WASHINGTON
LEGISLATIVE OFFICE

July 24, 2012

The Honorable Richard Durbin,
Chairman
Subcommittee on the Constitution,
Civil Rights and Human Rights,
Committee on the Judiciary
224 Dirksen Senate Office Bldg.
Washington, DC 20510

The Honorable Lindsey Graham,
Ranking Member
Subcommittee on the Constitution,
Civil Rights and Human Rights,
Committee on the Judiciary
224 Dirksen Senate Office Bldg.
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Re: "Taking Back Our Democracy: Responding to Citizens United and the Rise of Super PACs"

Dear Chairman Durbin and Ranking Member Graham:

On behalf of the ACLU, a non-partisan organization with over a half million members, countless additional supporters and activists, and 53 affiliates nationwide, we submit this statement for the record on today's hearing. We urge the subcommittee to exercise caution in responding to the Supreme Court's decision in *Citizens United v. Federal Election Commission*,[1] and we strongly urge the Senate to resist any effort to amend the Constitution to limit the First Amendment.

The ACLU has been involved in the public debate over campaign finance reform for decades, providing testimony to Congress on these issues regularly and challenging aspects of campaign finance laws in federal court.

We applaud the subcommittee in its efforts toward the laudable goal of fair and participatory federal elections. We support numerous campaign disclosure and fair election measures that promote and inform the electorate. These include public financing, tightening regulations governing independent expenditures to bar coordination with campaigns and candidates, disclosure that preserves issue-based anonymous speech rights and either free or discounted broadcast advertising rates for political advertisements. We address these non-controversial proposals below.

We have serious concerns on several other fronts. Perhaps most serious are the various proposals for constitutional amendments that would either limit corporate First Amendment protection or directly limit the First Amendment

[1] 558 U.S. 50 (2010).

itself. We also oppose the various iterations of the DISCLOSE Act,[2] which would require non-partisan "issue advocacy" groups like the ACLU, the National Rifle Association and the Sierra Club to disclose the identity of certain members. Finally, we note common misconceptions about the decision in *Citizens United*, a decision which has very little to do with the "problem" of independent expenditure-only committees (colloquially, and inaccurately, known as "Super PACs").

The election of public officials is an essential aspect of a free society, and campaigns for public office raise a wide range of competing civil liberties concerns. Any regulation of the electoral and campaign processes must be fair and evenhanded, understandable, and not unduly burdensome. It must assure integrity and inclusivity, encourage participation, and protect privacy and rights of association while allowing for robust, full and free discussion and debate by and about candidates and issues of the day. Measures intended to root out corruption should not interfere with freedom of expression by those wishing to make their voices heard, and disclosure requirements should not have a chilling effect on the exercise of rights of expression and association, especially in the case of controversial political groups.

Further to these core principles, we offer comments in four areas.

1. **Do Not Amend the Constitution.**

There are at least 14 separate constitutional amendments pending in Congress to address the decision in *Citizens United*.[3] Although they differ in the particulars, all take one of two general approaches. Several would limit constitutional rights to "natural persons." The rest provide for either Congressional regulation of contributions and expenditures, or directly limit contributions and expenditures by corporations, including for-profit and non-profit entities. Both approaches would effectively "amend" the First Amendment to limit speech rights, and would be the first time in history that the Constitution has been amended to *restrict*, rather than expand, individual, constitutionally guaranteed rights.[4]

The amendatory process for the Constitution is as burdensome as it is to prevent precisely these types of amendments. While the ACLU is concerned about the impact of aggregated wealth, including that of corporations and unions, on the political process, taking the radical step of amending the Constitution to restrict speech rights cannot be the answer.

Furthermore, we fear an amendment to "fix" *Citizens United* would serve as precedent for other restrictive constitutional amendments. The ACLU has long fought numerous constitutional amendment proposals designed to restrict constitutional rights and liberties, including

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[2] S. 3369, S. 2219, H.R. 4010, 112th Cong. (2012). S. 3369 is identical to S. 2219, the previously introduced version of the DISCLOSE Act, but removes the disclaimer requirements of 2219 and moves the effective date of the legislation beyond the 2012 elections. H.R. 4010 resembles in significant part S. 2219.

[3] *See* League of Women Voters, Review of Constitutional Amendments Proposed in Response to Citizens United, http://www.lwv.org/content/review-constitutional-amendments-proposed-response-citizens-united#_ftn1.

[4] Even Prohibition was not as extreme a restriction on individual liberties as these proposals. The right to consume alcohol is not constitutionally enumerated.

amendments prohibiting or permitting the prohibition of flag "desecration," the so-called Victims' Rights Amendment, and birthright citizenship amendments (that would repeal the 14th Amendment's guarantee of citizenship to individuals born in the United States). These *Citizens United* amendments are just as misguided (and unnecessary), and we urge all members of Congress to oppose them if they are ever formally considered.

Finally, those amendments targeting corporate personhood would have serious civil liberties implications in that they could inadvertently strip away, for example, Fourth and 14th Amendment rights that derivatively protect the "natural person" constitutional rights of shareholders and other stakeholders. Great care should be taken when legislating in this area. Any constitutional amendment restricting corporate speech would pose a danger that simply cannot be overstated for other rights and civil liberties.

2. Set the Record Straight on Citizens United

As recently reported by Matt Bai, chief political correspondent for the New York Times, assigning total blame for "money in politics" to *Citizens United* is, at best, "overly simplistic."[5] *Citizens United* is a relatively narrow decision. It held that unions and corporations (including non-profit corporations like the ACLU) can spend general treasury funds on communications that are not coordinated with a candidate or campaign. That is, they no longer need to form a political action committee, or PAC, in order to engage in direct political speech (direct *contributions* to candidates remain totally forbidden).

The simple fact is, unless corporations and/or unions are doing so through disclosure-exempt 501(c)(4) organizations,[6] they have not spent a sizeable amount of money on independent expenditure-only committees. To date, only about 13 percent of "Super PAC" donations have come from corporations, and less than one percent from publicly traded corporations.[7] It bears repeating: virtually all of the relatively small amount of corporate spending is coming from private and most likely closely held corporations, which are often affiliated with a particularly influential *individual*. For example, five donor companies share an address in The Villages, Florida, affiliated with developers H. Gary and Renee Morse.[8]

Additionally, all indications are that the current state of campaign finance is not a historical anomaly. There has been a consistent upward trend in campaign expenditures for decades as television advertising becomes more expensive (because a growing audience and more competitive races means more spots need to be purchased cycle after cycle). As Bai noted, the

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5 Matt Bai, *How Much Has Citizens United Changed the Political Game?*, N.Y. Times, July 17, 2012.

6 In which case, there should be disclosure to shareholders or members.

7 Bai, *supra* note 5. And a Bloomberg Government study has an even lower number—7.6 percent—for the period of December 2011 and March 2012. Mark Silva, *Super-PACs: Little from Corporations*, Bloomberg, July 12, 2012, http://go.bloomberg.com/political-capital/2012-07-12/super-pacs-little-from-corporations/.

8 *Corporate Shells Ramp Up Super PAC Giving*, Wash. Times, July 21, 2012, http://www.washingtontimes.com/blog/inside-politics/2012/jul/21/corporate-shells-ramp-super-pac-giving/.

percentage increase in outside expenditures (i.e., not direct contributions) has remained relatively static even after *Citizens United* (rising 164% from 2004 through 2008 and 135% from 2008 through 2012).

Finally, despite the deserved media attention surrounding the significant expenditures by Super PACs favoring Republican candidates and policies, there is no indication thus far that the increase in political spending has disproportionately benefitted any one party or candidate. The Romney campaign is likely to "outspend" the Obama campaign in this year's presidential election. Further, for the first time in history, the GOP-affiliated Super PACs are spending at a level such that "outside" independent expenditures could outstrip direct contributions.

That said, President Obama was, in 2008, the first major-party candidate to decline public financing due to the remarkable number of relatively small direct contributions he received (which is testament, further, to the resiliency of popular democracy in America).[9] Additionally, even the Super PAC race is far from one-sided. Of the top individual contributors, three—including comedian Bill Maher, actor Morgan Freeman and CEO of Dreamworks, Jeffrey Katzenberg—are supporting Priorities USA, the "Obama" Super PAC. And, Priorities USA is aggressively running precisely the type of negative advertising against Mr. Romney that has been so derided in the current debate, which Professor Thomas Edsall at Columbia University suggests is a tactic to dissuade white men without college degrees—Obama's least favorable constituency—from going to the polls.[10]

For all the oxygen consumed on *Citizens United*, the decision in *SpeechNow.org v. Federal Election Commission* is of more salience for the Super PAC phenomenon.[11] That said, even before *SpeechNow,* individuals were free to spend significant amounts of money on political speech and sometimes anonymously. For instance, during the 2004 presidential election, groups like Moveon.org, America Coming Together, and Swift Boat Veterans for Truth spent significant amounts of money on political speech.

There should be a public discussion of the problems arising from the influence of aggregated wealth, be it corporate or individual. Nevertheless, the country must not act with undue haste in changing our elections laws—and especially should not do so based on faulty information. We urge the subcommittee and all members of Congress to act on facts, and not hyperbole.

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[9] *See* Shailagh Murray & Perry Bacon Jr., *Obama to Reject Public Funds for Election*, Wash. Post, June 20, 2008, http://www.washingtonpost.com/wp-dyn/content/article/2008/06/19/AR2008061900914.html.

[10] Thomas B. Edsall, *The Politics of Anything Goes*, N.Y. Times, July 23, 2012, http://campaignstops.blogs.nytimes.com/2012/07/23/the-politics-of-anything-goes/.

[11] 599 F.3d 686 (D.C. Cir. 2010). There, the D.C. Circuit held that individual contribution limits to unincorporated "527" committees, named after the section of the tax code, were unconstitutional in light of the holding in *Citizens United* that uncoordinated expenditures do not give rise to the type of quid pro quo corruption or the appearance thereof that would justify limiting the First Amendment.

3. Disclosure and Protecting Anonymous Political Speech Not Mutually Exclusive

Transparency drives democracy. The American electorate has a legitimate interest in knowing the source of significant support for a candidate. Accordingly, relatively large contributions and/or expenditures are subject to legitimate disclosure (as they already are). What disclosure rules cannot do is act to chill constitutionally protected associational and expressive rights.[12] Unfortunately, the current disclosure legislation pending in Congress would do exactly that.[13]

First, all of the DISCLOSE Acts currently pending would dramatically expand the period of time during which issue advocates—those taking no position in support of or in opposition to a political candidate—must disclose their donors if they wish to publish issue ads.[14] The Act would expand the "electioneering communications" period—currently the 30 days before a primary and the 60 days before a general election—quite significantly. For communications that refer to a candidate for the House or Senate, the period would begin on January 1 of the election year and end on the election, and would encompass the entire period following the announcement of a special election up to the special election. For communications mentioning a presidential or vice presidential candidate, the period would extend from 120 days before the primary or caucus in an individual state, which would radically extend the heightened disclosure period in numerous jurisdictions.

Additionally, the legislation would expand the definition of independent expenditure, which is currently limited strictly to communications that expressly endorse or oppose a candidate, to those that are the "functional equivalent" of express advocacy. The functional equivalency test, such as it is, invariably drags in speech that is and should be protected from limitation under the First Amendment. This, in fact, was the case in *Citizens United*, where the communication at issue was an independent documentary critical of then-presidential candidate Senator Hillary Clinton. Similar communications (assuming they are outside the electioneering communications window) would trigger disclosure as independent expenditures. And, as the government conceded in the *Citizens United* oral arguments, the same logic would extend to a book or other non-broadcast medium like a pamphlet or sign that could be construed as critical of a candidate, which is an obvious First Amendment violation.[15]

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[12] The constitutional interest in anonymous speech was most obvious during the civil rights era, when segregationist state governments sought to chill associational activity in civil rights groups. *See, e.g.*, *Nat'l Assoc. for the Advancement of Colored People v. Alabama*, 357 U.S. 449 (1958) (holding NAACP membership lists off limits to state government seeking to prevent organization's operation in-state).

[13] *See supra* note 2 for a list of the relevant legislation.

[14] S. 3369 § (2)(a)(2).

[15] Transcript of Oral Argument at 65:2-15, *Citizens United v. Fed. Election Comm'n*, 558 U.S. 50 (2010) (No. 08-205). Then-Solicitor General Elena Kagan explained that to the extent that a book would be construed as express advocacy, 2 U.S.C. § 441b would cover that book, but further explained that there would be a good "as-applied" challenge to any enforcement. She further noted that there had never been an FEC action covering a book. Nevertheless, the government clearly admitted that a book would be covered by the ban in 441b. To the extent the definition of independent expenditure is amended to include the functional equivalency test, even a book that does not expressly say "vote for candidate X," but is highly critical of said candidate, would be covered.

Finally, and to be very clear, the DISCLOSE Act would require non-partisan issue advocates like the ACLU, Planned Parenthood or the National Rifle Association to disclose the identity of some donors. To the extent that donors contribute more than $10,000 that is spent on electioneering communications, independent expenditures or "covered transfers," their identities must be disclosed. While the legislation provides for disclosure only with regard to a segregated account, assuming these organizations take the time and trouble to set it up, this legislation will require membership disclosure for those issue advocates who must rely on larger donations to fund political communications simply because of the economics of their operations (some small organizations have, for instance, a limited base of larger donors).

Further, and even with a $10,000 trigger, the present exceptions in the DISCLOSE Act may still leave the door open to disclosure when a donor had no intention that a gift be used for political purposes.[16] It is both impractical and unfair to hold contributors responsible for every advertisement that an organization publishes, which would be required were the entity to spend more than $10,000 in a cycle on covered communications from general treasury funds, and even donors who give more than $10,000 may be small relative to the size of the covered organization's donor base as a whole.

The DISCLOSE Act is likely to do one of two things, particularly when an organization is engaged in advocacy on controversial issues with which typical donors or members might not want to be associated publicly. First, the organization might refrain from engaging in public communications that would subject its donors to disclosure, in which case the organization's speech will have been curtailed. Alternatively, donors sensitive to public disclosure may refrain from giving to the organization (or may cap disclosure just below the trigger threshold), in which case the organization's ability to engage in speech will also have been curtailed. In both cases, those whose names are disclosed would be subject to personal, political or commercial impacts, and the national political conversation will itself have been chilled.

4. There Are Numerous Productive Alternatives to Constitutional Amendments, Further Limitations on Speech and Onerous Disclosure Rules.

a. Tighten Coordination Rules to Prevent Sham Independent Expenditures

First, Congress and the Federal Election Commission ("FEC") should turn their attention to ensuring that independent expenditures are truly independent. As a matter of economics (not to mention common sense), truly independent expenditures cannot be corrupting or produce the appearance of corruption because there is no promise—tacit or explicit—that the candidate will provide something of value, including access, in exchange for the expenditure. The individual or group spending the money will have to hope that the candidate is listening and receptive. Additionally, truly independent expenditures are also frequently used to promote salutary policy debate (e.g., "support candidate X, a true friend of the Second Amendment").

[16] S. 3369 § (2)(b)(1)(a)(3)(B). The donor would have to specifically prohibit, in writing, use of the funds for any covered payment, and the covered organization would have to agree and then segregate the funds.

During the recently concluded primary season, Super PACs spent millions supporting particular candidates or—more frequently—opposing rivals. That practice has now turned to the general election, with Super PACs for and against President Obama and former Governor Romney taking turns attempting to sway voters. Because these organizations carefully avoid the regulatory definition of coordinating' with a candidate, they are allowed to spend unlimited sums. In truth, connections between most of these organizations and the candidates they support run deep.[17]

When Newt Gingrich was still a viable candidate, he announced to the world how much he would benefit from an upcoming independent ad campaign.[18] His public comments clearly gave a clue to his benefactors that he approved. The Super PAC supporting Mitt Romney—Restore Our Future—is led by a group of people deeply involved in the 2008 Romney campaign. As noted, Priorities USA is President Obama's Super PAC and it was founded by a former key staffer to Rahm Emmanuel and a former campaign press secretary.[19] The candidates are allowed to help the Super PACs raise money and, despite rules to the contrary, the campaigns and the Super PACs share consultants and communicate routinely across the public airwaves and otherwise.

Regulations that define 'coordination' do not necessarily ensure complete separation between organizations making independent expenditures and the candidates they support. An ad is considered to be coordinated with a candidate—and thus restricted—if it meets certain 'content' and 'conduct' standards. Most ads do NOT avoid the content standard because they all advocate the election or defeat of a candidate. To avoid the conduct standard, a Super PAC must, among other things, avoid employing or contracting with someone who worked for the candidate in the past four months or must make sure the ads are based on publicly available information. In fact, most Super PACs supporting major candidates employ plenty of people closely aligned with the candidates—but they simply make sure they haven't worked for the candidates for over four months. Such a restriction is easy to overcome and it is naïve to think that a candidate staffer who has been intimately involved in the strategic thinking of a campaign will somehow be uninformed about the strategic and tactical needs of the campaign only four months after leaving.

Congress and the FEC should tighten the definitions so that independent expenditures are truly independent of the campaigns they are intended to benefit.

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[17] *See* Nicholas Confessore, *At 40, Steering a Vast Machine of GOP Money*, N.Y. Times, July 22, 2012, *available at* http://www.nytimes.com/2012/07/22/us/politics/steering-the-rights-vast-money-machine.html?_r=2&ref=politics; Mike McIntire & Michael Luo, *Fine Line Between 'Super PACs' and Campaigns*, N.Y. Times, Feb. 25, 2012, http://www.nytimes.com/2012/02/26/us/politics/loose-border-of-super-pac-and-romney-campaign.html? pagewanted=all.

[18] *See* Quin Hillyer, *Did Gingrich Break the Law?*, The American Spectator, Spectator Blog, Jan. 9, 2012, http://spectator.org/blog/2012/01/09/did-gingrich-break-the-law.

[19] Dan Eggen & Chris Cillizza, *Romney Backers Launch 'Super PAC' to Raise and Spend Unlimited Amounts*, Wash. Post, June 23, 2011, http://www.washingtonpost.com/politics/romney-backers-launch-super-pac/2011/06/22/AGTkGchH_story.html.

b. Support Effective Public Financing

Contrary to the perceived wisdom, public financing of elections can be highly effective. As noted above, President Obama was the first to turn down the sizeable pool of public financing dollars for presidential elections, suggesting that the preceding presidential races benefitted greatly from the financing program. ***There is no constitutional reason not to enact similar policy for other federal elections***. We applaud Chairman Durbin for his efforts in this area, and the Fair Elections Now Act is a promising step in this direction. Much of it follows the key principles of an effective public financing system: funds are available to all-comers who meet certain local support criteria; it provides a floor for campaign expenditures sufficient to allow candidates to run a competitive campaign; and it would not be unduly burdensome.

Note, however, that the adjustment mechanism should not be allowed to unfairly disadvantage the non-cooperating candidate, nor interfere with the voluntary nature of the candidate's choice to participate in the public finance system.

c. Speed Tax-Exempt Status Determinations

A relatively easy improvement in campaign finance would be to ensure that the Internal Revenue Service has the resources and expertise to expeditiously approve or deny tax-exempt status proceedings. One complaint heard over and over is that organizations are able to shield donors under tax exemption laws without any oversight or enforcement until well after the relevant election period has ended.[20] At the very least, federal agencies with enforcement authority should be given the tools to prevent abuses of the system and not rely solely on punishing those intent on committing such abuses.

d. Mandate Lowest Cost Political Advertising

The ACLU supports cost reduction mechanisms, which may be the best option for limiting the influence of aggregations of money in politics. For instance, we support government-sponsored communications platforms that permit all candidates to state their views. Additionally, we support extending the franking privilege to challengers in federal campaigns, and we support providing for free or lowest-cost broadcast television airtime to candidates. Such measures must, of course, be administered in a nondiscriminatory manner and under circumstances that expand candidates' access to media. But they would, quite literally, end the problem in one fell swoop.

5. Conclusion

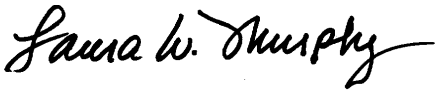
The current debate over campaign finance is a worthy one. We share the legitimate concerns of many Americans about the influence of "money in politics." Campaigns for federal office are expensive, and are becoming more so by the day and the cycle. Nevertheless, many of the recent calls for reform are unnecessary and counterproductive. In the case of proposed constitutional

[20] Jonathan Weisman, *Democrats to Ask for Curbs on Donor-Shielding Groups*, N.Y. Times, July 8, 2012, http://www.nytimes.com/2012/07/09/us/politics/democrats-want-fec-to-restrict-donor-shielding-groups.html ("The F.E.C. is usually slow to respond to such complaints, and any action is unlikely to affect the 2012 election.").

amendments and legislation that would require actual social welfare organizations to disclose the identity of their members, these proposals present civil liberties perils of the highest order. Despite the influence of money in politics, evidence does not yet exist of a threat that large donors are monopolizing channels of communication to the exclusion of candidates, parties, or those organizations funded by aggregations of smaller donors. We strongly urge the subcommittee, and indeed the whole Congress, to tread lightly in any effort implicating the right to speak freely on issues of political and public moment.

Please do not hesitate to contact Legislative Counsel Gabe Rottman if you have any questions or comments at 202-675-2325 or grottman@dcaclu.org.

Sincerely,



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cc: Members of the Senate Judiciary Subcommittee on the Constitution, Civil Rights and Human Rights