policy Review*, Vol. 11 : 273, 297-98 (1993).

<sup>162</sup> Adam Lioz, "Breaking the Vicious Cycle: How the Supreme Court Helped Create the Inequality Era and Why a New Jurisprudence Must Lead Us Out," *Seton Hall Law Review*, Vol. 43: 1228, 1255 (2013).

evolving commitments to political equality, the Democracy For All Amendment sensibly says: Yes, the government may act.

Absent action to address political inequality, argues Professor Richard Hasen, “American elections and policy battles are no better than lotteries in which the rich get to purchase many extra tickets and most voters will consistently lose.”<sup>163</sup>

In short, the current system is indefensible and incompatible with basic democratic norms. Writes Hasen, “It would be hard to think of good normative arguments in favor of a system in which those with wealth, including foreign individuals and entities, have a much greater chance than an average voter of having their preferred policies enacted into law, of blocking proposals they do not like, and of altering proposals for their private benefit. Such a system promotes oligarchy or plutocracy is inconsistent with current thinking about the nature of our democracy.”<sup>164</sup>

The Court has lost sight of this fundamental reality. The Democracy For All Amendment re-centers political equality as a core constitutional value and empowers legislatures to enact campaign spending measures to rescue our polity from oligarchic domination.

#### 4. Democratic Legitimacy

*Buckley* and subsequent decisions have emphasized the compelling governmental interest in preventing corruption *and* the appearance of corruption. But the frame of the “appearance of corruption” understates and underappreciates what is really at stake in public perceptions of corruption and government responsiveness. The fundamental issue is democratic legitimacy. A democracy cannot function if the people believe the system is rigged.

And in the United States now, the people – with good reason, as the discussion above of the impacts of *Citizens United* shows – believe just that. Seventy percent of Americans say, “I feel ‘angry’ because our political system seems to only be working for the insiders with money and power.”<sup>165</sup> Three-quarters say the government is run by big, powerful interests.<sup>166</sup> Eighty-five percent of Americans “believe that elected officials return favors for those who contribute greatly to their campaigns.”<sup>167</sup>

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<sup>163</sup> Richard Hasen, *Plutocrats United*, New Haven, CT: Yale University Press, 2012, p. 83.

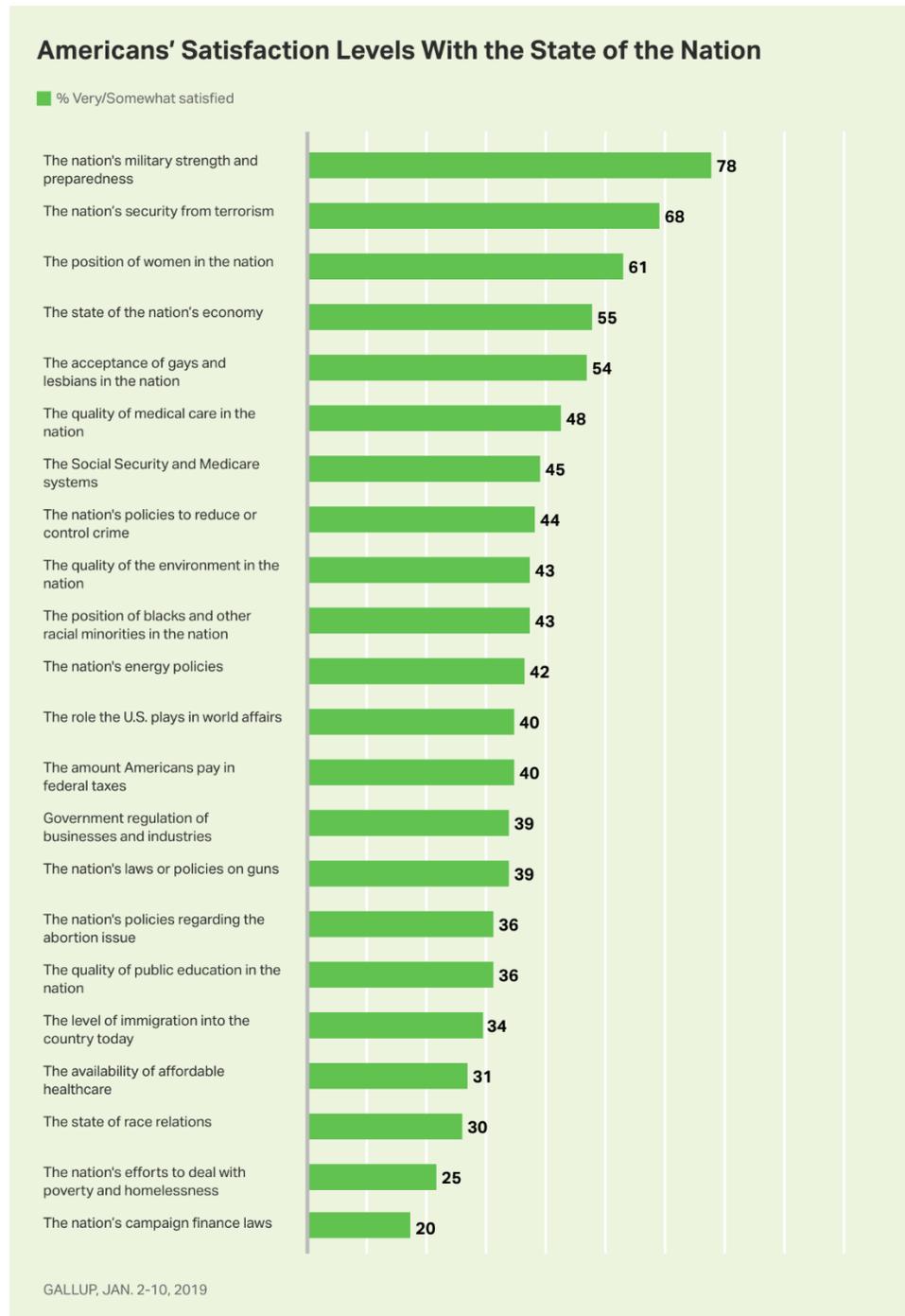
<sup>164</sup> Richard Hasen, *Plutocrats United*, New Haven, CT: Yale University Press, 2012, p. 83.

<sup>165</sup> Carrie Dann, “A deep and boiling anger’: NBC/WSJ poll finds a pessimistic America despite current economic satisfaction,” NBC News, August 15, 2019, available at: <https://www.nbcnews.com/politics/meet-the-press/deep-boiling-anger-nbc-wsj-poll-finds-pessimistic-america-despite-n1045916>.

<sup>166</sup> Pew Research Center, “The Public, the Political System and American Democracy,” April 26, 2018, Available at: <https://www.people-press.org/2018/04/26/the-public-the-political-system-and-american-democracy/>

<sup>167</sup> Ipsos, “Americans report a bipartisan desire for transparent political financing laws,” February 18, 2019, available at: <https://www.ipsos.com/en-us/news-polls/americans-report-a-bipartisan-desire-for-transparent-political-financing-laws>. See also “Critical Issues Poll,” University of Maryland, November 1, 2016, available at: [https://criticalissues.umd.edu/sites/criticalissues.umd.edu/files/presentation\\_for\\_november\\_2016\\_poll.pdf](https://criticalissues.umd.edu/sites/criticalissues.umd.edu/files/presentation_for_november_2016_poll.pdf). (65 percent of Americans agree that “our system is rigged against people like me.”)

No doubt, there are many elements of the widespread public view that the system is rigged. But concern with Big Money dominance of elections is at the heart of this perspective. A Gallup poll of Americans' level of satisfaction with 22 various policies and aspects of society finds



campaign finance firmly at the bottom of the list. Only one in five Americans are satisfied with the state of the country's campaign finance laws (compared to 68 percent satisfied with

preparations against terrorism, 48 percent with the quality of medical care and 40 percent with the amount Americans pay in taxes.<sup>168</sup>

The extensive data on Americans' passionate desire for fundamental campaign finance reform, including a constitutional amendment to overturn *Citizens United*, is further reviewed in the conclusion to this testimony.

The consistent message that emerges from the data is: Americans are losing faith in their government and its ability to respond to their urgent and deeply felt needs. They are losing faith in the reality and idea of democracy, believing that powerful corporate interests have taken control of elections and policymaking. This is a desperately serious matter. As Justice Breyer noted in his *McCutcheon* dissent, “The “appearance of corruption” can make matters worse. It can lead the public to believe that its efforts to communicate with its representatives or to help sway public opinion have little purpose. And a cynical public can lose interest in political participation altogether.”<sup>169</sup> The erosion of democratic legitimacy could easily portend the decline and even collapse of our democratic institutions, presenting very frightening prospects of massive apathy and tightening oligarchic control, on the one hand; and/or demagogic appeals reliant on racist and anti-immigrant tropes and policies to buttress the power of authoritarian rulers, on the other.

To be very clear, the problem here is not with the American people and their perceptions. The perceptions of a rigged system and failing democracy reflect underlying truths. The fix is not a pro-democracy advertising campaign – it is to repair the democracy itself, as H.R.1 and the Democracy For All Amendment aim to do.

#### **IV. CONCLUSION: PUBLIC DEMAND FOR A CONSTITUTIONAL AMENDMENT TO OVERTURN *CITIZENS UNITED***

Appropriately and by design, it is hard to win adoption of a constitutional amendment. Locking in rules that will bind future generations and not be subject to legislative repeal, executive veto or judicial override requires a broad national consensus and supermajorities of each house in Congress and of the states. Obtaining such supermajorities, in turn, requires overwhelming public support.

There is such overwhelming public support to end Big Money dominance of our elections, including through a constitutional amendment to overturn *Citizens United*.

The American public strongly disapproves of *Citizens United*. Polling has consistently showed overwhelming opposition to the decision among those who identify as Republican, Democrat or Independent/Other. Polling consistently shows 9 in 10 Americans expressing disgust with Big Money influence in politics and three-quarters or more of Americans supporting a constitutional

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<sup>168</sup> Megan Brenan, “Americans Most Satisfied With Nation's Military, Security,” Gallup, January 28, 2019, available at: <https://news.gallup.com/poll/246254/americans-satisfied-nation-military-security.aspx>.

<sup>169</sup> *McCutcheon v. Fed. Election Comm'n*, 572 U.S. 185 (2014) (Breyer, J. dissenting).

amendment to overturn *Citizens United*.<sup>170</sup> Reviewing poll results, a Bloomberg writer in 2015 noted, “Americans may be sharply divided on other issues, but they are united in their view of the 2010 Supreme Court ruling that unleashed a torrent of political spending: They hate it.”<sup>171</sup>

When asked, Americans say that addressing corruption and Big Money dominance is their top concern. One representative poll found that three-quarters identify fighting corruption as their top concern.<sup>172</sup> A September 2018 Wall Street Journal/NBC poll similarly showed that 77 percent of surveyed registered voters said that “Reducing the influence of special interests and corruption in Washington” is either the most important or a very important issue facing the country.<sup>173</sup>

Americans across the political spectrum want far-reaching solutions to the *Citizens United*-enabled flood of Big Money in politics. “With near unanimity,” reported The New York Times, “the public thinks the country’s campaign finance system needs significant changes.” Americans are roughly split between whether the system needs “fundamental change” (39 percent) or should be “completely rebuilt” (46 percent); effectively no one believes no changes are needed.<sup>174</sup>

To take one example of a policy that seems common sense to Americans, more than three-quarters of Americans favor imposing a cap on the amount candidates can spend in election races, a measure made completely impossible by *Buckley*.<sup>175</sup>

That profound disgust with *Citizens United* has fueled an ever-growing democracy movement. Thanks to that movement:

- More than 1 million people have submitted comments to the Securities and Exchange Commission in support of a petition calling for a rule requiring publicly traded companies to disclose their political spending.<sup>176</sup>
- A huge coalition of organizations, known as the Declaration for American Democracy, has come together to support measures such as H.R.1, the most sweeping pro-democracy legislation in the past 50 years, which this House passed in March 2019.

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<sup>170</sup> Steven Kull, et. al., “Americans Evaluate Campaign Finance Reform,” Program for Public Consultation, University of Maryland, May 2018, available at: <https://www.documentcloud.org/documents/4455238-campaignfinancereport.html>. See additional polling here: <https://democracyisforpeople.org/page.cfm?id=7>.

<sup>171</sup> Greg Storh, “Bloomberg Poll: Americans Want Supreme Court to Turn Off Political Spending Spigot,” Bloomberg, September 28, 2015, available at: <http://www.bloomberg.com/politics/articles/2015-09-28/bloomberg-poll-americans-want-supreme-court-to-turn-off-political-spending-spigot>.

<sup>172</sup> Greenberg Quinlan Rosner Research, “First Agenda Item for Congressional Majority: Ending the Culture of Corruption in Washington,” November 18, 2018, available at: <https://endcitizensunited.org/wp-content/uploads/2019/01/ECU-Post-Elect-Public-Memo-FINAL-112018.pdf>.

<sup>173</sup> “Corruption in Washington Is a Top Concern for Voters, WSJ/NBC News Poll Shows,” Wall Street Journal, September 24, 2018, available at: <https://www.wsj.com/livecoverage/campaign-wire-2018-midterms/card/1537810213>.

<sup>174</sup> The New York Times-CBS News Poll: “Americans’ Views on Money in Politics,” The New York Times (June 2, 2015), <http://www.nytimes.com/interactive/2015/06/02/us/politics/money-in-politics-poll.html>

<sup>175</sup> “The Public, the Political System and American Democracy,” Pew Research Center, April 26, 2018, available at: <https://www.people-press.org/2018/04/26/the-public-the-political-system-and-american-democracy>.

<sup>176</sup> See <https://www.sec.gov/comments/4-637/4-637.shtml>.

- Cities and states have pursued aggressive measures to offset the impact of *Citizens United*, with Washington, D.C.; Seattle; Montgomery County, Maryland; New York state; among others, adopting public financing systems in recent years. Countless other states and localities have adopted disclosure rules, contribution limits and other reforms.<sup>177</sup>

Motivated in large part by the Supreme Court’s decision in *Citizens United*, the growing democracy movement has pushed at every level of government for a constitutional amendment to overturn *Citizens United* and related decisions. By now, 20 states and more than 800 localities have passed resolutions calling for a constitutional amendment to overturn the decision. Millions have signed petitions calling for an amendment. In 2014, the U.S. Senate voted 54-45 in favor a constitutional amendment. More than 200 members of the U.S. House of Representatives have co-sponsored a constitutional amendment in the current Congress.

Now it is time for Congress to hear the will of the people and act decisively: Pass the Democracy For All Amendment and send it on to the states for ratification.

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<sup>177</sup> See <https://www.ncsl.org/research/elections-and-campaigns/campaign-finance-database-2015-onward.aspx>.