July 24, 2012

Senate Judiciary Committee
Senate Subcommittee on the Constitution, Civil Rights and Human Rights

Re: **Taking Back Our Democracy: Responding to Citizens United and the Rise of Super PACs**

Dear Chairman Durbin and Members of the Subcommittee:

People For the American Way (PFAW) commends you for holding this extremely important hearing. We appreciate this opportunity to address the serious problems that have arisen since the Supreme Court's disastrously misguided ruling in *Citizens United v. Federal Elections Commission*.

Introduction

The January 2010 *Citizens United* decision granted corporations the right to make unlimited independent expenditures to support or defeat electoral candidates. The narrow 5-4 majority decision was based on two severely flawed foundations: (1) that corporations have the same First Amendment rights as people to make independent expenditures to affect elections; and (2) that such independent expenditures cannot possibly cause real or perceived corruption and, therefore, any government interest in limiting such expenditures is outweighed by the corporation's First Amendment right.

Within weeks of *Citizens United*, the DC Circuit relied on that case in its *SpeechNow v. Federal Elections Commission* opinion. The court ruled that since independent expenditures do not cause real or perceived corruption, then an individual's giving contributions to groups that make only independent expenditures also cannot create real or perceived corruption. Therefore, according to the court, the Constitution prohibits laws limiting individuals' contributions to such entities. And so the current phenomenon of unlimited contributions to the "super PAC" was born.

Americans have responded to *Citizens United* and its progeny with remarkable agreement. A nation that is split down the middle on so many political issues nonetheless agrees overwhelmingly that the people's constitutional authority to hold elections with integrity must be restored. Surveys show lopsided supermajorities opposing *Citizens United*. For instance, polling from earlier this year, two years after the Court handed down the opinion, reveals that 62% of Americans oppose the Court's decision, and more than half say they would support a constitutional amendment to reverse it.[1] Around the nation, local and state governments are

[1] Democracy Corps and Public Campaign Action Fund, *Two Years After Citizens United, Voters Fed Up with Money in Politics*, http:// campaignmoney.org/files/DemCorpPCAFmemoFINAL.pdf. The survey was conducted by Greenburg Quinlan Rosner Research.

responding to their constituents by passing more than 275 resolutions urging Congress to send a constitutional amendment to the states for ratification. Six state legislatures are on record in support of constitutional remedies: Hawaii, New Mexico, Vermont, Rhode Island, Maryland, and California. They have been joined by towns, cities, and counties both large and small, in red states and blue states, like Kansas City (Missouri), Fayettesville (Arkansas), Los Angeles and San Francisco (California), Alleghany County and Asheville, (North Carolina), Albany and New York City (New York), Missoula (Montana), Wilkes-Barre and Pittsburgh (Pennsylvania), South Miami (Florida), and Madison (Wisconsin).

In distorting the Constitution, the Supreme Court has created a "movement moment," where Americans are joining together to fix the country we love. During today's hearing, we look forward to an honest examination of the damage that *Citizens United* and its progeny have done to our nation, damage that can be repaired only through a constitutional remedy.

Corporations do not have the same First Amendment rights as people.

Citizens United treated corporations and people the same for the purposes of a First Amendment analysis of campaign spending rules. In elevating the constitutional rights of a corporation to those of a person in the context of affecting elections to public office, the Roberts Court has radically transformed the fundamental premise of the Constitution: For the first time, corporations are, as a constitutional matter, members of the political community of the United States. Sovereign power no longer flows only from the people, but now must be shared by people and non-human corporations.

The First Amendment was never intended to equate multibillion dollar corporations with real persons. Nothing in the Constitution even requires governments to allow corporations to exist. A corporation is an artificial creation whose basic nature is determined by the state law where it is incorporated. Governments allow businesses to organize as corporations in order to limit the financial liability of their owners and managers. A corporation, unlike an individual, does not retire, die, and distribute its wealth among its descendants. A corporation, unlike an individual, can consist of thousands of people working full time across the country, operating in several sectors of the economy simultaneously. The corporation can take risky actions that lead to big payoffs, but its owners and managers are not personally liable for those actions if they fail. In other words, the law grants corporations vast, superhuman abilities that are denied to individuals. And with those vast abilities, granted to these artificial creations at the discretion of the government for the purpose of advancing commerce, the corporation can amass far more wealth than an individual can.

So the idea that the First Amendment *requires* governments to treat these corporations *identically to people* for the purposes of regulating how corporations spend that wealth to influence elections is bizarre.

This recognition of the obvious differences between people and corporations – and the subsidiary role the latter play in our constitutional structure – was not lost on those who adopted the Constitution. As Chief Justice John Marshall wrote in 1818, "A corporation is an artificial being, invisible, intangible, and existing only in contemplation of law. Being the mere creature of law,

it possesses only those properties which the charter of creation confers upon it, either expressly, or as incidental to its very existence."[2]

The *Citizens United* majority went on at great length about how the campaign finance laws in question purportedly restricted and even punished the political speech of "associations of citizens" during election seasons. A gathering of Bostonians challenging George III is an "association of citizens," but that term can hardly be used to describe creations of the state licensed solely to do business and make a profit. Moreover, the laws in question did not restrict or punish any people. A law that restricts *corporate* spending does not at all affect *individuals'* ability to talk or to spend their own money, either alone or in conjunction with other people. It does prevent the use of funds from a corporation's general treasuries to spend money to influence elections.

Before *Citizens United* was decided, the people who ran corporations were not having any difficulty making their voices heard during election campaigns, including on matters of direct interest to their corporations. They could have their corporation set up a PAC, then give their personal money directly to the PAC for electoral purposes, with the PAC either giving directly to a campaign or making independent expenditures. In addition, like anyone else, they could contribute directly to candidates running for office subject to contribution limits.

What these businesspeople could not do before *Citizens United* was spend *the corporation's* money to advocate for or against a federal political candidate. But in the wake of *Citizens United*, corporate officers can now tap into the potentially vast resources of the corporate treasury, essentially spending someone else's money. Ordinary people have no such luxury; the money they donate must be their own. But corporate CEOs and business owners can now give millions of dollars for independent expenditures without losing a dime of their own money. This is a stunning new inequality given constitutional legitimacy by the Supreme Court: Those with positions of influence have been handed even more influence.

Massive funds from large corporations and a sliver of extremely wealthy individuals cannot help but have a destabilizing influence on our national political structure and effectively silence the majority.

In 2008, before *Citizens United*, Exxon-Mobil set up a PAC that raised more than $1 million from corporate officials. That is a significant amount of money, but it all came from individuals. That same year, Exxon-Mobil earned $70 billion in profits. Had *Citizens United* been the law, the company could have devoted a mere 10% of those profits to affecting elections and dwarfed the PAC's spending by a factor of 7000. The $7 billion it could have easily spent would have been more than was spent by the campaigns of Barack Obama, John McCain, and every Senate and House candidate combined.

And that is just one company.

[2] *The Trustees of Dartmouth College v. Woodward*, 17 U.S. 518 (1818).

Imagine the most powerful corporations in the nation devoting these enormous sums to affect elections. The voices of 99% of the population would be completely drowned out, with the airwaves filled with corporate-sponsored ad after corporate-sponsored ad.

All this spending would have something in common: the corporate officers who write the checks have a fiduciary duty to maximize shareholder returns. The goals that animate people acting on their own behalf – concern for their community, concern for their neighbors, concern about values – are irrelevant to how that corporate electoral money is spent. In fact, in some cases, corporate officers who allow themselves to be swayed by such human factors may be violating their fiduciary duty to the companies that employ them.

Of course, to accomplish its goals, a corporation need not actually spend such sums in every race they are interested in. Far from it. Especially for offices or in areas where electoral races are generally not overwhelmingly expensive – in other words, for most state and local legislative and judicial elections throughout the United States – the implied threat to spend large expenditures against elected officials could easily be enough to "persuade" them to take the "right" position. Conversely, the promise of an enormous windfall in supportive corporate independent expenditures could have an equally persuasive effect.

Such corruption leaves no evidence: no paper trail, no recordings, no ads. But it poisons our nation's democracy.

Unfortunately, limitless spending from the wealthy and powerful need not be corporate in source to drown out the voters and intimidate elected officials: Especially through super PACs, we are seeing a tiny number of phenomenally wealthy individuals exert obscenely oversized influence over elections. For instance, during the 2012 presidential primary campaigns in Alabama and Mississippi, 91% of the television ads promoting presidential contenders were paid for by the candidates' super PACs.[3] Certain candidates with little public support and thus minimal funding to their campaigns were nevertheless able to campaign for months on the "generosity" of one or two billionaires, whose support for single-candidate super-PACs grossly disrupted the electoral process.

Does anyone doubt the influence these mega-donors would have had in a White House run by the individuals whose efforts they indirectly bankrolled?

Whether those super-PACs are funded by phenomenally wealthy individuals or phenomenally wealthy corporations, they are doing serious damage to our democracy. The lesson is being learned not just on the national stage via the presidential campaign, but in states and communities across America.

In Arizona, for instance, corporate money brought into play by *Citizens United* may have decided that state's election for Attorney General in 2010. The race between Republican Tom Horne and Democrat Felecia Rotellini was expected to be the closest statewide race that year, and the two candidates' campaigns' spending were relatively close to each other. But during the

[3] Bloomberg News, *Super-PAC Ads Dominate Republican Race in Alabama, Mississippi*, http://www.businessweek.com/news/2012-03-12/super-pacs-dominate-republican-ads-aired-in-alabama-mississippi-primaries.

final weeks of the campaign, a conservative organization called Business Leaders for Arizona [BLA] spent more than half a million dollars on independent expenditures attacking Rotellini, the Democrat. This happened when her campaign was low on cash, making it harder to respond. Horne – buoyed by BLA's election spending – ended up winning by five percentage points. Discussing the race earlier this year, Rotellini's campaign manager credited the independent expenditures with throwing the race to the Republican: "If he hadn't have had access to all that money, it would've been a different race -- and I think it clearly would've been a different outcome."[4]

And just who were the business leaders of Business Leaders for Arizona? After the election, BLA's campaign finance report to the state[5] revealed that only 25% of its contributions in those critically important final weeks came from individual contributions (and less than 15% of those individual contributions came from people in Arizona, despite the organization's name). BLA reported that 75% of its funds came from three business contributions:

- NCP Finance Limited - $30,000
- Texas Loan Corporation - $15,000
- RSLC - $350,000

RSLC, BLA's largest funder, turns out to be the Republican State Leadership Committee. According to the Annenberg Center's FactCheck project[6], the RSLC was a 527 political committee whose top donors were the U.S. Chamber of Commerce, Wal-Mart, Pfizer, Devon Energy, AT&T, Reynolds American (the tobacco company), and the American Justice Partnership, an organization seeking legislation to limit liability awards and reduce what it calls "abusive lawsuits."

Arizona's state constitutional provision protecting its elections from corporate domination[7] was just one of many state and local provisions across America upended by *Citizens United*.[8]

The premise that independent expenditures don't cause real or perceived corruption has been proven to be wrong.

Even the Roberts Court acknowledges that the American people, through our elected governments, have an important interest in preventing public corruption, both real and perceived. Where *Citizens United* departed from the reality-based world was its assertion that independent expenditures cannot possibly cause real or perceived corruption and, therefore, any government interest in limiting such expenditures is outweighed by the corporation's First Amendment right.

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[4] http://www.azcentral.com/news/articles/2012/04/02/20120402attorney-general-tom-horne-under-investigation.html.

[5] State of Arizona Campaign Finance Report, Amended 2010 Post-General Election Report of Business Leaders for Arizona, http://www.azsos.gov/cfs/PublicReports/2010/C10F8C6B-F26E-44A8-B770-8D50F934D16A.pdf.

[6] Annenberg Public Policy Center, FactCheck.org entry for Republican State Leadership Committee (posted August 10, 2010), http://www.factcheck.org/2010/08/republican-state-leadership-committee.

[7] "It shall be unlawful for any corporation, organized or doing business in this state, to make any contribution of money or anything of value for the purpose of influencing any election or official action." AZ Const. Art. 14, §18.

[8] National Council of State Legislatures, *Life After Citizens United*, http://www.ncsl.org/legislatures-elections/elections/citizens-united-and-the-states.aspx.

While *Citizens United* involved corporate spending, the logic was that applied (and limited) to individuals in *Buckley v. Valeo*. But even that 1976 case's finding was narrow and tentative, with the majority concluding that "the independent advocacy restricted by the provision does not *presently* appear to pose dangers of real or apparent corruption comparable to those identified with large [direct] campaign contributions."[9] *Citizens United* was more doctrinaire, concluding "that independent expenditures, including those made by corporations, do not give rise to corruption or the appearance of corruption."[10]

Survey data show that statement to be demonstrably false.

- According to a Democracy Corps and Public Campaign Action Fund survey from January 2012, two years after the decision, two-thirds of Americans agree with a statement that says: "Given what I see in the presidential race, I am fed up with the big donors and secret money that control which candidates we hear about. It undermines democracy."[11]
- An April, 2012, survey by the Brennan Center[12] revealed that:
    - 68% of all respondents agreed that "a company that spent $100,000 to help elect a member of Congress could successfully pressure him or her to change a vote on a proposed law"
    - 77% agreed that "A member of Congress is more likely to act in the interest of a group that spent millions of dollars to elect him or her than to act in the public interest."
    - 69% believe that "the new rules that let corporations, unions and people give unlimited money to Super PACs will lead to corruption."
    - 26% said they are "less likely to vote because big donors to Super PACs have so much more influence over elected officials than average Americans." The withdrawal from the most basic and most important activity in democracy was even more pronounced among African Americans (29%), Latinos (34%), and people with annual incomes under $35,000 (34%).

Unfortunately, the laissez-faire campaign finance system that *Citizens United* made possible has clearly shown that enormous independent expenditures not just can, but *do*, lead to the appearance of corruption. This key factual premise upon which *Citizens United* was based is simply not true. Earlier this year, millions of Americans were hoping that the Court, perhaps having made an honest error, would take advantage of the recent Montana campaign finance case to reexamine the assumptions underlying Citizens United. The Montana Supreme Court had cited that state's dark history of political corruption caused by corporate influence on elections in upholding a state law prohibiting corporations from making independent expenditures in state and local races (including judicial elections). But when the same narrow majority as *Citizens United* reversed the Montana Supreme Court without even giving the state the opportunity to

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[9] *Buckley v. Valeo*, 424 U.S. 1, at 46 (1976) (emphasis added).
[10] *Citizens United v. Federal Elections Commission*, No. 558 U.S. ___, ___ (2010) (slip op. at 42).
[11] Democracy Corps and Public Campaign Action Fund, above.
[12] Brenan Center for Justice, *Super PACs, Corruption, and Democracy: A National Survey of Americans' Attitudes about the Influence of Super PAC Spending on Government and the Implications for our Democracy*, http://brennan.3cdn.net/bcb50100c0dda6d39a_g3m6bc9py.pdf. (Executive Summary: http://brennan.3cdn.net/5d2ff3bdfc12b2eb27_pym6b9cdv.pdf.

present oral arguments[13], Americans saw that *Citizens United* had been no honest mistake. The five conservatives on the Roberts Court knew exactly what they were doing.

So now the American people perceive a significant increase in political corruption as a result of the spending let loose in *Citizens United* and its progeny. When people regularly regard their government as corrupt and available for sale to the highest bidder – when elections are no longer seen as reflecting the voice of the people – then faith in our democracy is severely undermined.

Amending the Constitution to Overturn Citizens United Shows Respect for the Constitution.

Amending the United States Constitution is not something we recommend lightly, but the danger caused by the Roberts Court's distortion of the First Amendment requires us to take corrective action. Some who are genuinely concerned about the threat to our democracy might nevertheless be reluctant to tamper with perhaps the greatest legal document in world history. As an organization that deeply respects the Constitution, we understand that reluctance, and we address this section of our comments to those of that view. We also extend an invitation to engage with the nationwide grass roots coalition united in wanting a constitutional remedy and discussing the various forms that such an amendment might take.

Some may be concerned because a Citizens United amendment has been characterized as the first to take away a constitutional right. This description is inaccurate for two reasons. First, *Citizens United* did not extend any new rights to individuals, to any member of the "We The People" who are this nation's sovereign power, with the sole exception of corporate officers who were given the new right to write checks from their extensive corporate treasuries to affect elections that are supposed to represent the people's voice. The right to spend our own money in politics was one already enjoyed by every citizen, and restoring the person/corporation distinction would restore each person's right to engage in a vigorous debate over public issues.

Second, constitutional reform that has protected and expanded rights has always been characterized by the forces of reaction as "taking away rights." The Thirteenth Amendment took away the property rights of white southerners who dehumanized African Americans and reduced them to property to be bought and sold. White men's voting power was undeniably diluted by the Fifteenth and Nineteenth Amendments, granting the right to vote to non-whites and women. The 16th Amendment took away the right of plutocrats to not pay their fair share in the taxes needed to run the country that allowed them to make their fortunes. The 17th Amendment took the right of often-corrupt state legislatures to pick senators, placing that right in the hands of the American people. In all of these cases, the Constitution was amended to make it better reflect the values on which our nation was founded. A constitutional amendment to strengthen our elections and prevent corporate and special interest money from drowning out all other voices would be in that same tradition of improvements to the ideal and thus would protect the First Amendment rights of actual people.

[13] *American Tradition Partnership, Inc. v. Bullock*, 567 U.S. ____ (2012).

It is also important to note that even as the fundamental purposes of the First Amendment remain constant through the years – to protect the freedom of the individual and promote the vigorous exchange of ideas – the means through which the First Amendment accomplishes those functions evolves along with changes in technology and society.

For instance, at the time our nation was founded, requiring a government license in order to speak via popular media could not have had any purpose or effect but to limit speech. Although the founders could not have imagined a world where people send electronically amplified spoken messages over the air at the speed of light to far-away listeners, the First Amendment was able to adapt to this major technological change. In the early days of radio broadcasting, unregulated facilities interfered with each other and often prevented *anyone* from being heard over the airwaves. The traditional idea that more speech facilitates debate was turned upside down; additional broadcasting significantly curtailed the ability of other radio operators to be heard, often silencing them altogether. A content-neutral broadcast licensing system was developed to ensure that speakers could be heard, thereby protecting the First Amendment interests of both speakers and the public.[14]

The First Amendment did not change, but the world within which it operates did.

We now live in an economic, technological, and media environment where the ability of ordinary people to be heard in their communities' political debates is being eviscerated. Corporate and special interests with wealth that would have staggered our nation's founders purchase huge amounts of air time, drowning out the diverse voices of the 99%. Even worse, the identity of the speakers is often deliberately concealed, ensuring that voters are denied a key fact needed to analyze the reliability of the message being sent.

We can amend the Constitution to ensure our society accomplishes the fundamental purposes of the First Amendment. Currently, debate is in an early phase on how to accomplish that: To address the status of corporations under the Constitution? To address the damage to our elections caused by vast inequalities of access to effective means of communication? Perhaps some other way that has not yet been broached? An effective amendment will strengthen the First Amendment, not weaken it.

Conclusion

As an organization dedicated to defending the Constitution and, especially, the First Amendment, People For the American Way understands that a constitutional amendment is not an endeavor to be taken lightly or without great care to protect the rights and liberties of individual Americans. But the Supreme Court's decision to effectively silence the voice of the American people by invalidating restrictions on spending in elections by the nation's most powerful, wealthy, and elite is such that a constitutional amendment is the only appropriate and direct response.

[14] The Supreme Court discussed the early days of radio and the need for a government licensing system to ensure that speakers could be heard in *National Broadcasting Co. v. United States*, 319 U.S. 190, 210-213 (1943).

That a constitutional amendment is needed to protect the viability of our democracy is something most Americans agree on. We also agree that it must be done with great care, which is why the nation has launched a conversation about the exact form that such an amendment will take. By highlighting the current threats to our democracy, the subcommittee is providing the American people with the information needed to ensure a vigorous and productive debate.

Michael B. Keegan
President
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