WASHINGTON
LEGISLATIVE OFFICE

April 9, 2013

Honorable Sheldon Whitehouse
Chairman
Senate Judiciary Committee
Subcommittee on Crime and Terrorism
224 Dirksen Senate Office Building
Washington, DC 20510

Honorable Lindsey Graham
Ranking Member
Senate Judiciary Committee
Subcommittee on Crime and Terrorism
152 Dirksen Senate Office Building
Washington, DC 20510

AMERICAN CIVIL LIBERTIES UNION
WASHINGTON
LEGISLATIVE OFFICE
915 15th STREET, NW, 6TH FL
WASHINGTON, DC 20005
T/202.544.1681
F/202.546.0738
WWW.ACLU.ORG

LAURA W. MURPHY
DIRECTOR

NATIONAL OFFICE
125 BROAD STREET, 18TH FL.
NEW YORK, NY 10004-2400
T/212.549.2500

OFFICERS AND DIRECTORS
SUSAN N. HERMAN
PRESIDENT

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EXECUTIVE DIRECTOR

ROBERT REMAR
TREASURER

Re: Current Issues in Campaign Finance Law Enforcement

Dear Chairman Whitehouse and Ranking Member Graham:

The American Civil Liberties Union writes to offer comments in advance of today's hearing on current issues in campaign finance law enforcement, and we thank the subcommittee for its attention to this topic. Although the ACLU opposes campaign finance measures that violate the First Amendment, we strongly agree that constitutional campaign finance laws should be enforced vigorously and consistently to assure the integrity of our electoral, legislative and administrative systems at all levels of government.

We briefly comment on several specific issues below, highlighting a number of areas of common ground between the ACLU and proponents of campaign finance reform.

1. Continue to Crack Down on Conduit Contributions

The ACLU supports efforts by the Internal Revenue Service and other federal law enforcement agencies to investigate and prosecute conduit contributions, in which an entity or individual attempts to mask the true source of a direct political contribution by using a straw contributor. Even in a system of unlimited contributions, such transactions, which present a significantly heightened risk of outright bribery and limit the public's ability to properly gauge the loyalties of the candidates they support, are particularly pernicious. The ACLU has long recognized that the prevention of real or perceived corruption may present a compelling government interest that can support properly tailored restrictions on political activity.

There is little that is more corrupting than masking direct contributions to political candidates through the use of straw contributors.

2. Appropriately Enforce the Coordination Rules

Many advocates on both sides of the campaign finance debate properly recognize that independent expenditure-only committees ("IECs")—colloquially and inaccurately termed "Super PACs"—present a heightened risk of corruption when they coordinate their activities with a particular candidate. As the Supreme Court recognized in *Buckley v. Valeo*, however, truly uncoordinated independent expenditures are unlikely to present a risk of quid pro quo corruption, may actually harm a candidate, and represent literal political speech in support or opposition to a candidate for public office, which, if anything, is what the First Amendment was adopted to protect from government censorship.[1] As the Supreme Court explained in *Buckley*:

> 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. Rather than preventing circumvention of the contribution limitations, § 608(e)(1) severely restricts all independent advocacy despite its substantially diminished potential for abuse.[2]

That said, many IECs—encouraged by the current challenges facing the Federal Election Commission—engaged during this past cycle in conduct that could result in coordination.[3] For instance, on numerous occasions, IECs shared vendors with the campaigns they supported.[4] While some of this conduct may be illegal under current regulations,[5] many vendors claim to have availed themselves of the firewall safe harbor, which may be insufficient to prevent tacit or even active coordination.[6] The current regulation is phrased in very broad terms, and merely requires—for coordinated communications—that the firewall be "designed and implemented to prohibit the flow of information between employees or consultants providing services for the person paying for the communication and those employees or consultants currently or previously

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1 424 U.S. 1 (1976).

2 *Id.* at 47.

3 *See* Mike McIntire & Michael Luo, *Fine Line Between 'Super PACs' and Campaigns*, N.Y. Times, Feb. 25, 2012, at A1 ("Rules the commission adopted in 2003, still on the books, allow for regulation of [non-advertising activities of candidates and IECs], but they have been largely ignored.").

4 T.W. Farnam, *Vendors Finesse Law Barring 'Coordination' By Campaigns, Independent Groups*, Wash. Post., Oct. 13, 2012 ("The Democratic Congressional Campaign Committee shares 10 vendors with the major super PAC helping Democrats win House races, the House Majority PAC.").

5 *See* 11 C.F.R. § 109.21(d)(4) (2013).

6 *See* 11 C.F.R. § 109.21(h) (2013).

providing services to the candidate. . . ."[7] Current regulations may need to be revised to cover other activities beyond those envisioned in the coordinated communications regulation.[8]

Similarly, although this presents significant First Amendment considerations and must be addressed with care, candidate communications with, or directed at, IECs raise additional concerns and may present another area where regulations could be tightened to promote public integrity without running afoul of the Constitution. During the last election cycle, several practices that were claimed not to present unlawful coordination raised heightened concerns of constitutionally relevant quid pro quo corruption. These included direct fundraising appeals by candidates to IECs, candidates making public statements about the value of IEC communications and candidates appearing in IEC promotional material.[9] Not only do these practices facilitate actual coordination through communications between the candidate and IEC staff, they also often spur donations to the IEC, which in certain cases—under the logic of *Buckley* and, indeed, *Citizens United*[10]—could be considered in-kind direct contributions.[11]

Great care, however, must be taken not to repeat the mistakes of earlier efforts to reform the coordination rules. Past proposals have, for instance, failed to exempt true issue advocacy groups, which often communicate with a candidate for public office (particularly in the context of lobbying) in advance of identifying them in issue advocacy material.[12]

Appropriate regulations should also consider the practical difficulty in distinguishing between "functionally equivalent" issue advocacy (that is, advocacy that could be construed as supporting or opposing the election of a candidate without using express terms of support or opposition) and legitimate issue advocacy (communications urging a candidate to take a position on a particular issue, or that praise or criticize a candidate for past positions). Revised coordination rules should

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[7] 11 C.F.R. § 109.21(h)(1) (2013).

[8] *See* 11 C.F.R. § 109.20(b) (2013) (requiring reporting as in-kind contribution *any* coordinated expenditure that is not made for a coordinated communication).

[9] *See* Michael W. Macleod-Ball, *One Key to Campaign Finance Reform?*, ACLU.org, June 21, 2012, http://www.aclu.org/blog/free-speech/one-key-campaign-finance-reform.

[10] *Citizens United v. Fed. Elections Comm'n*, 130 S. Ct. 876, 909-10 (2010).

[11] Direct fundraising appeals by a candidate to an IEC skirt much closer to the "hallmark of corruption" cited in *Citizens United*—namely, "dollars for political favors." *Id.* at 910 (quoting *Fed. Elections Comm'n v. Nat'l Conservative Political Comm.*, 470 U.S. 480, 497 (1985) [hereinafter "*NCPAC*"]. When a candidate appears at an IEC event, promotes the IEC, increases the fundraising prowess of the IEC and is consequently and directly rewarded by independent expenditures expressly promoting the candidate, logic suggests that the danger of quid pro quo corruption—that the candidate will "take notice of and reward those responsible for PAC expenditures by giving official favors to the [PAC contributors] in exchange for the supporting messages"—is amplified. *NCPAC*, 470 U.S. at 498.

[12] *See* Letter from Laura W. Murphy & Joel M. Gora to the Senate in Opposition to the McCain-Feingold Bipartisan Campaign Reform Act of 2001, § II (Mar. 20, 2001), *available at* http://www.aclu.org/free-speech/letter-senate-opposition-mccain-feingold-bipartisan-campaign-finance-reform-act-2001.

draw clear lines between issue and express advocacy to prevent the chilling of legitimate issue advocacy.

3. Provide Adequate Resources for and Mandate Timely § 501(c) Determinations

Finally, we also urge Congress to directly address the concerns of many that structural problems at the Internal Revenue Service—including lack of funding and incentives—may have allowed organizations claiming tax exemption to skirt rules designed to limit express political advocacy by such organizations.[13] Congress has the power and ability to provide appropriate resources and direction to the Tax Exempt and Government Entities Division of the IRS, and to mandate that determinations be made in a timely fashion. Congress may also appropriately tailor the timing requirements for tax filings by organizations claiming exemption to provide for appropriate determinations in advance of federal elections. This would address the concern with both backlog and the related problem that organizations are able to operate as tax exempt groups for a significant amount of time before their applications are considered.

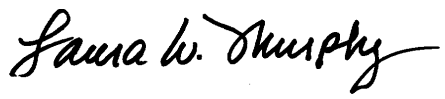
Importantly, we do not offer a view on the propriety of the "primary purpose" test, and we urge Congress and the IRS to continue to exempt true issue advocacy from the sweep of "political activit[y]" as that term is interpreted under 26 C.F.R. § 1.501(c)(4)-1 (2013).

4. Conclusion

There is much that can be done within the bounds of the Constitution to address the understandable concerns of many about the influence of large aggregations of wealth on the political system. We present a few of these options above, and we urge Congress and federal law enforcement to focus on these achievable and effective measures before, as some advocate, restricting political speech. Targeting straw donations, perfecting the anti-coordination rules and addressing the serious tax-exempt backlog at the IRS would all leave the Constitution unharmed while doing much to improve the integrity of our elections and our government.

Please do not hesitate to contact Gabe Rottman, legislative counsel/policy advisor, at 202-675-2325 or grottman@dcaclu.org with any questions.

Sincerely,



Laura W. Murphy
Director, Washington Legislative Office

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[13] *See* Dan Berman & Kenneth T. Vogel, *Crossroads GPS Said Elections Wouldn't Be 'Primary Purpose'*, Politico, Dec. 14, 2012; Kenneth P. Vogel & Tarini Parti, *The IRS's 'Feeble' Grip on Big Political Cash*, Politico, Oct. 15, 2012; T.W. Farnam & Dan Eggen, *Lax Internal Revenue Service Rules Help Groups Shield Campaign Donor Identities*, Wash. Post., Mar. 9, 2011; Michael Luo & Stephanie Strom, *Donor Names Remain Secret as Rules Shift*, N.Y. Times, Sept. 20, 2010, at A1.

Gabriel Rottman
Legislative Counsel/Policy Advisor

cc: Members of the Senate Judiciary Subcommittee on Crime and Terrorism

Testimony to Senate Judiciary Subcommittee on Crime and Terrorism

April 9, 2013

Gregory L. Colvin, Adler & Colvin, San Francisco

Current Issues in Campaign Finance Law Enforcement

"Problems in IRS Enforcement of Political Rules for 501(c)4) Organizations; Reforms Needed"

Supplemental Statement

12. *Isn't the IRS, as a tax collection agency, ill-suited to regulate political activities?*

I am more optimistic than others on this question. In my 35 years in this field, I have not seen the IRS deny or revoke the tax-exempt status of an organization for political activities without good justification. Yes, some IRS political activity audits have been protracted, mainly because of its approach that it must investigate "all the facts and circumstances." It has methodically handled cases involving high-profile individuals, including former House Speaker Newt Gingrich, NAACP Chairman Julian Bond, Jimmy Swaggart, and even President Obama, who spoke as a candidate in his own United Church of Christ. After many years, working with the Department of Justice, it settled the question of the Christian Coalition's 501(c)(4) exemption, including carefully-drawn procedures to ensure that its voter guides comparing candidates would be prepared in a nonpartisan fashion.[i]

The current director of the IRS Exempt Organizations Division had experience with the Federal Election Commission before she came to the Service. Senior IRS officials have deep experience evaluating political tax cases and have written long treatises on the subject. I believe that they are scrupulously fair and nonpartisan in these cases. Where they have made mistakes at lower levels, such as the sudden enforcement of gift tax on a few donors to (c)(4)s in 2011 or the recent improper release of confidential donor information, they have quickly corrected their procedures. The IRS is able to recognize political intervention in clear cases, such as express advocacy for or against candidates, outright political contributions, endorsements, and partisan candidate training programs, although the Service does not have a broad-scale program to detect and prosecute violations.

I have seen first-hand the IRS and Treasury produce bright line regulations in the political realm that have been well-crafted to guide tax-exempt organizations and achieve self-enforcement in the vast majority of situations. Between 1986 and 1990, with heavy input from the nonprofit sector, the Service developed lobbying regulations for public charities and private foundations with clear definitions and clear safe harbor exceptions. Working outside of government, groups like the Alliance for Justice have trained thousands of nonprofit executives on how to apply these rules,

and for the last 23 years there have been virtually no law enforcement problems in the lobbying area due to lack of clarity, no complaints of oppressive IRS prosecution.

The Service and Treasury could draw bright lines defining political intervention as well. They just need the institutional imperative to do so. In July, 2012, the director of the Exempt Organizations Division wrote to Democracy 21 and Campaign Legal Center, saying that the Service "will consider proposed changes" to regulations and other guidance in the area of 501(c)(4) political activity.[ii] But a few months later, the topic was completely absent from the IRS 2012-2013 Priority Guidance Plan. Recently, the IRS took the step of issuing a questionnaire to 1300 organizations that had declared themselves tax-exempt under 501(c)(4), (5), or (6), asking in detail about their activities, including media buys and political intervention during 2012.[iii] That's a start. The IRS should be mandated to launch a regulations project on tax-exempt political intervention, with public input, to be finished by January, 2016, before the next presidential election cycle.

To those who say the IRS should not be involved in political activity law enforcement I would reply: Congress set things up this way. The Internal Revenue Code denies a business tax deduction for political spending, charities are banned from political intervention, Sections 501(c) and 527 apply limits and taxes on political activity so that private political campaigning is not subsidized through the federal tax system. The only way to remove what Yale Professor John Simon calls political "border patrol" from IRS responsibility would be for Congress to repeal all those parts of the Code.

The IRS' jurisdiction over political activity reaches beyond federal elections to the state, county, and city levels. It is the only law enforcement system in a position to apply consistent rules on political spending by Americans and their organizations at every level of government. I believe that's actually a good thing.

13. *What's the difference between a 501(c)(4) organization and a 501(c)(3)?*

A 501(c)(4) social welfare organization is one step below a 501(c)(3) charity. They both must serve the public interest, and both are exempt from federal income tax on their annual net earnings. But the (c)(4) cannot receive tax-deductible charitable contributions and therefore the tax rules it must obey are more lenient. It is not subject to any public support testing, it can conduct unlimited lobbying on legislation, and it can engage in some degree of political campaign activity--what kind and how much is the critical question in this hearing.

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[i] Gregory L. Colvin, IRS Gives Christian Coalition Green Light for New Voter Guides, *Tax Notes* Vol.109/No. 8, Page 1093, November 21, 2005.

[ii] http://electionlawblog.org/?p=37338.

[iii] http://www.irs.gov/Charities-&-Non-Profits/Other-Non-Profits/Self-declarers-questionnaire-for-section-501-c-4-5-and-6-organizations.

January 4, 2011

A Democracy 21 Report:

Leading Presidential-Candidate Super PACs and The Serious Questions That Exist About Their Legality

"… he gave to me. He's given to me before."

Mitt Romney describing himself as the recipient of a $1 million contribution made to the Super PAC supporting his presidential campaign

Independent expenditures are only those "without any candidate's approval (or wink or nod)…."

Supreme Court decision in *FEC v. Colorado Republican Federal Campaign Comm.* (2001)

Introduction to Report

By Democracy 21 President Fred Wertheimer

Mitt Romney's comment describing a $1 million contribution made to Restore Our Future PAC -- the Super PAC supporting Romney -- as a contribution made to him captures in a nutshell the reality of presidential candidate-specific Super PACs.

The leading presidential candidate-specific Super PACs are serving as vehicles for candidates and donors to massively evade and circumvent candidate contribution restrictions. These restrictions have been enacted over a period covering more than a century to prevent the corruption of federal officeholders and government decisions – in other words, to prevent the corruption of our democracy.

Each presidential candidate-specific Super PAC is raising unlimited contributions from individuals and/or from corporations and unions for the explicit purpose of being spent by the Super PAC to directly support its favored presidential candidate. Such contributions would be illegal if given directly to the presidential candidate, so they are instead being given to Super

PACs controlled by close political and personal associates of the presidential candidate and which are directly serving the campaign interests of the presidential candidate.

In essence, the unlimited contributions are being given by the wealthy supporters of each presidential candidate to a Super PAC dedicated to supporting that candidate. The donors know that their contributions will be spent to directly support that presidential candidate. The Super PAC is spending the contributions only to directly support the associated presidential candidate. The presidential candidate knows (or will know) the identity of the donors who are providing huge contributions to the Super PAC supporting the candidate's campaign.

For all practical purposes, these unlimited, corrupting contributions are being given to the presidential candidates. As such, candidate-specific Super PACS are eviscerating candidate contribution limits and restoring the system of legalized bribery that existed in our country in the pre-Watergate era.

To date (and based on the limited disclosure information reported so far), individual contributions as large as $2 million have been given to presidential candidate-specific Super PACs.

It strains credulity to believe that these presidential candidate-specific Super PACs sprung up on their own without some initial involvement, approval or sign-off from either the candidate for whose benefit they were established, the candidate's campaign operatives or agents of the candidate or campaign. In each case, the leading presidential candidate-specific Super PACs were established by or are being run by individuals who are closely linked with the presidential candidate.

The claim made by these Super PACs is that they are "independent" of the candidate with which they are associated and are making only "independent expenditures."

The Supreme Court has spoken in the broadest terms about the degree of independence that is necessary for "independent expenditures" to be considered free of the legal constraints that would otherwise apply to in-kind contributions. Such expenditures must be "totally independent," "wholly independent," "truly independent," and made "without any candidate's approval (or wink or nod)…," according to the Court. (The Supreme Court decisions and applicable law are discussed on pages 15 to 19 of the report)

If the presidential candidate or the candidate's campaign (or agents of either the candidate or the campaign) were in any way, formally or informally, involved in the formation or operation of the candidate-specific Super PAC aiding that candidate, it would defeat the "total independence" that such PACs must have, and constitute the requisite coordination to turn all of the expenditures made by the Super PAC into illegal in-kind contributions to the candidate's campaign.

The information presented in the report raises serious questions about whether each of these leading candidate-specific Super PACs meets the Supreme Court standard of being "totally independent" from the candidates they are supporting, and whether each of these Super PACs

meets the Supreme Court's test for independence – of being formed (or operated) "without any candidate's approval (or wink or nod)…."

To date, there is no indication that any of the presidential candidates have made a serious effort to shut down the Super PACs supporting them, or have called on their associated Super PAC to cease operations.

Candidate-specific Super PACs are the most dangerous vehicles for corruption in American politics today. They are a monstrosity and the logical extension of the *Citizens United* decision given to the nation by five Supreme Court Justices who have done enormous damage to our democracy.

Unless stopped, candidate-specific Super PACs will continue to eviscerate the contribution restrictions enacted by Congress, signed into law by Presidents and repeatedly upheld by the Supreme Court as constitutional because they are necessary to prevent corruption. And these Super PACs will engulf not just our Presidential elections but also our elections for Congress to which they will spread like wildfire.

The ability to determine whether any presidential candidate-specific Super PACs have violated the laws is severely hampered by the consistent refusal of the three Republican Commissioners on the six-member FEC to support any civil enforcement of the law, and by the Department of Justice being limited to bringing only criminal prosecutions.

Congress needs to pass legislation to protect the integrity of the Nation's campaign finance laws and ensure that candidate-specific Super PACs are not used as vehicles to circumvent candidate contribution limits. Democracy 21 is working to develop legislation that would accomplish this goal.

Democracy 21 Report on Presidential Super PACs

In the 2012 presidential campaign, for the first time, individuals who have for years been closely associated with particular presidential candidates have set up candidate-specific "Super PACs" that are dedicated to supporting that single presidential candidate.

These Super PACs are run by political operatives and associates who have long histories with, or close ties to, the candidates or the campaign operatives working for the candidates; they are publicly identified with the candidates; they are self proclaimed to have the sole purpose of raising and spending money to support those candidates; they are explicitly or tacitly blessed by the candidates or their agents; they are raising funds from the same donors as the presidential candidates; in at least one case they have been directly and personally assisted in fundraising by the presidential candidate, and in another case the major donor to the Super PAC is the presidential candidate's father.

As one published report noted, the presidential candidates and their associated Super PACs "are intertwined by personnel."[1] According to this same article, the head of a Super PAC supporting former Governor Huntsman's presidential campaign said:

> "Super PACs are headed by political people that know the campaign already," said Fred Davis, a Republican strategist who left Huntsman's presidential campaign this year to direct the super PAC benefiting the former governor. "They know the candidate and they know the players."
>
> Davis estimated that about half of the group's small staff used to work on Huntsman's official campaign. *Id.*

FEC Commissioner Ellen Weintraub has said, "Super PACs are functioning as the alter-egos of the campaigns. . . ."[2] A report in *The Washington Post* said these candidate-specific committees "are emerging as de facto subsidiaries of the traditional presidential campaigns."[3] An article in *The New York Times* said these groups "function as auxiliary units of the campaigns."[4]

In some cases, the Super PACs are "running ads that are almost indistinguishable from commercials run by the campaigns themselves."[5] One report stated:

> In the past two weeks, for example, Make Us Great Again PAC has aired at least $700,000 in ads in Iowa and South Carolina on behalf of Texas Gov. Rick Perry, touting the GOP hopeful's hardscrabble beginnings and budget-cutting credentials. The ads began on the same day that the Perry campaign started running similar feel-good spots in Iowa.

In other cases, Super PACs are launching the negative attacks on their candidate's opponents, so the candidate can remain aloof from the negative advertising while benefiting from its impact.

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1 T. Hamburger & M. Mason, "'Super PACs' are showing their power," *The Los Angeles Times* (Jan. 1, 2012).

2 D. Levinthal & K. Vogel, "Super PACs go stealth through first contests," *Politico* (Dec. 30, 2011).

3 D. Eggen, "The Influence Industry: 'Candidate Super PACs' surge ahead in the 2012 money race," *The Washington Post* (Aug. 24, 2011).

4 J. Zeleny and N. Confessore, "Perry and Romney Set Clear Lines of Attack," *The New York Times* (Sept. 24, 2011).

5 D. Eggen, "New ad shows cozy ties between super PACs and candidates," *The Washington Post* (November 16, 2011).

As one report stated:

> The highest profit victim so far is Newt Gingrich, whose rapid descent in opinion polls correlates with the drubbing he received in negative ads produced by a super PAC aligned with Mitt Romney.
>
> The group, Restore Our Future, has outspent the official Romney campaign on TV and radio in Iowa by more than 2 to 1, according to sources familiar with ad buys. Ultimately, the independent committee will spend $3.1 million in the state, according to the organization's director, Carl Forti.[6]

In another case, a presidential candidate ran ads that made use of footage that was identical to footage used in ads run by the Super PAC supporting the presidential candidate.[7]

Federal campaign finance laws provide that expenditures made "in cooperation, consultation, or in concert with or at the request or suggestion of a candidate, his authorized political committees, or their agents, shall be considered to be a contribution to such candidate." 2 U.S.C. § 441a(a)(7)(B)(i). Any involvement of a presidential candidate or his campaign in the establishment or operation of a candidate-specific Super PAC to support that campaign would constitute coordination that would render all of the Super PAC's subsequent expenditures as having been made in coordination with the presidential campaign.

While court rulings allow political committees that make only "independent expenditures" to raise and spend unrestricted contributions, *e.g., Speech Now v. FEC,* 599 F.3d 686 (D.C. Cir. 2010), these activities must be "totally independent" of a candidate. *Buckley v. Valeo,* 424 U.S. 1, 47 (1976).

Absent such total independence from the candidate it is supporting, the spending by the outside committee is considered to be an in-kind contribution to the candidate, and is subject to the contribution limits and source restrictions applicable to federal candidates. 2 U.S.C. § 441a(a)(1)(A) (contribution limit of $2,500 per election); 2 U.S.C. § 441b(a) (prohibition on contributions from corporations and unions). Further, the contributions made to the candidate-specific Super PACs would be subject to the $5,000 per year limit, 2 U.S.C. § 441a(a)(1)(C), and to the prohibition on corporate and union contributions. 2 U.S.C. § 441a(b).

The information presented in this Report indicates that Restore Our Future PAC (associated with the Romney for President campaign), Make Us Great Again PAC (associated with the Perry for President campaign), Priorities USA Action PAC (associated with the Obama re-election campaign), Winning Our Future PAC (associated with the Gingrich for President campaign) and Our Destiny PAC (associated with the Huntsman for President campaign) are in essence each functioning as an arm of the presidential campaign they have been created to

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[6] T. Hamburger & M. Mason, "'Super PACs' are showing their power," *The Los Angeles Times* (Jan. 1, 2012).

[7] P. Hirschkorn, "Unlimited campaign cash fuels Super PACs," *CBS News* (Dec. 10, 2011).

support. This information accordingly raises serious questions of whether these candidate-specific Super PACs fail to meet the test of being "totally independent" of the candidates they are solely devoted to supporting.

If these Super PACs are in fact not "totally independent" of the presidential campaigns they support, their spending should be considered violations of the campaign finance laws on a massive scale. The five Super PACs discussed below are, in aggregate, likely to raise and spend tens of millions, and perhaps hundreds of millions, of dollars to advocate the election of the presidential candidates with whom they are solely associated.

Most of this money will consist of contributions in amounts that cannot be contributed to the candidates themselves, or are from sources that cannot make contributions to candidates, because such contributions are prohibited by law.

So this money is instead being funneled through a Super PAC that is closely aligned with the candidate. It is given with the certain knowledge that it will be spent for the benefit of that candidate. In this fashion, tens or hundreds of millions of dollars of potentially illegal contributions are likely to flow through these Super PACs for the benefit of presidential candidates in the 2012 election. To the extent the spending by the Super PACs is not "totally independent" of the candidate being supported, this scheme effectively eviscerates the limits and source prohibitions on contributions to candidates that are core provisions of the campaign finance law.

Facts About the Candidate-Specific Super PAC Committees

A. Restore Our Future PAC

The Restore Our Future PAC registered with the Federal Election Commission as a "Super PAC" on October 8, 2010. Its stated goal is to make expenditures to support former Governor Mitt Romney's presidential campaign.[8] One report states, "[T]he group's organizers have explicitly said their goal is to elect Romney president (and Romney has appeared at its fundraising dinners.)"[9] One of the PAC's founders said of the mission of the PAC, "This is an independent effort focused on getting Romney elected president."[10]

According to one published report, "Restore Our Future is run by a trio of top operatives who worked on Romney's 2008 campaign – lawyer Charlie Spies, political director Carl Forti

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[8] M. Viser, "Romney gets a boost from new funding environment," *The Boston Globe* (June 9, 2011).

[9] M. Isikoff, "'Independent'? Maybe, but super PAC heavily backs Perry," *NBC News* (Aug. 17, 2011).

[10] D. Eggen and C. Cillizza, "Romney backers launch 'super PAC' to raise and spend unlimited amounts," *The Washington Post* (June 23, 2011).

and adman Larry McCarthy."[11] Forti was Romney's national political director in his 2008 presidential campaign; McCarthy was part of Romney's media team in the 2008 campaign and Spies was general counsel to the 2008 campaign.[12]

Romney appeared in person at a fundraiser for the PAC in June, 2011. As one article reported, his appearance "bestowed an unofficial blessing on the group, helping it to pull in a whopping $12.2 million from some of Romney's wealthiest career patrons in its first six months of fundraising."[13] This included four contributions of $1 million each. According an *iWatch News* report, Romney attended a private dinner on July 19, 2011 "to show his appreciation for about two dozen current and potential donors to his PAC in New York." [14]

Further, "some of the PACs largest donors are also big bundlers for the campaign. On August 28, hedge fund mogul John Paulson, who has donated $1 million to the PAC, is hosting a big bash for the campaign at his home in Southampton." *Id.*

There has also been movement of staff between the Romney campaign and the Restore Our Future PAC. A "top Romney campaign fundraiser," Steve Roche, "jumped to Restore Our Future to help spearhead the Super PAC's multimillion-dollar fundraising operation, in another sign of synergies between the campaign and the PAC." *Id*. Another article described Roche as "one of Mitt Romney's most trusted advisers, helping the former Massachusetts governor raise tens of millions of dollars in his long quest for the White House."[15]

The Romney campaign has publicly welcomed the efforts of Restore Our Future PAC, a public signal to potential donors that the campaign considers the efforts of the PAC important to the Romney campaign's own activities. According to this report in the *Washington Post*:

> Gail Gitcho, the Romney campaign's communications director, said outside support is welcome, given the existence of Democratic Super PACs and predictions that the Obama campaign could raise as much as $1 billion for his reelection bid.

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[11] K. Vogel, "Super PACs' new playground: 2012," *Politico* (Aug. 10, 2011).

[12] M. Viser, "Romney gets a boost from new funding environment," *The Boston Globe* (June 9, 2011).

[13] K. Vogel, "Super PACs' new playground: 2012," *Politico* (Aug. 10, 2011).

[14] P. Stone, "Romney fundraiser jumps from campaign to super PAC," *The Center for Public Integrity iWatch news* (Aug. 24, 2011).

[15] D. Eggen, "The Influence Industry: 'Candidate Super PACs' surge ahead in the 2012 money race," (Aug. 24, 2011).

> "We are pleased that independent groups will be active in fighting this entrenched power so the country can get back to work," Gitcho said.[16]

Published reports stated that the Restore Our Future PAC received two separate $1 million donations from small companies that appeared intended to mask the identity of the actual sources of the funds. After media scrutiny of the donations, the individuals who were the actual donors disclosed themselves and both had long histories of donating large sums to Romney's political campaigns and leadership PACs.

One of the donations came from W. Spann LLC, a corporation established in March and dissolved in July. According to one report, "Under the pressure of official investigation and intense media scrutiny, one individual – Edward W. Conard – stepped forward and told *Politico* that he was the man behind W. Spann LLC." [17] Conard had been a managing director at Bain Capital, a company Romney helped to create. According to *Open Secrets*, Conard and his wife have donated $55,900 to Romney's campaign committees and leadership PACs since 1994. *Id.*

According to one published report, Romney himself considers the contributions to the Super PAC to be contributions to him. When Romney was asked about the controversy generated by the Conard donation to the Super PAC through the corporate entity, he said:

> Well, there's no need to have the company if he's not going to give to any other candidates so he gave to me. He's given to me before. One of my partners – so it's not hidden, it's all out in the open.[18]

By these comments, Romney made clear that he considers the contribution that Conard made to Restore Our Future PAC as a contribution that Conard "gave to me."

Another $1 million donation to Restore Our Future PAC was from Eli Publishing, a Utah corporation. The owner of Eli Publishing is Steven Lund. Since 1990, Lund and his wife have donated $45,100 to Romney's campaigns and leadership PACs, according to *Open Secrets.*[19]

B. Make Us Great Again PAC

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[16] D. Eggen and C. Cillizza, "Romney backers launch 'super PAC' to raise and spend unlimited amounts," *The Washington Post* (June 23, 2011).

[17] B. Hooker, Men Linked to Corporate Donations to Pro-Romney Super PAC Have Long History of Donating to Romney," *Open Secrets* (Sept. 13, 2011).

[18] P. Blumenthal, "Mitt Romney Dismisses Secrett Corporate Contributions: 'No Harm, No Foul,'" *Huffington Post* (Aug. 25, 2011) (emphasis added).

[19] B. Hooker, Men Linked to Corporate Donations to Pro-Romney Super PAC Have Long History of Donating to Romney," *Open Secrets* (Sept. 13, 2011). A third $1 million donation received by Restore Our Future PAC was from F8 LLC, another Utah corporation, founded by Lund's son-in-law, Jeremy Blickenstaff. According to *Open Secrets,* Blickenstaff does not have a history of making campaign contributions.

Make Us Great Again PAC registered with the Federal Election Commission as a Super PAC on July 27, 2011. On its website, the PAC states that its goal is to support the campaign of Rick Perry for President: "The mission of Make Us Great Again is to support Rick Perry for the Republican nomination for President in 2012, to oppose Barack Obama's reelection, and to support Rick Perry in the general election in November 2012."[20] According to published reports, the Super PAC has set a goal of raising and spending $55 million during the primary season.[21]

The PAC was formed by "three Perry loyalists, including Perry's former chief of staff, Austin lobbyist Mike Toomey."[22] Toomey has been described as "[o]ne of Perry's closest confidantes"[23] and "a loyal and constant Perry political ally throughout this career."[24] According to *The New York Times*, "In Rick Perry's world, one man stands above them all: Mike Toomey.":

> Should Mr. Perry, who is seeking the Republican presidential nomination, reach the White House, it will be in no small measure because of the efforts of Mr. Toomey. A lobbyist, former legislator and onetime chief of staff to the governor, Mr. Toomey has tapped a sprawling network of donors, business allies and friendly (or indebted) lawmakers to help Mr. Perry accomplish ambitious political and legislative goals.[25]

According to a *Politico* article, "Toomey maintains close ties both to Perry and his top political strategist Dave Carney (reportedly co-owning a private island in New Hampshire with Carney)…."[26] One report stated:

> Toomey accompanied Perry on a controversial trip to the Bahamas in 2004 with large GOP donors, other staff, anti-tax advocate Grover Norquist and political adviser Dave Carney. He now owns a private island in New Hampshire with Carney, who's Perry's chief political consultant. That relationship has raised red flags concerning Toomey's role as head of a Super PAC raising money for the

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20 *See* http://makeusgreatagain.com/mission/

21 K. Tumulty, "Perry and ex-aide have deep, mutually beneficial ties," *The Washington Post* (Sept. 16, 2011).

22 K. Vogel, "Super PACs' new playground: 2012," *Politico* (Aug. 10, 2011).

23 D. Eggen, "Perry has deep financial ties to maker of HPV vaccine," *The Washington Post* (Sept. 13, 2011).

24 P. K. Hart and P. Fikac, "Austin lobbyist has played a key role in Perry's career," *The Houston Chronicle*, (Sept. 13, 2011).

25 J. Root, R. Ramsey and J. Rutenberg, "For Perry, Lobbyist Is a Take-No-Prisoners Ally," *The New York Times* (Oct. 15, 2011).

26 K. Vogel, "Super PACs' new playground: 2012," *Politico* (Aug. 10, 2011).

> Perry presidential effort because its efforts legally can't be coordinated with the Perry campaign.[27]

A number of press reports have stressed the close and longstanding relationship that Toomey has with Governor Perry. According to a report in the *Washington Post*, in Perry's career, "few relationships have been more mutually beneficial than one that began back in the mid-1980s, when both [Perry] and Toomey were members of the Texas House and roomed together during legislative sessions. Since then Toomey has made himself useful to Perry in a number of capacities. . . ."[28] Another report in the *Houston Chronicle* stated, "Toomey and Perry served together in the Texas House in the 1980s and have been linked ever since, from Perry's personal finances to his public legacy."[29] According to another report:

> With the rise of super PACs in this year's presidential race, Toomey will be doing what he always does: helping Perry by tapping business donors, many who are Toomey clients.
>
> Since 2001, 42 of Toomey's clients have donated about $5.5 million, or about 5 percent of Perry's contributions, during the governor's tenure.[30]

Prior to the formation of Make Us Great Again PAC, several other pro-Perry Super PACs had registered with the FEC. According to reports, Toomey and the other co-founders of Make Us Great Again PAC wrote to would-be donors to "urge potential supporters to ignore other independent efforts for Perry in favor of the new organization."[31] According to the same report, the message to potential donors said, "Our advice is to avoid any other group claiming to be 'the' pro-Perry independent effort and, when the timing is right, to support 'Make Us Great Again.'" *Id.* Toomey is quoted as saying that this message was "an effort to tell people who might want to help if Perry gets in to hold off, and this is the proper forum that will handle their business appropriately."[32] According to another report, "Toomey's involvement signaled to many Perry allies that Make Us Great Again has the unofficial endorsement of Team Perry."[33] One of the

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[27] P. K. Hart and P. Fikac, "Austin lobbyist has played a key role in Perry's career," *The Houston Chronicle*, (Sept. 13, 2011).

[28] K. Tumulty, "Perry and ex-aide have deep, mutually beneficial ties," *The Washington Post* (Sept. 16, 2011).

[29] P. K. Hart and P. Fikac, "Austin lobbyist has played a key role in Perry's career," *The Houston Chronicle*, (Sept. 14, 2011).

[30] L. Copelin, "Perry has long history with super PAC friend," *The Austin American-Statesman* (Sept. 16, 2011).

[31] R. Ramsey, "Another Super PAC Run by Close Perry Associates," *The Texas Tribune* (Aug. 8, 2011).

[32] K. Vogel, "Super PACs' new playground: 2012," *Politico* (Aug. 10, 2011).

[33] K. Vogel, "Perry's cash dash sparks worries," *Politico* (Aug. 16, 2011).

organizers of another pro-Perry Super PAC, Robert Schuman, is quoted as saying of the Make Us Great Again PAC, "To the extent that there is an official PAC…they're it."[34]

According to further reports, the Make Us Great Again PAC has a budget of $55 million and "is preparing for what amounts to a full-service primary campaign, with television advertisements, direct mail and social media outreach."[35] The same report notes, "Officials at Make Us Great Again said they were expecting their own spending to be matched by that of other Super PACs, notably Restore Our Future, a group founded by allies of Mitt Romney, the former Massachusetts governor." *Id.*

C. Priorities USA PAC

Priorities USA Action PAC registered with the Federal Election Commission as a Super PAC on April 28, 2011. According to one press report, "It was formed with the explicit purpose of helping President Obama with unlimited donations from corporations, unions and wealthy individuals."[36] According to another article, "[I]t was started by a pair of former top White House operatives" and for this reason, "appears to have benefited from an unofficial affiliation with the president."[37] The PAC states on its website, "We are committed to the reelection of President Obama and setting the record straight when there are misleading attacks against him and other progressive leaders."[38]

The two White House aides who started the Super PAC are Bill Burton, deputy press secretary for Obama's 2008 campaign and deputy press secretary during the first two years of his Administration,[39] and Sean Sweeney, a White House political aide during the Obama Administration. *Id.* They started the PAC in April, 2011, "just two months after they left their jobs at the White House in February."[40]

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[34] M. Isikoff, "'Independent'? Maybe, but super PAC heavily backs Perry," *NBC News* (Aug. 17, 2011).

[35] N. Confessore, "Super PAC Plans Major Primary Campaign for Perry," *The New York Times* (Sept. 7, 2011).

[36] J. Rutenberg, "New Video Attacks Romney," *The New York Times* (Nov. 2, 2011).

[37] K. Vogel, "Super PACs' new playground: 2012," *Politico* (Aug. 10, 2011).

[38] *See* http://www.prioritiesusaaction.org/about

[39] A. Hunt, "Super PACs Line Their Coffers for 2012 Battle," *Bloomberg News* (Aug. 21, 2011).

[40] N. Confessore, "Lines Blur Between Candidates and PACs with Unlimited Cash," *The New York Times* (Aug. 27, 2011).

According to press reports, Priorities USA held a reception for Obama's national finance committee members immediately after and in close proximity to a meeting of the finance committee members held by the Obama reelection committee:

> A meeting of the top fundraisers for President Obama's 2012 reelection campaign kicks off tonight in Chicago with a speech-watching party at Obama's headquarters. Right afterward, the national finance committee members have been invited to another event – a reception hosted by Bill Burton and Sean Sweeney, two former White House aides who formed an independent "super PAC" to support Obama's reelection.
>
> The reception hosted by Priorities USA will be at the University Club, right down the street from the Palmer House Hilton, where the national finance committee members are staying and meeting Friday.[41]

D. Winning Our Future PAC

Winning Our Future PAC was registered with the Federal Election Commission as a Super PAC on December 13, 2011. On its website, the PAC states: "**Winning Our Future** means nominating Former Speaker Newt Gingrich for President in 2012. And advancing that goal is what **Winning Our Future** is all about."[42]

According to published articles, the chair of the PAC is Becky Burkett, "who was the lead fundraiser for Gingrich's main political vehicle over the past few years, the fundraising juggernaut American Solutions for Winning the Future."[43] According to another report, "The aide, Becky Burkett, is an experienced fund-raiser who served until earlier this year as chief development officer for American Solutions, a political action committee that Mr. Gingrich founded in 2007."[44]

Similarly this report in *Real Clear Politics* noted the close ties between Winning Our Future PAC and the Gingrich campaign:

> Winning Our Future, which is being helmed by longtime Gingrich fundraiser Becky Burkett, appears to be the outside group that enjoys the unofficial blessing of Gingrich's inner circle.

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41 M. Gold, "Pro-Obama 'super PAC' to host event after speech," *The Los Angeles Times* (Sept. 8, 2011).

42 *See* http://www.winningourfuture.com/about.

43 M. Haberman and K. Vogel, "Newt's loot: Billionaire commits $20M," *Politico* (Dec. 15, 2011).

44 N. Confessore, "Former Gingrich Aide Forms Fund-Raising Group," *The New York Times* (Dec. 13, 2011).

> Burkett told RCP that she has spoken recently with former Gingrich spokesperson Rick Tyler, and a second source close to Gingrich confirms that Tyler is moving toward joining the super PAC.[45]

Again, another report notes that Tyler did join the PAC: "Rick Tyler, longtime aide and confidante to Gingrich, announced recently that he would joint Winning Our Future, the new super PAC set up by another close Gingrich aide."[46]

E. Our Destiny PAC

Our Destiny PAC was registered with the Federal Election Commission as a Super PAC on September 1, 2011. Its Statement of Organization filed with the Commission states that the Committee "supports/opposes only one candidate. . ." On its website, the PAC states: "On August 25, 2011, Our Destiny PAC was created to help elect Jon Huntsman the next president of the United States."[47] The PAC website contains a link – "Learn more at JonHuntsman.com" – which is to the website of the authorized Huntsman for President Committee. *Id.*

According to one press report, the PAC was formed by Thomas Muir, who is a vice president at the Huntsman Corporation, a corporation owned by the Huntsman family where Jon Huntsman was once the CEO.[48] As this report further states:

> [T]he company is also inseparable from the Huntsman family and its fortune. Jon Huntsman Sr., who founded the company, is chairman of the board. Peter Huntsman, the candidate's brother, is CEO. Jon Huntsman Jr. made millions of his own substantial fortune at his dad's firm. *Id*.

According to another press report, "The PAC, which formed in August, is being advised by at least one former Huntsman aide: ad guru Fred Davis, who produced several web ads for Huntsman in the run-up to his candidacy."[49] According to one report in the *Washington Post*, Davis "helped create a series of attention-getting commercials kicking off the former Utah governor's presidential campaign earlier this year."[50] The PAC itself touts the fact that Davis, a former adviser to the Huntsman for President Committee, recently left the authorized campaign

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45 S. Conroy, "Gingrich's Shaky Infrastructure Shows Cracks," *Real Clear Politics* (Dec. 15, 2011).

46 T. Hamburger & M. Mason, "'Super PACs' are showing their power," *The Los Angeles Times* (Jan. 1, 2012).

47 *See* http://ourdestinypac.com/about-our-destiny-pac.html.

48 A. Burns, "Jon Huntsman Corporation distances from PAC," *Politico* (Aug. 30, 2011).

49 H. Bailey, "Pro-Huntsman super PAC launches ad in New Hampshire," *Yahoo News* (Nov. 14, 2011).

50 D. Eggen & T.W. Farnam, "New ad shows cozy ties between super PACs and candidates," *The Washington Post* (November 16, 2011).

committee to work for the Super PAC. On the PAC website, it states: "Our Destiny PAC is excited that Fred Davis, of Strategic Perception Inc., who resigned from the Jon Huntsman for President campaign on July 27, 2011, will be an important part of the PAC's team."[51] As a *Politico* article states, "Our Destiny PAC already has something of an official seal of approval from Huntsman-world, thanks to the involvement of GOP ad man Fred Davis, who worked for Huntsman's campaign before heading to the independent expenditure group."[52]

The *Post* report noted that the PAC "has the backing of Huntsman's billionaire father, Jon Huntsman, Sr."[53] Another report in *The New York Times* said that Jon Huntsman's father may become the largest donor to the Huntsman Super PAC, and stressed the relationship between Huntsman's father and the Huntsman Super PAC:

> [T]he "super PAC' Our Destiny, is buying up hundreds of thousands of dollars worth of advertising time in what is in effect a last-ditch effort to help raise Mr. Huntsman's standing in New Hampshire.
>
> The move is the result of an emotionally fraught, behind-the-scenes drama over whether Mr. Huntsman's father, the founder of Huntsman Chemicals, Jon M. Huntsman Sr., will come to the rescue of his son's financially depleted campaign by dumping millions more in to the PAC so it can do what Mr. Huntman's team cannot afford to: deluge the airwaves with advertisements calling attention to a candidacy his team still believes can catch fire, if it only had the money to light it. . . .
>
> Mr. Huntsman has been loath to ask his father to up his commitment to the outside group, several people familiar with the situation said. His father, on the other hand, they said, has been unwilling to do so without being asked, especially given the uncertainty of whether the investment would make a huge difference.[54]

According to the *Post* article, Jon Huntsman expressed his gratitude for any spending on his behalf that might be done by the Super PAC. According to this report:

> While campaigning in New Hampshire, Huntsman told NBC News this week that he had not seen the super PAC's new ad nor talked to his father about it.

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[51] *See* http://ourdestinypac.com/about-our-destiny-pac.html.

[52] A. Burns, "Jon Huntsman Corporation distances from PAC," *Politico* (Aug. 30, 2011).

[53] D. Eggen & T.W. Farnam, "New ad shows cozy ties between super PACs and candidates," *The Washington Post* (November 16, 2011).

[54] J. Rutenberg and N. Confessore, "Major Ad Blitz for Huntsman in New Hampshire, by Group Backed by His Father," *The New York Times* (Nov. 14, 2011).

"But anything from the outside that serves to bolster our efforts in New Hampshire I am mighty grateful for," he said.[55]

Similarly, one of Huntsman's campaign aides was also quoted as expressing appreciation for the spending by the Super PAC. One press report states: "Still, one of his political aides acknowledged that his competitiveness depends on 'things we can't control, which is outside funding.' The aide said of Our Destiny's advertising, 'If they keep up the levels they've been at, that would be helpful.'"[56]

The Applicable Law

A cornerstone of the federal campaign finance laws is the limit on contributions to federal candidates that was enacted in 1974, following the Watergate scandals, to prevent corruption.

Since the landmark decision in *Buckley v. Valeo* in 1976, the Supreme Court has recognized that without contribution limits, "the integrity of our representative democracy is undermined." 424 U.S. at 26-27. The Court also stated in *Buckley* that "Congress was surely entitled to conclude" that "contribution ceilings were a necessary legislative concomitant to deal with the reality or appearance of corruption inherent in a system permitting unlimited financial contributions." *Id.* at 28 (emphasis added).

A core corruption danger posed by candidate-specific Super PACs is that they provide a means for donors to evade and circumvent the candidate contributions limits: wealthy donors can make a maximum contribution of $2,500 to a presidential candidate's authorized campaign committee and then make additional contributions in unlimited amounts – $10,000, $100,000, a $1 million or more – to that candidate's related Super PAC to support the same candidate, knowing that their money will be used for that purpose.

Candidate-specific Super PACs thus serve as a ready vehicle for eviscerating the candidate contribution limits that were enacted to prevent corruption. As one news report stated, "A super PAC allows politicians with large networks of wealthy donors to collect millions of dollars from individuals who have already given the maximum contribution to the candidate."[57]

Wealthy donors are taking advantage of the opportunity to use Super PACs as a way to give money in excess of the candidate contribution limits to directly benefit their preferred candidate. According to this *NPR* report:

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[55] D. Eggen & T.W. Farnam, "New ad shows cozy ties between super PACs and candidates," *The Washington Post* (November 16, 2011).

[56] J. Rutenberg, "Huntsman Campaign Gets Aid from Group Tied to Father," *The New York Times* (Dec. 3, 2011).

[57] N. Confessore, "There's Nothing Like a 'Super PAC' for the Serious Contender," *The New York Times* (Oct. 19, 2011).

> Nineteen wealthy Republicans gave presidential hopeful Mitt Romney the maximum legal contribution – and also sent between $100,000 and $1 million each to an independent committee supporting the former Massachusetts governor.
>
> The finding comes in a new report looking at overlap between donor lists for Romney's campaign and the super PAC Restore Our Future.
>
> In all, the report shows 55 donors maxed out to Romney and also gave to the super PAC. Those 55 accounted for more than half of the super PAC's early money.[58]

The Supreme Court has repeatedly stressed the importance of provisions in the campaign finance laws that prevent circumvention of the contribution limits, and has held that such anti-circumvention measures serve the same compelling anti-corruption interests as do the contribution limits themselves.[59]

The treatment of coordinated expenditures as in-kind contributions, subject to contribution limits, is a fundamental statutory provision to prevent circumvention of the contribution limits.

In *Buckley,* the Court distinguished for constitutional purposes between limitations on "contributions" to a candidate's campaign, and limitations on "expenditures" by an independent outside spender in support of, or opposition to, a candidate's campaign.

Buckley also recognized that, to be effective, any limitations on campaign contributions must apply to expenditures made in coordination with a candidate, so as to "prevent attempts to circumvent the Act through prearranged or coordinated expenditures amounting to disguised contributions." *Id.* at 47. Coordinated expenditures, in practical effect, thus amount to "disguised contributions."

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[58] P. Overby, "Top Donors Use Super PACs To Sidestep Money Limits to Candidates," *NPR* (Oct. 4, 2011).

[59] *E.g, McConnell v. FEC,* 540 U.S. 93, 144 (2003), (upholding the restrictions on political party "soft money," and stating that "anti-corruption interests have been sufficient to justify not only contribution limits themselves, but laws preventing the circumvention of such limits."); *FEC v. Colorado Republican Federal Campaign Comm.*, 533 U.S. 431, 455 (2001) (*Colorado II*), (upholding the coordinated party spending limits in order to prevent the "exploitation of parties as channels for circumventing contribution and coordinated spending limits binding on other political players."); *California Medical Ass'n v. FEC,* 453 U.S. 182, 197-98 (1981) (upholding limits on contributions to political committees in order "to prevent circumvention of the very limitations on contributions that this Court upheld in *Buckley*."); *FEC v. Beaumont*, 539 U.S. 146, 155 (2003) (upholding the restriction on corporate contributions on grounds that it "hedges against …use of corporations as conduits for 'circumvention of valid contribution limits.'").

Buckley emphasized the difference between expenditures "made totally independently of the candidate and his campaign," *id.* at 47 (emphasis added), and "coordinated expenditures," construing the contribution limits to include not only contributions made directly to a candidate, political party, or campaign committee, but also "all expenditures placed in cooperation with or with the consent of a candidate, his agents or an authorized committee of the candidate…." *Id.* at 46-47 n.53 (emphasis added); *see also id.* at 78.

The Court noted, "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." *Id.*

The 1976 amendments to the Federal Election Campaign Act (FECA) codified *Buckley*'s treatment of coordinated expenditures. The law was amended to provide that an expenditure made "in cooperation, consultation, or in concert with or at the request or suggestion of a candidate, his authorized political committees, or their agents, shall be considered to be a contribution to such candidate." Pub. L. No. 94–283, § 112, 90 Stat. 475 (codified at 2 U.S.C. § 441a(a)(7)(B)(i)).

Similarly, the 1976 FECA amendments defined an "independent expenditure" as:

> [A]n expenditure by a person expressly advocating the election or defeat of a clearly identified candidate which is made without cooperation or consultation with any candidate, or any authorized committee or agent of such candidate, and which is not made in concert with, or at the request or suggestion of, any candidate, or any authorized committee or agent of such candidate.

Pub. L. No. 94–283, § 102, 90 Stat. 475 (emphasis added) (codified at 2 U.S.C. § 431(17)).

The broad language of *Buckley* regarding coordination was echoed in subsequent Supreme Court decisions on the same topic. In *Colorado Republican Federal Campaign Committee v. FEC,* 518 U.S. 604 (1996) ("*Colorado I*"), the Supreme Court held that a political party ad aired prior to a candidate's nomination would not be treated as coordinated because the ad was developed "independently and not pursuant to any general or particular understanding with a candidate…." *Id.* at 614 (emphasis added). The Court stressed that "the constitutionally significant fact … is the lack of coordination between the candidate and the source of the expenditure." *Id.* at 617.

In *FEC v. Colorado Republican Federal Campaign Committee,* 533 U.S. 431 (2001) ("*Colorado II*"), the Court—again in the context of party spending—underscored "the good sense of recognizing the distinction between independence and coordination." 533 U.S. at 447. The Court recognized that there is a "functional, not a formal" line between contributions and expenditures, and contributions include expenditures made in coordination with a candidate. *Id.* at 443.

Of particular importance, the Court noted that independent expenditures are only those "without any candidate's approval (or wink or nod)…." *Id.* at 442.

The Court stated, in the context of spending by a party:

> There is no significant functional difference between a party's coordinated expenditure and a direct party contribution to the candidate, and there is good reason to expect that a party's right of unlimited coordinated spending would attract increased contributions to parties to finance exactly that kind of spending. Coordinated expenditures of money donated to a party are tailor-made to undermine contribution limits.

Id. at 464 (emphasis added). The Court went on to conclude that "a party's coordinated expenditures, unlike expenditures truly independent, may be restricted to minimize circumvention of contribution limits." *Id*. at 465 (emphasis added).

In *McConnell v. FEC*, 540 U.S. 93, 144 (2003), the Court again noted that the relevant "dividing line" was "between expenditures that are coordinated—and therefore may be regulated as indirect contributions—and expenditures that truly are independent." 540 U.S. at 221 (emphasis added). The Court explained:

> [T]he rationale for affording special protection to wholly independent expenditures has nothing to do with the absence of an agreement and everything to do with the functional consequences of different types of expenditures. Independent expenditures are poor sources of leverage for a spender because they might be duplicative or counterproductive from a candidate's point of view. By contrast, expenditures made after a "wink or nod" often will be as useful to the candidate as cash. For that reason, Congress has always treated expenditures made "at the request or suggestion of" a candidate as coordinated.

Id. at 221-22 (internal citations and quotation marks omitted) (*quoting Colorado II*, 533 U.S. at 446) (emphasis added). The Court thus continued to adopt a broad view—a "wink or nod" view—of what constitutes coordination between a candidate and an outsider spender, a position it had earlier set forth in both *Colorado I* ("general or particular understanding") and *Colorado II* ("wink or nod").

In short, the Supreme Court has spoken in the broadest terms about the degree of independence that is necessary for "independent expenditures" to be considered free of the restrictions that would otherwise apply to in-kind contributions. Such expenditures must be "totally independent," "wholly independent," "truly independent," and "without any candidate's approval (or wink or nod)…."

The FEC has promulgated a regulation that governs "coordinated communications," 11 C.F.R. § 109.21, but that regulation is limited to communications which meet certain restricted "content" standards.

The FEC, however, has also promulgated a broader regulation which repeats the statutory coordination standard and which applies to all other spending that is "made in cooperation,

consultation or concert with, or at the request or suggestion of" a candidate or agent of a candidate. 11 C.F.R. § 109.20. Under this regulation, where the candidate and outside spender have "coordinated" in the establishment or operation of an outside spending group, all expenditures made by the outside spender should be considered to be a function of the coordinated efforts.

This understanding of the statutory and regulatory language is based on the Supreme Court's consistently demanding requirement that campaign expenditures by an outside spender be "totally," "truly" and "wholly" independent of a candidate to qualify as independent spending.

Conclusion

The facts discussed above raise serious questions about whether the millions of dollars being spent by the candidate-specific Super PACs in the 2012 presidential election fail to meet the rigorous standards to qualify as "independent" activity required by statute, by rule and by multiple Supreme Court rulings.

These facts show that the five presidential-candidate candidate Super PACs at issue here are each closely intertwined with their respective candidates and were each established by or are being operated by close political operatives or associates of the candidates they support. Those operatives and associates have long histories with the candidates themselves, and/or with the political operatives running the authorized presidential campaign committees.

Mike Toomey, who founded the Make Us Great Again PAC, is described as "one of Perry's closest confidantes." [60] The organizers of the Restore Our Future PAC all played key roles for Romney's authorized campaign committee in his 2008 presidential campaign. The founders of Priorities USA PAC left White House jobs this year where they worked for President Obama and quickly established the Obama-specific Super PAC. The founder and head of the Winning Our Future PAC is a key fundraiser and political aide to Newt Gingrich. The key adviser for Our Destiny PAC worked for the authorized Huntsman campaign committee until just before he left to work for the Super PAC.

These and other facts presented in the report raise serious questions about whether these Super PACs were established or are operating "in concert with, or at the request or suggestion" of the presidential candidates they are supporting. They also raise serious questions as to whether the overall expenditures being made by these Super PACs meet the test of being "totally independent," "wholly independent" and "truly independent" of the candidates with whom they are aligned.

The practical function of the presidential candidate-specific Super PACs is clear: their purpose is to serve as vehicles for donors and presidential candidates to circumvent and evade the contribution limits and source prohibitions set forth in the campaign finance laws.

With the introduction of the candidate-specific Super PACs in the 2012 presidential election, donors now have the opportunity to make a maximum hard money contribution to a

[60] D. Eggen, "Perry has deep financial ties to maker of HPV vaccine," *The Washington Post* (Sept. 16, 2011).

presidential candidate's campaign and then also make additional unlimited contributions to the related candidate-specific Super PAC which is operating, in essence, as an arm of that same presidential campaign. Or donors can just make unlimited contributions to a presidential candidate's related Super PAC that is far in excess of the contribution restrictions that apply to donations made to that presidential candidate.

Such unlimited contributions are permitted under the law only if the presidential candidate-specific Super PAC is operating "truly," "totally" and "wholly" independently of the candidate it is organized to support, and without "wink or nod" approval from that candidate, the candidate's campaign or their agents.

Absent such total independence, the raising and spending of such contributions should be considered to be violations of the campaign finance law by the Super PAC, the presidential candidate and the donors contributing to the Super PAC. 2 U.S.C. §§ 441a(a), 441a(f), 441b(a).

The stakes for the country are enormous in addressing the abuses involved with candidate-specific Super PACs and preventing a return to the system of legalized bribery that existed in the pre-Watergate era.

It is the responsibility of enforcement agencies, including the Federal Election Commission and the Justice Department, to prevent massive violations of the campaign finance laws that were enacted to protect citizens against corruption. It is the responsibility of Congress to enact legislation to stop candidate-specific Super PACs from serving as vehicles for evading and circumventing the campaign finance laws and thereby to protect the integrity of our democracy.

March 22, 2012

Hon. Douglas H. Shulman
Commissioner
Internal Revenue Service
Room 3000 IR
1111 Constitution Avenue, N.W.
Washington, DC 20224

Lois Lerner
Director of the Exempt Organizations Division
Internal Revenue Service
1111 Constitution Avenue, N.W.
Washington, DC 20224

Re: Petition for rulemaking on candidate election activities by Section 501(c)(4) groups

Dear Commissioner Shulman and Director Lerner:

On July 27, 2010, Democracy 21 and the Campaign Legal Center submitted to the Internal Revenue Service a "Petition for Rulemaking on Campaign Activities by Section 501(c)(4) Groups."

The Petition challenged as contrary to law the existing regulations that define eligibility for an organization to qualify for section 501(c)(4) tax-exempt status. The Petition called on the IRS to initiate a rulemaking proceeding to revise and clarify its regulations regarding the extent of candidate election activities that a "social welfare" organization can engage in under 26 U.S.C. § 501(c)(4).

Since then, we have heard nothing from the IRS to indicate that such a rulemaking is under consideration.

Meanwhile, developments in the course of the 2012 national elections have served to underscore the fact that inadequate and flawed IRS regulations are facilitating widespread misuse of the tax laws by organizations claiming tax-exempt status under section 501(c)(4) in order to keep secret the donors financing their candidate campaign-related expenditures.

This is seriously undermining the integrity of the tax laws and the credibility of the nonprofit sector. According to a column in *Roll Call*:

> "Charitable organizations depend on the confidence and trust of the public for support," said Diana Aviv, president and CEO of Independent Sector, which represents the nonprofit and philanthropic community. Campaign spending by nonprofits, she added, could pose "a serious reputational risk" to the sector.[1]

We are writing again to strongly urge the IRS to act on our Petition promptly and initiate a rulemaking proceeding. The IRS must take steps to properly interpret and enforce the tax law and stop these abuses from continuing to explode in our elections.

Recently, a group of Democratic Senators and a group of Republican Senators have each separately written to the IRS, both complaining about the agency's administration of section 501(c)(4). One group of Senators argues that the agency is too intrusive in its inquiries into the candidate election activities of applicants for 501(c)(4) "social welfare" status. The other group of Senators argues that the agency is too lax in enforcing the limits on candidate campaign activities by such groups.

The IRS has a statutory responsibility to administer and enforce the tax laws as interpreted by the courts, without regard to political pressure. These letters from the Senators, however, serve to confirm that it is essential for the IRS to initiate a rulemaking to provide clarity and a legally correct bright line standard for determining when a group is eligible to receive tax-exempt status under section 501(c)(4).

The Internal Revenue Code provides that section 501(c)(4) groups must engage "exclusively" in social welfare activities. 26 U.S.C. § 501(c)(4). The regulations implementing this provision state, however, that "social welfare" organizations must be "primarily engaged" in social welfare activities. 26 C.F.R. § 1.501(c)(4)–1(a)(2)(i).

Although the IRS has clearly and correctly stated that "social welfare" activities do not include activities that constitute participation or intervention in candidate elections, it has not clearly or properly defined the "primarily engaged" standard that was established by the agency to serve as a cap on such candidate campaign activities.

In the absence of a proper regulation, the standard has been widely misinterpreted to mean that section 501(c)(4) groups can engage in candidate election activities so long as such activities do not constitute a majority of the group's spending – that is to say, they can spend up to 49 percent of their expenditures on candidate campaign-related activities.

This is in conflict with the statutory language and with court interpretations of this language which hold that "social welfare" organizations cannot engage in any "substantial" amount of non-exempt activity. This means that section 501(c)(4) organizations cannot do more than an *insubstantial amount of candidate election activity*, whether or not it is their "primary" purpose.

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[1] E. Carney, "Rules of the Game: Bad News for Nation's Nonprofits," *Roll Call* (March 20, 2012).

However, as we documented in our Petition and in other letters we have sent to you,[2] a number of groups claiming tax exempt status under section 501(c)(4) are engaging in substantial candidate election activities this election cycle – spending tens of millions of dollars to directly influence the 2012 candidate elections, much as such groups also did to influence the 2010 elections. This candidate campaign activity is bound to increase as the 2012 general election draws closer.

For instance, as we discussed in our letter to you of December 14, 2011, one section 501(c)(4) group, American Action Network, reportedly spent $26 million on candidate campaign-related activities in 2010, which was approximately *87 percent* of the organization's total spending that year. Another supposed "social welfare" organization, Americans Elect, is seeking ballot access as a political party in all 50 states for the purpose of nominating and running its own presidential candidate. The group has already obtained this status as a political party in a number of states. A group cannot be a "political party" and a "social welfare" organization at the same time.

The extent of the candidate election activities by these and other groups appears on its face to violate even the current ineffectual regulatory standard that limits participation in candidate campaign-related activities by section 501(c)(4) "social welfare" organizations. The activities certainly violate both the statutory language of section 501(c)(4) and the court interpretations of that provision.

The IRS must act expeditiously to revise and clarify the "primarily engaged" standard and to conform its regulations to the statute as construed by the courts. Absent action by the IRS, it is a virtual certainty that candidate election activities by groups improperly claiming tax-exempt status under section 501(c)(4) will escalate.

The stakes here are very high for the country and for the integrity of our elections. Organizations are improperly claiming tax-exempt status under section 501(c)(4) in order to keep secret the donors financing their candidate campaign-related expenditures. Citizens have a basic right to know who is giving and spending money to influence their votes.

Since section 501(c)(4) groups (unlike section 527 "political organizations") are not required to publicly disclose their donors, the sources of the money such groups spend for candidate election activities are hidden from public scrutiny.

Recent press reports have taken note of the increased candidate campaign spending by section 501(c)(4) groups, and the use of such "social welfare" groups specifically for the purpose of keeping secret the donors financing their candidate election activities.

One report in *Politico* noted that corporations have generally not contributed to so-called "Super PACs," which are federally registered political committees that are required to report their donors to the FEC. The report explained:

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[2] *See* Letters of October 5, 2010, September 28, 2011, December 14, 2011 and March 9, 2012.

> Instead, corporate lobbyists and others say companies have preferred to give to politically active nonprofits that allow their donations to stay anonymous. . . .
>
> Millionaires and others might see an advantage to giving to super PACs, but one in-house corporate lobbyist told POLITICO that "nondisclosure is always preferred" when it comes to any contribution to mitigate any public perception issues and shareholder controversy.
>
> It's unclear how much money is being directed to nonprofit advocacy organizations – 501(c)(4)s – which do not have to disclose their donors to the Federal Election Commission but are in many cases associated with Super PACs.[3]

By allowing groups to claim tax exempt status under section 501(c)(4) while also engaging in substantial candidate election activity, the IRS is serving to deny citizens essential campaign finance information about the money being spent to influence federal elections.

This is information that the Supreme Court in *Citizens United* said "permits citizens and shareholders to react to the speech of corporate entities in a proper way. This transparency enables the electorate to make informed decisions and give proper weight to different speakers and messages." *Citizens United v. FEC,* 130 S. Ct. 876, 916 (2010).

The widespread abuse of the tax laws by groups improperly claiming section 501(c)(4) tax-exempt status will continue and grow until the IRS revises its regulations to conform with the statutory provision in the Internal Revenue Code and with court interpretations holding that tax-exempt groups may not engage in more than an insubstantial amount of non-exempt activity.

The IRS must move promptly to set a new clear, bright-line and administrable standard for determining eligibility for 501(c)(4) tax status, and ensure that such standard complies with the statute. Absent such action by the IRS, the agency will bear direct responsibility for the misuse and abuse of the tax laws by groups that are flooding our elections with secret money.

We strongly urge the IRS to promptly institute a rulemaking proceeding to address this matter. We would appreciate receiving a response from the IRS to our letter regarding what action the agency is prepared to take.

Sincerely,

/s/ Gerald Hebert	*/s/ Fred Wertheimer*
J. Gerald Hebert Executive Director Campaign Legal Center	Fred Wertheimer President Democracy 21

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[3] A. Palmer and A. Phillip, "Corporations not funding super PACs," *Politico* (March 8, 2012).

Testimony Submitted by
Democracy 21 President Fred Wertheimer

Hearing on Current Issues in
Campaign Finance Law Enforcement"

Subcommittee on Crime and Terrorism

Senate Judiciary Committee

April 9, 2013

Democracy 21 appreciates the opportunity to submit this testimony for the record and appreciates the important leadership of Senator Sheldon Whitehouse in examining the serious problems that exist today concerning the enforcement of campaign finance laws.

My name is Fred Wertheimer and I am president of Democracy 21, a nonprofit, nonpartisan organization that supports effective campaign finance laws to protect our political system from corruption, to empower ordinary Americans citizens in the political process and to inform citizens about who is giving and spending political money to influence their votes.

Democracy 21 strongly supports the efforts by the committee to examine the issues surrounding the enforcement of federal laws that deal with campaign finance activities, including the federal campaign finance laws and the tax laws that relate to campaign activities.

Federal Election Commission

The campaign finance enforcement problems start with the Federal Election Commission.

In order to be effective, laws have to be enforced and people have to believe that they will be enforced. In the case of the FEC, however, we have a completely dysfunctional enforcement agency. Three current commissioners on the six-member Commission are ideologically opposed to the campaign finance laws and have consistently refused to properly interpret and enforce the laws.

This has created a "wild west" approach to the laws where participants in the electoral process know they can pretty much do whatever they want without facing consequences for violating the laws.

I would like to submit for the record an Issue Brief recently published by Democracy 21 in conjunction with the American Constitution Society entitled "The FEC: The Failure to Enforce Commission."

The Issue Brief details how the Federal Election Commission has undermined the campaign finance laws with flawed regulations and blocked the enforcement of the laws based on ideological objections. It also spells out the structural problems that have existed from the establishment of the FEC in 1974 and that have helped to create today a "completely dysfunctional" agency.

The Issue Brief concludes, "We have reached the point where we have the illusion of campaign laws because in reality, there is little or no enforcement of these laws."

The Issue Brief sets forth a proposal to create a new campaign finance enforcement agency with strong enforcement powers, adequate resources and a new structural approach for the agency.

The Brief also notes the failure of President Obama to nominate new commissioners to the FEC to replace the four Commissioners now sitting as lame ducks whose terms expired and who are ineligible to be reappointed (A fifth lame duck Commissioner recently left the agency creating a fifth position that needs to be filled.) It is essential for new commissioners be appointed to the FEC who are committed to properly interpreting and enforcing the campaign finance laws.

Department of Justice

The failure of the FEC to carry out its exclusive civil enforcement powers and the flawed regulations adopted by the FEC in a number of areas have made it more difficult for the Justice Department to carry out its criminal enforcement responsibilities.

Nevertheless, given the abdication of enforcement by the FEC, it is important for the Justice Department to investigate serious potential violations of the campaign finance laws and bring criminal enforcement proceedings where appropriate.

In this regard, on January 4, 2011 we sent a report to the Justice Department entitled "A Democracy 21 Report: Leading Presidential-Candidate Super PACs and The Serious Questions That Exist about Their Legality." I ask that a copy of our report be placed in the record.

This was followed with a series of letters raising serious questions about potential illegal coordination between a number of candidate-specific Super PACs and the candidates they were exclusively supporting in the 2012 presidential election. The letters can be found on the Democracy 21 website at www.democracy21.org and are dated January 10, 2012, January 13, 2012, February 15, 2012, February 21, 2012, March 5, 2012, March 6, 2012 and January 3, 2013.

In our letters, we asked the Justice Department to conduct investigations and, where appropriate, to bring criminal enforcement proceedings. In our view, illegal coordination took place in the 2012 presidential election, even under the weak FEC coordination regulations that exist. Given

the non-existing enforcement by the FEC, the only place to potentially obtain enforcement of the campaign finance laws has been the Justice Department.

We are not aware of any actions taken by the Justice Department regarding our letters.

Internal Revenue Service

An additional serious enforcement problem has occurred at the IRS.

In the wake of the disastrous 2010 Supreme Court decision in the *Citizens United*, a number of groups have improperly claimed tax-exempt status as section 501(c)(4) "social welfare" organizations in order to hide from the American people the donors financing their campaign activities.

Beginning in 2010, Democracy 21, joined by the Campaign Legal Center, sent a series of letters to the IRS asking the agency to investigate and take appropriate action against a number of groups that appeared to be ineligible for 501(c(4) tax-status and using this status to evade campaign finance disclosure requirements. The letters can be found on the Democracy 21 website and are dated October 5, 2010, September 28, 2011, December 14, 2011, March 9, 2012, April 17, 2012, July 23, 2012, August 9, 2012, August 21, 2012, September 27, 2012, December 3, 2012, January 2, 2013 and January 16, 2013.

Democracy 21, joined by the Campaign Legal Center, also submitted a petition to the IRS on July 27, 2011 challenging as contrary to law the existing regulations governing eligibility for 501(c)(4) tax-status and asking for a proceeding to adopt new rules. After not receiving a substantive response from the IRS, we sent a second letter regarding our petition to the IRS on March 22, 2013 further making the case for a rulemaking proceeding.

On July 17, 2012 we received a response from the IRS regarding our petition for a rulemaking that stated:

> The IRS is aware of the current public interest in this issue. These regulations have been in place since 1959. We will consider proposed changes in this area as we work with the IRS Office of Chief Counsel and the Treasury Department's Office of Tax Policy to identify tax issues that should be addressed through regulations and other published guidance.

The IRS to our knowledge, however, has not taken any action to open a rulemaking proceeding.

Meanwhile, blatant misuse of the tax laws by groups improperly claiming tax-exempt status continues to occur and citizens continue to be denied campaign finance information they have a right to know.

Conclusion

The integrity and effectiveness of our campaign finance laws and related tax laws is being seriously undermined by the absence of proper enforcement of these laws.

The abject failure of the FEC to properly enforce the campaign finance laws is a national scandal and is providing license for wholesale violation of the laws. The failure of the IRS to stop groups from misusing the tax laws in order to hide campaign finance information which citizens are entitled to know is its own scandal.

In order to protect the integrity of our democracy and political system against corruption, it is imperative for Congress to address the lack of enforcement of the campaign finance laws that currently exists. It is essential to make clear that campaign finance laws cannot be ignored with impunity.

Thank you again for the opportunity to submit our testimony.

AMERICAN CONSTITUTION SOCIETY FOR LAW AND POLICY

Toward a More Perfect Union:
A Progressive Blueprint for the Second Term

January 2013

"The FEC: The Failure to Enforce Commission"

by Fred Wertheimer and Don Simon

Toward a More Perfect Union:
A Progressive Blueprint for the Second Term

"Toward a More Perfect Union: A Progressive Blueprint for the Second Term" is a series of ACS Issue Briefs offering ideas and proposals that we hope the administration will consider in its second term to advance a vision consistent with the progressive themes President Obama raised in his second Inaugural Address. The series should also be useful for those in and outside the ACS network – to help inform and spark discussion and debate on an array of pressing public policy concerns. The series covers a wide range of issue areas, including immigration reform, campaign finance, climate change, criminal justice reform, and judicial nominations.

The FEC: The Failure to Enforce Commission

Fred Wertheimer[*] *and Don Simon*[**]

Throughout its history, the Federal Election Commission (FEC) has been widely seen as an ineffectual agency that fails to carry out its statutory responsibilities to enforce and interpret the campaign finance laws in accord with their language, meaning and purpose. It has been labeled a "toothless tiger," "toothless dog," "pussycat agency," "watchdog without a bite," "muzzled watchdog," "weak, slow-footed and largely ineffectual," "FECkless," and "designed for impotence," among other things.[1] A *New York Times* editorial last year described the FEC as "borderline useless."[2] A *St. Louis Post Dispatch* editorial went one step further, calling the FEC "completely useless."[3] Indeed, the FEC could be considered one of the great Washington success stories because it is exactly the weak and ineffective agency that members of Congress, whose campaign finance activities it oversees, intended it to be.

This Issue Brief explores some of the major regulatory failures over the history of the FEC, and suggests an agenda for structural reform of the agency so that it will better serve its vital function to protect the electoral process and our governance from corruption and the appearance of corruption.

I. An Agency Flawed by Design

A. The Original FEC

The FEC was established in 1974 as part of the Federal Election Campaign Act Amendments of 1974 (FECA), the comprehensive campaign finance reform legislation

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[*] Founder and President of Democracy 21.

[**] Counsel to Democracy 21.

[1] DEMOCRACY 21 (CITIZENS TASK FORCE), NO BARK, NO BITE, NO POINT: THE CASE FOR CLOSING THE FEDERAL ELECTION COMMISSION AND ESTABLISHING A NEW SYSTEM FOR ENFORCING THE NATION'S CAMPAIGN FINANCE LAWS 5 (2002) [hereinafter NO BARK, NO BITE, NO POINT] *available at* http://www.democracy21.org/vertical/Sites/%7B3D66FAFE-2697-446F-BB39-85FBBBA57812%7D/uploads/%7BB4BE5C24-65EA-4910-974C-759644EC0901%7D.pdf. The authors of this Issue Brief wrote the Citizens Task Force report and have drawn from relevant portions of the report. The authors would like to recognize the very important role played by Kathryn Beard, Communications and Research Director for Democracy 21, in providing substantial research and writing contributions to this paper.

[2] Editorial, *So Much for the Referees*, N.Y. TIMES, Apr. 18, 2011, http://www.nytimes.com/2011/04/18/opinion/18mon4.html.

[3] Editorial, *Time to Wake Up the Sleeping Watchdog That Is the Federal Elections Commission*, ST. LOUIS POST DISPATCH, Mar. 7, 2011, http://www.stltoday.com/news/opinion/columns/the-platform/time-to-wake-up-the-sleeping-watchdog-that-is-the/article_878f943c-4906-11e0-b3bf-0017a4a78c22.html.

enacted in response to the Watergate scandals. The FEC was created as an independent agency to oversee and enforce the campaign finance laws, following decades of failure to enforce the pre-FECA campaign finance laws.[4] The previous enforcement system suffered from inherent conflicts of interest. The Clerk of the House and Secretary of Senate were responsible for receiving and overseeing the disclosure reports that congressional candidates were required to file. The Clerk and the Secretary, however, were employees of their respective bodies and directly accountable to the members of Congress they were supposed to oversee. In addition, they had no enforcement powers. The Justice Department had civil and criminal enforcement powers, but Democratic and Republican administrations alike did little or nothing to enforce the laws.

The FEC created by FECA consisted of six commissioners, no more than three of whom were allowed to be from the same political party. The original statute provided for two commissioners to be appointed by the president, two by the House Speaker and Minority Leader, and two by the Senate Majority Leader and Minority Leader. But in *Buckley v. Valeo*,[5] the landmark Supreme Court decision that reviewed the constitutionality of FECA, the Court held that the appointment process for the FEC was unconstitutional. The Court said that because the statute allowed members of Congress to appoint individuals to an agency that exercised executive branch authority and powers, it violated the Appointments Clause of the Constitution. Following *Buckley,* the FEC was reauthorized by Congress in 1976, with the president given the power to nominate all six commissioners, subject to Senate confirmation. Notwithstanding the formal change in the appointments process, the actual practice for appointing commissioners has informally followed the approach set forth in the original statute. Over the years, House and Senate leaders have continued to name FEC commissioners by sending the names to the president who routinely forwarded them to the Senate for confirmation—a *de facto* version of the *de jure* process the Court held unconstitutional.

B. Today's FEC

Structural problems in the makeup and powers of the FEC lie at the heart of its reputation as the "Failure to Enforce Commission." These structural impediments include cumbersome internal enforcement procedures, the agency's absence of real enforcement powers, and the self-serving, conflict-laden process for appointing commissioners.

The FEC's enforcement process is time consuming, and severely limits the organization's ability to act. Former FEC Commissioner Scott Thomas has said, "procedural requirements and their attendant time allowances make it difficult—if not impossible—for the Commission to resolve a complaint in the same election cycle in

[4] *See* NO BARK, NO BITE, NO POINT, *supra* note 1, at 7–13 (including a brief history of the establishment of the FEC).
[5] 424 U.S. 1 (1976).

which it is brought."[6] Moreover, the agency currently lacks any real power to take significant enforcement actions on its own, and thus does not function as a real enforcement agency. It cannot directly impose penalties, except in minor matters, and cannot act in a timely manner. The Commission also lacks the ability to go into court to enjoin illegal activities and cannot undertake random audits of campaign committees. In the end, all the FEC can do, if a potential violator does not enter into a "conciliation" agreement, is to bring a lawsuit seeking civil penalties against the person and begin a process that is likely to drag through the courts for years.[7]

While membership of the Commission is generally made up of three members from each major party, the agency requires four votes to act on any matter—undertaking investigations, filing court cases, adopting regulations or issuing advisory opinions. This has proven to be a recipe for deadlock on important matters. If the FEC, for example, votes 3 to 3 on the question of whether to pursue an enforcement matter, the investigation is dropped. If the FEC votes 3 to 3 on issuing an advisory opinion, the individual or group requesting the opinion gets no advice.

In recent years, the agency has become completely dysfunctional. The three Republican commissioners on the six-member FEC have made clear that they are ideologically opposed to the campaign finance laws, and, as a result, have repeatedly refused to enforce the laws. In the 2012 election, candidates and political operatives were free to conduct campaign finance activities with little concern that the campaign finance laws would be enforced. We have reached the point where we have the illusion of campaign finance laws because in reality, there is little or no enforcement of these laws.

II. Major Campaign Finance Law Loopholes Created by the FEC

While the FEC's failure to enforce the law is problematic by itself, the Commission also often creates new campaign finance problems in interpreting the law. Since its inception, the FEC has created some of the biggest campaign finance problems by proactively establishing major loopholes in the laws. The three situations set forth below illustrate how the FEC has fundamentally undermined the very laws the agency is supposed to enforce.

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[6] *See* NO BARK, NO BITE, NO POINT, *supra* note 1, at 50; *see also* 2 U.S.C. § 437g (2006) (noting agency enforcement proceedings, for instance, have to go through a "reason to believe" finding and a separate "probable cause to believe" finding before the agency can commence a civil action to seek penalties for a potential violation).

[7] Most enforcement actions are concluded by a conciliation agreement in which a respondent typically does not admit liability but agrees to pay a civil penalty negotiated with the agency. 11 C.F.R. § 111.18 (2012).

A. Creating and Perpetuating Soft Money

The problems, and failures, of the FEC are nowhere better illustrated than in the story of the creation and growth of soft money in American politics. Soft money, before it was banned in 2002, was money donated to the national political parties that did not comply with federal contribution limits or source prohibitions. In other words, it was money that was *illegal* under federal law for the parties to raise and spend to influence federal elections.[8] The soft money system was premised on a legal fiction created by the FEC: that the unlimited contributions raised and spent by the national parties for voter mobilization activities and ads about federal candidates could be treated as only affecting *non-federal* elections, and therefore did not need to comply with federal limits on contributions to parties.

This theory was first created by the FEC in a 1978 advisory opinion in which it held that certain party *mixed* activities—such as get-out-the-vote and voter registration activities that benefited federal candidates as well as state candidates—could be financed with a combination of federal and non-federal funds allocated (for instance, 30 percent federal funds, and 70 percent non-federal funds) to reflect, in theory, the relative impact of the activity on federal and non-federal campaigns.[9] The FEC concluded that it could devise an allocation formula that would allow parties to pay for these activities with a mixture of soft money and hard money, with the soft money being artificially deemed to affect only non-federal voter activities and the hard money artificially deemed to affect only federal voter activities. But this allocation approach was based on a legal fiction and flawed from the beginning. It ended up allowing the national parties to spend unlimited soft money contributions to influence federal elections.

Common Cause sued the Commission in 1987 for failing to issue new rules to deal with the soft money problem.[10] Federal district court Judge Thomas Flannery found that the FEC had failed to provide adequate guidance to the political parties to prevent soft money abuses of the allocation system. Judge Flannery found that the FEC's failure to take regulatory action on soft money was "contrary to law" and "flatly contradict[ed] Congress's express purpose," and he ordered the FEC to issue new regulations.[11] After the FEC failed to take action in response to the court order, a second lawsuit by Common Cause resulted in the court's issuing a second order in 1988, again directing the agency to issue new regulations on its allocation system.[12] The court recognized "that there is a

[8] Hard money, by contrast, is money donated to candidates and parties that complies with federal contribution limits and source prohibitions. FEDERAL ELECTIONS COMMISSION, CAMPAIGN FINANCE LAW QUICK REFERENCE FOR REPORTERS, http://www.fec.gov/press/bkgnd/bcra_overview.shtml (last visited Jan. 30, 2013).
[9] FEC Op. 1978-10, [1976–1990 Transfer Binder] Fed. Election Camp. Fin. Guide (CCH) ¶5340 (1978).
[10] Common Cause v. FEC, 692 F.Supp. 1391 (D.D.C. 1987).
[11] *Id.* at 1395–96.
[12] Common Cause v. FEC, 692 F.Supp. 1397 (D.D.C. 1988).

public perception of widespread abuse, suggesting that the consequences of the regulatory failure identified a year ago are at least as unsettling now as then."[13] Further, the court noted that "[t]he climate of concern surrounding soft money threatens the very 'corruption and appearance of corruption' by which the 'integrity of our system of representative democracy is undermined,' and which the [post-Watergate reform law] was intended to remedy."[14] In the end, the FEC adopted new regulations in 1990.[15] They did not solve the soft money problem, however, but merely codified the existing flawed system. The FEC did take one positive step by adopting requirements for the parties to disclose their soft money contributions and expenditures.

By then, the problem presented by soft money being spent in federal elections had begun to dramatically increase. The presidential campaign in 1988 of Democratic nominee Governor Michael Dukakis started soft money off in a significant way with an effort to raise $100,000 contributions for the Democratic Party to spend on so-called "party building" activities that were, in fact, expenditures to support the Dukakis presidential campaign. Vice President Bush's campaign followed quickly with a similar program. By the end of the 1988 presidential race, each presidential campaign had raised some $25 million in soft money from federally prohibited sources, or a total of $50 million, and soft money had exploded into federal elections.

The total amount of soft money increased more than *five-fold* to $262 million in the 1996 election cycle, and for the first time, a presidential candidate, President Bill Clinton, decided to spend soft money to finance a multimillion-dollar TV ad campaign promoting his reelection.[16] In effect, President Clinton and his campaign ran two parallel presidential campaigns. The first was financed with public funds received by the Clinton campaign in return for limiting its campaign spending. The second involved unlimited expenditures financed with unlimited soft money contributions raised by the Clinton campaign and spent through the Democratic Party. Soon after the Clinton campaign undertook this practice, the Republican nominee, Senator Bob Dole, followed suit with similar expenditures.

The embrace of soft money and its use for TV campaign advertising, not surprisingly, fueled the demand for even more soft money. This pursuit of soft money resulted in the Clinton campaign finding itself embroiled in the worst campaign finance scandals since Watergate. The sale of presidential meetings, the White House coffees, the Lincoln Bedroom sleepovers, the Buddhist temple fundraiser, the illegal foreign contributions, the roles of John Huang, Charlie Trie and Pauline Kanchanalak, the Roger

[13] *Id.* at 1399.
[14] *Id.* at 1401.
[15] NO BARK, NO BITE, NO POINT, *supra* note 1, at 26.
[16] *Id.* at 24.

Tamraz fiasco—were among the parade of campaign finance abuses that marked the 1996 Clinton presidential campaign.[17]

The FEC, meanwhile, did nothing to address the problems. In 1997, *The New York Times* noted that "[h]ad there been an aggressive and vigilant Federal Election Commission, both campaigns might not have been able to make a mockery of campaign restrictions enacted in the 1970s."[18] By the 2000 national elections, the soft money system had grown to a $500 million problem, a *ten-fold* increase from the $50 million spent in 1988.

Finally, in 2002, Congress passed the Bipartisan Campaign Reform Act (BCRA), also known as the McCain-Feingold Law, which banned political party soft money entirely.[19] BCRA prohibited the political parties from raising or spending any funds that did not comply with federal contribution limits and source prohibitions. The constitutionality of the new law was immediately challenged and was upheld by the Supreme Court in 2003.[20] In its decision, the Court made clear the central role played by the FEC in creating the soft money system. The Court admonished the FEC for having "subverted" and "invited widespread circumvention" of the campaign finance laws by adopting the regulations that created the soft money system.[21] The Court further said that under that allocation regime created by the FEC in 1978, "the national parties were able to use vast amounts of soft money in their efforts to elect federal candidates."[22]

B. Improperly Implementing the Bipartisan Campaign Reform Act

Following the enactment of BCRA in 2002, the FEC adopted regulations to implement the new law. Many of these new rules, however, failed to properly interpret the law. The same agency that created the soft money system proceeded to adopt numerous regulations that undermined the very law just enacted to end the soft money system the agency created.

The House sponsors of BCRA, Representatives Chris Shays and Marty Meehan, brought a lawsuit in 2004 challenging many of the regulations adopted by the FEC. In *Shays v. Federal Election Commission*, a federal district court issued a stinging rebuke of the FEC by striking down, as contrary to law, fifteen of the nineteen FEC regulations that had been challenged in the lawsuit.[23] These regulations addressed a range of issues

[17] *Id.* at 27.
[18] Editorial, *Waking Up the F.E.C.*, N.Y. TIMES, Mar. 31, 1997, http://www.nytimes.com/1997/03/31/opinion/waking-up-the-fec.html.
[19] Bipartisan Campaign Reform Act of 2002, Pub. L. No. 107-155, 116 Stat. 81 (codified as amended at 36 U.S.C. § 510 and in scattered sections of 2 U.S.C.).
[20] McConnell v. FEC, 540 U.S. 93 (2003).
[21] *Id.* at 142, 145.
[22] *Id.* at 142.
[23] Shays v. FEC, 337 F.Supp. 2d 28 (D.D.C. 2004).

relating to the implementation of BCRA, including the definition of terms such as "coordination," "solicitation," "agent" and "federal election activity." Mincing no words, Judge Kollar-Kotelly said that one of the regulations "runs completely afoul" of basic campaign finance law, another "severely undermines FECA's purposes" and would "foster corruption," another "would render the statute largely meaningless," another had no rational basis.[24] The judge found the FEC's actions "run[] contrary to Congress' intent" and "create the potential for gross abuse."[25]

The FEC appealed the district court's decision with regard to five of the fifteen regulations that had been struck down, and lost its appeal on all five.[26] The D.C. Circuit Court of Appeals sharply rebuked the FEC concerning the five regulations before it. The court found with regard to the various regulations, "[t]he FEC's definitions fly in the face of [Congress's] purpose because they reopen the very loophole the terms ['solicit' and 'direct'] were designed to close;" "the FEC's rule far exceeds any exemption BCRA would permit . . . and runs roughshod over express limitations on the Commission's power;" and that one regulation "appears particularly irrational" and "makes no sense."[27] The court of appeals also said:

> Under the Commission's interpretation, candidates and parties may not spend or receive soft money, but apart from that restriction, they need only avoid explicit direct requests. Instead, they must rely on winks, nods, and circumlocutions to channel money in favored direction—anything that makes their intention clear without overtly "asking" for money. Simply stating these possibilities demonstrates the absurdity of the FEC's reading. *Whereas BCRA aims to shut down the soft money system, the Commission's rules allow parties and politicians to perpetuate it, provided they avoid the most explicit forms of solicitation and direction.*[28]

Following the court rulings, the FEC conducted new rulemaking proceedings for the fifteen invalidated regulations. While in some cases the Commission fixed its improper regulations, in other cases the FEC ignored the mandate of the court and again failed to cure the regulations and the problems the agency had created. The most egregious example of this FEC failure was its proposed new regulation that once again failed to deal properly with the critically important issue of defining when a third party is

[24] *Id.* at 63, 70, 79, 87.
[25] *Id.* at 65, 79 (citing Orloski v. FEC, 795 F.2d 156, 164, 165 (D.C. Cir. 1986).
[26] Shays v. FEC, 414 F.3d 76 (D.C. Cir. 2005).
[27] *Id.* at 106, 109, 112.
[28] *Id.* at 106 (emphasis added).

illegally coordinating its expenditures with a candidate or political party.[29] The district court had struck down the FEC regulation defining "coordination" because it ran "completely afoul of [the] basic tenet of campaign finance law" that coordinated communications, like contributions, have great value to candidates, and that failing to regulate such communications accordingly "create[s] an immense loophole that would facilitate the circumvention of [federal] contribution limits, thereby creating 'the potential for gross abuse.'"[30] The court of appeals reached the same result, though for slightly different reasons, and concluded that the FEC regulation authorized "a coordinated communication free-for-all for much of each election cycle."[31]

The new "coordination" regulation adopted by the FEC in response to the court decisions, however, turned out to be even worse than the "coordination" regulation that had been rejected by the courts. As a result, Representatives Shays and Meehan went back to the district court and asked it to invalidate the FEC's new coordination regulation as again being contrary to law. The court once again struck down the FEC's coordination regulation, and the D.C. Circuit Court of Appeals once again upheld that ruling.[32] In its opinion issued in 2008, the D.C. Circuit sharply criticized the FEC's arguments in support of the "coordination" regulation, and in support of four other regulations that had been challenged in the second Shays and Meehan lawsuit. The circuit court called one argument "absurd," said that another "flies in the face of common sense," emphasized that another "disregards everything Congress, the Supreme Court, and this court have said about campaign finance regulation," and concluded that another "ignores both history and human nature."[33] In criticizing the FEC's revised coordination rule, the court said:

> The FEC's rule not only makes it eminently possible for soft money to be used in connection with federal elections, but it also provides a clear roadmap for doing so, directly frustrating BCRA's purpose. Moreover, by allowing soft money a continuing role in the form of coordinated expenditures, the FEC's proposed rule would lead to the

[29] The Supreme Court held in *Buckley* that outside spending coordinated with a candidate should be treated the same as a contribution to the candidate, and thus subject to the contribution limitations. *See Buckley*, 424 U.S. at 47. Since *Buckley*, the definition of what constitutes "coordination" had become a crucial issue in the law, and the FEC had a history of weakly defining a standard for coordination. In BCRA, Congress repealed by statute the then-existing, flawed FEC regulation defining "coordination" and told the agency to do it over. Bipartisan Campaign Reform Act § 214. The problem came, however, when the FEC issued new regulations following the enactment of BCRA that were as poorly conceived as the ones invalidated by Congress. *See* Coordinated & Independent Expenditures, 68 Fed. Reg. 421 (Jan. 3, 2003).
[30] Shays v. FEC, 337 F.Supp. 2d 28, 63, 65 (D.D.C. 2004).
[31] *Shays*, 414 F.3d 76, 100 (D.C. Cir. 2005).
[32] Shays v. FEC, 511 F.Supp. 2d 19 (D.D.C. 2007), *aff'd*, 528 F.3d 914 (D.C. Cir. 2008).
[33] Shays v. FEC, 528 F.3d 914,926–28 (D.C. Cir. 2008).

> exact perception and possibility of corruption Congress sought to stamp out in BCRA . . . ."[34]

By this time, it was more than six years after BCRA had been enacted, and there still was no valid regulation to implement the important coordination provisions of the law. The *Shays* cases illustrate how the FEC opened and perpetuated major soft money loopholes in a new law enacted to end the massive and corrupting soft money loophole the agency itself had created in the first place. The cases also show the willingness of FEC commissioners to ignore the clear intent of Congress and the clear decisions of federal courts in order to misinterpret laws enacted to prevent corruption and the appearance of corruption.

C. Undermining Disclosure Requirements

As part of BCRA, Congress in 2002 banned corporations, including nonprofit advocacy organizations and trade associations, and labor unions from making expenditures for "electioneering communications." An "electioneering communication" was defined as a broadcast ad that refers to a federal candidate and that is run in the period 30 days before a primary election or 60 days before the general election.[35] These provisions were enacted to address the widespread problem of sham "issue ads" being financed by corporations and labor unions that were prohibited from spending their treasury funds on campaign ads to influence federal elections but were, in fact, financing such ads in the guise of their being "issue ads."

Congress also adopted as part of BCRA comprehensive disclosure requirements for "electioneering communications." These disclosure provisions required any person who pays for an electioneering communication to disclose "the names and addresses of all contributors who contributed an aggregate amount of $1,000 or more to the person making the disbursement during the period beginning on the first day of the preceding calendar year and ending on the disclosure date."[36] An alternative disclosure approach for the spender was also provided: the spender could set up a "segregated bank account" consisting only of donations from individuals who are U.S. citizens, and pay for electioneering communications out of that account. If this alternative was used, the spender only had to disclose the names and addresses of the individuals who contributed $1,000 or more to that bank account.[37]

In 2007, the Supreme Court greatly narrowed the scope of the BCRA provision banning corporations and labor unions from making expenditures for "electioneering

[34] *Id.* at 925.
[35] 2 U.S.C. § 434(f)(3)(A)(i) (2006).
[36] 2 U.S.C. § 434(f)(2)(F) (2006).
[37] § 434(f)(2)(E).

communications."[38] The Court ruled that the ban applied only to "electioneering communications" that contained express advocacy—such as saying "vote for" or "vote against" a candidate— or that contained a campaign message that is so clear that it constitutes the functional equivalent of express advocacy. As a result of the ruling, corporations could now pay for "electioneering communications" that did not contain express advocacy or its functional equivalent. However, the ruling also left in place the disclosure provisions for those expenditures.

Because corporations were now permitted to pay for certain kinds of electioneering communications, the FEC issued new regulations in 2007 to implement the disclosure requirements that would apply to corporations. In its new regulations, however, the FEC radically narrowed the statutory contribution disclosure requirements. For "electioneering communications" made by a corporation and not paid out of a segregated bank account, the new regulations required disclosure of the name and address of "each person who made a donation aggregating $1,000 or more" to the corporation, *but only* if the donation "was made for the purpose of furthering electioneering communications."[39] Thus, even though the statute requires the disclosure of "all contributors" to a person spending money for an electioneering communication (unless the expenditures are made out of a segregated account), the FEC regulation requires disclosure of *only* those donors who gave a donation specifically "for the purpose of furthering electioneering communications."

Under this 2007 FEC regulation, any person who gives money to a corporation, including a nonprofit corporation, that is not *explicitly* donated for the purpose of "furthering" electioneering communications escapes all contribution disclosure requirements, even if the money is used by the corporation to pay for "electioneering communications." Thus, the FEC regulation created an easy path to evading the donor disclosure requirements, a path that was widely used in the 2010 and 2012 national elections. The donor simply avoids designating his donation specifically to further any "electioneering communication," in which case no disclosure of the donor is required.

In 2010, the Supreme Court in the *Citizens United* case struck down the remaining narrowed portion of the corporate ban on financing electioneering communications.[40] This ruling freed corporations and labor unions to spend general treasury funds to make any kind of campaign expenditure or "electioneering communication," including communications that contain express advocacy. The Court, however, by an 8 to 1 vote, upheld the existing contribution disclosure requirements in the statute that apply to spending by outside groups on "electioneering communications," without any apparent

[38] FEC v. Wis. Right to Life, Inc., 551 U.S. 449 (2007).
[39] 11 C.F.R. § 104.20(c)(9) (2007).
[40] Citizens United v. FEC, 558 U.S. 310 (2010).

recognition that these contribution disclosure requirements had been radically narrowed by FEC regulations.

Following the Court's decision, the three Republican commissioners on the FEC further narrowed the already narrow disclosure requirement to the point of absurdity. They took the position in an enforcement proceeding that the contribution disclosure requirements applied *only* if a contribution was given for the explicit purpose of paying for the *specific* communication that was made. Thus, as long as there was no explicit statement that the contributions were being given to finance a specific ad, the donors did not have to be disclosed.

In March 2012, Representative Chris Van Hollen filed a lawsuit in federal district court in Washington, D.C. challenging the FEC's regulations dealing with the requirements for disclosure of contributions by outside spending groups. The district court proceeded to strike down the FEC disclosure regulation as contrary to the statute, stating that "there is no question that the regulation promulgated by the FEC directly contravenes the Congressional goal of increasing transparency and disclosure in electioneering communications . . . ."[41] The court further said, "the general legislative purpose here is clearly expressed and it favors plaintiff's interpretation of the statute: that Congress intended to shine light on whoever was behind the communications bombarding voters immediately prior to elections."[42]

This ruling was later reversed by the D.C. Circuit Court of Appeals, which found that the FEC regulation was not plainly foreclosed by the language of the statute. The court sent the matter back to the district court for further proceedings to determine whether the regulation was an arbitrary and capricious interpretation of the law.[43] The district court, in turn, has given the FEC an opportunity to clarify its disclosure regulation and the case is pending.

Meanwhile, experience has borne out the fact that the Commission's 2007 disclosure regulation gutted the statute's contribution disclosure requirement. An estimated $400 million was spent by nonprofit groups to influence the 2012 national elections with virtually no disclosure of the donors who financed these massive "dark money" expenditures.[44] The FEC regulation has effectively interpreted out of existence the statutory requirement for contribution disclosure by outside spending groups making "electioneering communications."

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[41] Van Hollen v. FEC, 851 F. Supp. 2d 69, 83 (D.D.C. 2012).
[42] *Id.* at 84.
[43] Ctr. for Individual Freedom v. Van Hollen, 694 F.3d 108 (D.C. Cir. 2012).
[44] Paul Blumenthal, *'Dark Money' in 2012 Election Tops $400 Million, 10 Candidates Outspent by Groups with Undisclosed Donors*, HUFFINGTON POST, Nov. 2, 2012, http://www.huffingtonpost.com/2012/11/02/dark-money-2012-election-400-million_n_2065689.html.

III. The Failure to Enforce Commission

While the FEC has historically been ineffective and subject to partisan deadlock on key issues, the degree of dysfunction at the agency in recent years has reached unprecedented levels. This core problem for the agency stems from the fact that the three Republican commissioners currently serving on the six-member body are ideologically opposed to the campaign finance laws. As a result, these commissioners have consistently blocked even routine enforcement of the law. A *Washington Post* editorial on June 15, 2009 captured the role played at the FEC by the Republican commissioners:

> The three Republican appointees are turning the commission into The Little Agency That Wouldn't: wouldn't launch investigations, wouldn't bring cases, wouldn't even accept settlements that the staff had already negotiated. This is not a matter of partisan politics. These commissioners simply appear not to believe in the law they have been entrusted with enforcing.[45]

A *New York Times* editorial on April 17, 2009 similarly noted:

> [The agency] has become a model of repeated dysfunction as its three Republican members vote together to block major enforcement efforts affecting violators—from either party—producing 3-3 standoffs.[46]

If anything, the enforcement problem at the FEC has only gotten worse since 2009. The Republican commissioners have consistently blocked the agency's professional staff from pursuing enforcement matters and have worked to prevent laws on the books from being properly interpreted. This concerted campaign has effectively shut down any significant enforcement of the nation's campaign finance laws and has made the FEC nonfunctional.

Examples abound of the refusal of the Republican commissioners to enforce the laws.[47] In two cases, for example, respondents had already agreed to conciliation

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[45] Editorial, *Deadlocked in Regulation*, WASH. POST, June 15, 2009, http://www.washingtonpost.com/wp-dyn/content/article/2009/06/14/AR2009061402400.html.

[46] Editorial, *Mr. Obama's Chance to Fix the F.E.C.*, N.Y. TIMES, Apr. 16, 2009, http://www.nytimes.com/2009/04/17/opinion/17fri3.html.

[47] Fred Wertheimer, *Mayday, Mayday at the Federal Election Commission*, DEMOCRACY 21, May 9, 2009, http://www.democracy21.org/index.asp?Type=B_PR&SEC=%7B240FF259-2264-46CE-94C4-882DD39A1496%7D&DE=%7B2F9ED0AD-D6F4-4047-A43F-E09D95E33AEC%7D("[T]he FEC's three Republican commissioners had voted to reverse the agency's course on key issues. . . . The recent votes represent a sharp break with the past. In late 2006 and throughout 2007, for example, different casts of

agreements, or "plea bargains," and to pay civil penalties. Nevertheless, the three Republican commissioners voted to reject the "plea bargain" agreements and instead killed the enforcement actions altogether. In one of these cases involving The November Fund, a 527 group[48] created by the Chamber of Commerce, the FEC professional staff entered into a conciliation agreement with the group regarding soft money expenditures the group made to influence the 2004 presidential election in support of President Bush. The 527 group agreed to pay a civil penalty as part of the agreement. The three Republican commissioners, however, refused to accept the "plea bargain" agreement and instead killed the enforcement action. Democratic Commissioners Ellen Weintraub and Cynthia Bauerly challenged their Republican colleagues "refusal to enforce the law" as a "dramatic departure . . . from the Commission's prior enforcement efforts and the laws itself."[49]

In the second case, involving a Democratic congressional candidate, the candidate's campaign committee entered into a conciliation agreement with the FEC professional staff regarding the committee's failure to provide full disclosure information for nearly 90 percent of its contributors who gave more than $200. The candidate's committee sent in a check to pay for the civil penalty imposed by the agreement. Despite the "plea bargain" agreement, and the support of the three Democratic commissioners for pursuing an enforcement action against the Democratic candidate, the three Republican commissioners rejected the conciliation agreement and instead killed the enforcement action.[50]

There are numerous examples where the Republican commissioners have blocked enforcement actions against Democratic respondents that were proposed by the FEC professional staff and supported by the Democratic commissioners. The fact that the Republican commissioners voted not to pursue enforcement actions recommended by the staff against Democratic candidates that even the Democratic commissioners supported illustrates their across-the-board ideological opposition to the campaign finance laws.

- A former employee of the Washington State Democratic Central Committee admitted to a "knowing and willful" violation of the law by embezzling $65,000 from the Democratic Party committee. The FEC professional staff recommended an enforcement action against the Democratic Party employee, and the three Democratic commissioners

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FEC commissioners voted unanimously to impose some of the largest FEC fines ever in key cases involving controversial issues, such as restrictions on 527 groups.") (quoting a Jan. 5, 2009 BNA MONEY AND POLITICS Report).

[48] "527 groups" are groups organized as "political organizations" under §527 of the tax code, but not registered as "political committees" under the federal campaign finance laws. They accordingly claim the right to operate free of restrictions that apply to registered political committees.

[49] *See* Wertheimer, *supra* note 47.

[50] *See id*.

supported the staff recommendation. The three Republican commissioners, however, rejected the recommendation and killed the enforcement action. "This result was at odds with similar cases which resulted in large fines and in some cases jail terms."[51]

- In another case, the FEC professional staff, supported by two Democratic commissioners (the third Democrat recused herself), recommended that the Commission find "probable cause" that the Democratic Congressional Campaign Committee had violated the disclaimer requirement in the law. The three Republican commissioners rejected the recommendation and killed the enforcement action.

- The FEC professional staff recommended pursuing a complaint filed by the Arizona Republican party against the Arizona Democratic Party for illegally laundering soft money. The Democratic commissioners supported pursuing the enforcement action. The three Republican commissioners voted to dismiss the complaint and killed the enforcement action.

- The FEC professional staff wanted to pursue an enforcement lawsuit against billionaire Democratic supporter George Soros for failing to disclose independent expenditure activities attacking President Bush and supporting Senator Kerry in the 2004 presidential election. The Democratic commissioners supported pursuing the enforcement lawsuit against Soros. The three Republican commissioners rejected the lawsuit and killed the enforcement action.

- In a case involving the American Leadership Project, a 527 political group, a complaint was filed that the group illegally spent soft money to promote Senator Hilary Clinton's presidential campaign during the 2008 primary election. Two Democratic commissioners voted to find "reason to believe" that a violation had occurred and to pursue the case. (The third Democratic commissioner recused herself.) The three Republican commissioners voted to dismiss the complaint, killing the enforcement action.

- In a case involving improper payments by the Georgia Democratic Party from a soft money account, the three Democratic commissioners voted to pursue the investigation on the recommendation of the FEC professional staff. The three Republican commissioners voted against pursuing the case and killed the enforcement action.

[51] *See id*. (quoting a Jan. 5, 2009 BNA MONEY AND POLITICS Report).

There are also numerous examples of the Republican commissioners blocking enforcement action against Republicans. Here are two examples.

- The FEC professional staff, supported by the three Democratic commissioners, wanted to pursue an enforcement action against the 2008 Republican presidential candidate Mitt Romney's campaign for accepting an illegal in-kind contribution of $150,000. The Romney supporter chartered an airplane to fly a group of other Romney supporters from Salt Lake City to Boston for a fundraising event. The three Republican commissioners voted to reject the complaint and killed the enforcement action. Democratic commissioners Weintraub and Bauerly stated that this "was not a difficult case" under long-established law.

- In a case involving a Republican congressional candidate, the FEC professional staff recommended the Commission find "probable cause" that the candidate violated the "personal use" prohibition in the law after the candidate took $70,000 from the sale of the campaign's contributor lists to a vendor. The three Democratic commissioners voted to pursue the enforcement action. The three Republican commissioners rejected the professional staff's recommendation, and killed the enforcement action.

The pattern of these and others FEC cases makes clear that the three Republican commissioners currently on the FEC are ideologically opposed to the campaign finance laws and have fundamentally undermined the laws by refusing to enforce them.

IV. Solutions

A. President Obama and FEC Appointments

President Obama has his share of responsibility for the current problems at the FEC because he has failed to nominate new commissioners to the agency, even though he has long had the opportunity to do so. The president could nominate five new commissioners to the FEC tomorrow. Currently, there are four lame duck commissioners who have continued to serve on the FEC in hold-over status long after their terms expired. (A fifth commissioner who also had lame duck status has stepped down from the commission, and the sixth commissioner will become a lame duck on April 30, 2013.)

The lame duck commissioners are ineligible to be reappointed to the agency but can continue serving on the FEC until their replacements are sworn in. President Obama could have acted long ago to nominate new commissioners, but has treated the problems of a dysfunctional campaign finance enforcement agency as a matter of little concern to his administration. Even if the president faced a filibuster in confirming his appointments, the nomination of new FEC commissioners would force the Senate to

stand up and be counted. Each senator would be required to take a public stand on whether they support or oppose the current lack of enforcement of the nation's campaign finance laws. As long as President Obama fails to nominate new commissioners, however, the absence of FEC enforcement of the campaign finance laws in the first instance rests with the president.

During his 2008 presidential campaign, then-Senator Obama was more than ready to take on the problems at the FEC. As a presidential candidate, Senator Obama said:

> I believe that the FEC needs to be strengthened and that individuals named to the Commission should have a demonstrated record of fair administration of the law and an ability to overcome partisan biases. My initial goal as president will be to determine whether we can make the FEC more effective through appointments. What the FEC needs most is strong, impartial leadership that will promote integrity in our election system . . . . As president, I will appoint nominees to the Commission who are committed to enforcing our nation's election laws.[52]

With the exception of one unsuccessful attempt in 2009, however, President Obama has not only failed to nominate commissioners "committed to enforcing our nation's election laws," but he has failed to nominate *anyone* to serve on the FEC.[53] The president has stood by idly while the number of lame duck commissioners grew to five of the six seats, and the Republican commissioners continued to block enforcement of the laws.

In making new nominations to the FEC, it is essential for President Obama to abandon the business-as-usual approach of letting congressional party leaders select the nominees. This approach has played a pivotal role in creating the failed agency we have today. Democracy 21[54] and other reform groups have proposed that President Obama establish a bipartisan advisory group of distinguished individuals to recommend qualified nominees for each seat available on the commission. The president could then choose nominees based on these recommendations and in compliance with the statutory requirement that no more than three members of a political party can serve on the

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[52] MIDWEST DEMOCRACY NETWORK QUESTIONNAIRE, ISSUE FEC REFORM, 5 (2007), *available at* http://www.midwestdemocracynetwork.org/files/pdf/PresidentialQuestionnaire_FirstResponses.pdf.

[53] John Israel, *Withdrawn FEC Nominee Laments 'Broken' Confirmation Process*, CTR. FOR PUB. INTEGRITY, Oct. 7, 2012, http://www.publicintegrity.org/2010/10/07/2450/withdrawn-fec-nominee-laments-broken-confirmation-process.

[54] Democracy 21 is a nonpartisan, nonprofit, organization that works to strengthen our democracy and ensure the integrity and fairness of government decisions and elections. Its main focus is promoting effective campaign finance laws to protect against the corruption of federal officeholders and government decisions and to engage and empower citizens in the political process.

commission at the same time. In any event, President Obama must nominate new commissioners who are committed to enforcing the campaign finance laws if we are to get beyond the current dysfunctional FEC.

B. Democracy 21 Task Force Proposals

In December 2000, Democracy 21 established a bipartisan task force composed of campaign finance and enforcement experts at the national, state, and local levels to examine the failure of the FEC to effectively oversee and enforce the federal campaign finance laws, and to make recommendations on how to address this problem.[55] After studying the FEC for more than a year, the task force concluded that the FEC's problems require fundamental, not incremental, structural change in order to be solved. The FEC has become a classic example of a "captured" agency; an agency serving the interests of the community it is supposed to regulate. The commission needs to be replaced by a new enforcement entity to fully eliminate its structural and historical failings, and to "achieve the independence, credibility and effectiveness that are essential to a workable system."[56]

1. A Single Administrator

The Democracy 21 task force identified several foundational principles to guide the creation of a new enforcement agency. It recommended that "[a] new agency headed by a single administrator should be established with responsibility for the civil enforcement of the federal campaign finance laws." It concluded that the FEC, as currently structured, has become a highly politicized agency. This has produced a culture of responding both to the interests of the federal officeholders and party leaders who select the leadership of the FEC and to the interests of the campaign finance community it is supposed to regulate. To establish an effective and credible enforcement agency, the structure and leadership of a new agency must be freed from the partisan and ideological divisions that have prevented effective enforcement of the campaign finance laws.

The task force concluded that restructuring the agency around a single administrator would "provide the best opportunity for obtaining a highly qualified and publically credible person to lead the agency who could command the nation's respect and confidence"[57] and would eliminate the often deadlocked divisions of the current six-member body. The *Washington Post* has endorsed a similar concept:

> A far better model would put civil enforcement under the direction of one person, who—like the FBI director—would serve a term of years not corresponding to that of the President who appoints him or the Senators who confirm

[55] *See* NO BARK, NO BITE, NO POINT, *supra* note 1 at 33–46.
[56] *See id.* at 35.
[57] *See id*.

> him. This person would not be nearly so answerable to the regulated community as are the current commissioners.[58]

While an agency under the control of one individual would raise concerns of partisan decision-making, the presidential nominee would have to be confirmed by the Senate. Given the Senate's 60-vote requirement to overcome a filibuster against confirmation, each party would likely have veto power if they deemed the nominee too partisan.

2. A New Decision-Making Structure

To help prevent partisan decisions, the task force also recommended that the decision-making structure of the new agency include a system of impartial administrative law judges to hear enforcement cases and make initial decisions about potential violations of the law. It further recommended that "the new agency should have the authority to act in a timely and effective manner and to impose appropriate penalties on violators, including civil money penalties and cease-and-desist orders, subject to judicial review."[59]

Under the current system, the FEC can only seek to enter a conciliation agreement with a respondent to decide and settle an enforcement matter, invariably a lengthy process. And if no agreement is reached, the agency must pursue civil action in federal court, an additional lengthy process. This has led to long delays in resolving enforcement matters. To deal with this flawed process, the new agency must have the power to directly impose penalties for violations of the campaign finance law, including civil money penalties and cease-and-desist-orders. The goal of this proposed new system, according to the task force, is to "provide real time penalties for violations of the campaign finance laws, where possible, in order to remove the perception that there is no cost to violating the law."[60]

The task force also recommended that "the criminal enforcement process should be strengthened and a new limited private right of action should be established where the agency chooses not to act."[61] The task force recommended that the agency should have the discretionary authority to authorize a private complainant to "pursue a matter directly in court on the merits if the agency decides not to act on an enforcement matter brought to it by a private complainant."[62]

3. An Adequately Resourced Agency

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[58] Editorial, *Rethinking the FEC*, WASH. POST, Mar. 5, 1999, at A32.
[59] *See* NO BARK, NO BITE, NO POINT, *supra* note 1, at 40–43.
[60] *See id*. at 43.
[61] *See id*. at 44.
[62] *See id*. at 45.

An approach must also be established to help ensure that the agency receives adequate resources to carry out its enforcement responsibilities. The FEC has an inherent conflict problem as it is funded by the very individuals who it is responsible for regulating. Congress has historically underfunded the FEC's enforcement efforts and imposed constraints on how the agency can use the money it receives. To help solve this problem, the task force recommended that the General Accounting Office make recommendations on the funding level that would be necessary for an effective new agency. It also recommended multi-year funding for the new agency, to provide stability during the course of an election cycle.

4. Legislative Response to the Task Force Proposals

The task force recommendations were incorporated into the Federal Election Administration Act of 2003 (FEA),[63] legislation introduced by Senators John McCain and Russ Feingold, and Representatives Christopher Shays and Marty Meehan, the sponsors of BCRA. One significant change to the legislation was based on the recommendations presented by the task force: the FEA provided for two additional administrators, one from each party, to join the lead administrator, who would have responsibility for running the day-to-day operations of the agency. The lead administrator would have a longer term than the other two administrators, whose principal roles would be to vote on formal actions to be taken by the agency. The FEA was reintroduced in succeeding Congresses through 2010, but Congress has shown no inclination even to examine the problems that exist with campaign finance enforcement. The legislation is expected to be reintroduced in the current Congress, and efforts will be made to obtain serious congressional consideration of the need to address the abject failure to enforce the campaign finance laws.

V. Conclusion

The FEC today is controlled by three Republican commissioners who are ideologically opposed to the campaign finance laws they were appointed to enforce. The commissioners consistently block agency action and prevent the proper enforcement and interpretation of those laws. As a result, it is widely recognized that the nation's campaign finance laws—enacted to prevent corruption and the appearance of corruption—are not being enforced. They will not be enforced in the future as long as these commissioners control the agency.

The responsibility to address this problem lies, in the first instance, with President Obama, who must nominate new commissioners to the FEC who are committed to enforcing the laws. As long as the president fails to act, we will continue to have a dysfunctional FEC. In the longer term, the structural problems that have caused the FEC

[63] Federal Election Administration Act, S. 1388, 108th Cong. (2003).

to be an ineffective agency throughout its history must be addressed. A new campaign finance enforcement agency is needed with the authority, power and independence to effectively enforce the laws. The current situation demands a real campaign finance enforcement agency to enforce the campaign finance laws and protect the integrity of our elections.

Democracy 21
2000 Massachusetts Avenue, NW
Washington, DC 20036
p: 202.355.9600 f: 202.355.9606
www.democracy21.org

Fred Wertheimer
President

July 27, 2011

The Honorable Douglas H. Shulman
Commissioner, Internal Revenue Service
1111 Constitution Avenue Northwest
Washington, DC 20224

Dear Commissioner Shulman,

Enclosed is a petition for IRS rulemaking submitted by Democracy 21 and the Campaign Legal Center.

Sincerely,

Fred Wertheimer
President, Democracy 21

Before the Internal Revenue Service
U.S. Department of the Treasury

Petition for Rulemaking On Campaign Activities by Section 501(c)(4) Organizations

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Introduction

1. This petition for rulemaking, filed by Democracy 21 and the Campaign Legal Center, calls on the IRS to revise its existing regulations relating to the determination of whether an organization that intervenes or participates in elections is entitled to obtain or maintain an exemption from taxation under 26 U.S.C. § 501(c)(4). The existing IRS regulations do not conform with the statutory language of section 501(c)(4) of the Internal Revenue Code (IRC) nor with the judicial decisions that have interpreted this IRC provision and are, accordingly, contrary to law.

2. Following the Supreme Court's ruling last year in *Citizens United v. Federal Election Commission*, 130 S.Ct. 876 (2010), which struck down the ban on corporate spending in federal campaigns, non-profit corporations organized as "social welfare" organizations under section 501(c)(4) of the IRC engaged in an unprecedented amount of campaign spending to influence the 2010 congressional elections. According to the Center for Responsive Politics, spending by all section 501(c) groups in the 2010 election is estimated to have totaled as much as

$135 million.[1] Virtually all of the money used for these campaign expenditures came from sources kept secret from the American people. The 2010 campaign thus witnessed the return of huge amounts of secret money to federal elections not seen since the era of the Watergate scandals.

3. Section 501(c)(4) of the IRC establishes tax-exempt status for "[c]ivic leagues or organizations not organized for profit but operated exclusively for the promotion of social welfare. . . ." 26 U.S.C. § 501(c)(4) (emphasis added). IRS regulations make clear that spending to intervene or participate in political campaigns does not constitute "promotion of social welfare." 26 C.F.R. § 1.501(c)(4)-l(a)(2)(ii).

4. Current IRS regulations, nevertheless, authorize section 501(c)(4) organizations to intervene and participate in campaigns as long as such campaign activities do not constitute the "primary" activity of the organization, which must be the promotion of social welfare. 26 C.F.R. § 1.501(c)(4)–1(a)(2)(i). The "primary" activity standard established by the IRS regulation is not further defined by the IRS. Instead, a revenue ruling explains that "all facts and circumstances are taken into account in determining a § 501(c)(4) organization's primary activity." Practitioners, however, have interpreted this "primary" activity requirement to mean that section 501(c)(4) organizations can spend up to 49 percent of their total expenditures in a tax year on campaign activities, without such campaign activities constituting the "primary" activity of the organization.

5. These regulations and interpretations are in direct conflict with the statutory language of the IRC that requires section 501(c)(4) organizations to engage *exclusively* in the promotion of social welfare and with court decisions that have held that section 501(c)(4)

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[1] *See* http://www.opensecrets.org/outsidespending/summ.php?cycle=2010&disp= O&type =U&chrt=D.

organizations cannot engage in a substantial amount of "nonexempt activity," such as campaign activity. Contrary to the IRC language and court decisions, the regulations permit 501(c)(4) organizations to engage in *substantial* campaign activity, as long as this nonexempt activity falls just short of being the organization's "primary" activity. Thus the regulations permit far more campaign activity by a 501(c)(4) organization than the limited amount allowed by the statute and court decisions. The IRS's regulations conflict with the IRC and court decisions interpreting the IRC, and are contrary to law.

6. This petition calls on the IRS to expeditiously adopt new regulations to provide that an organization that intervenes or participates in elections is not entitled to obtain or maintain tax- exempt status under section 501(c)(4) if the organization spends *more than an insubstantial amount* of its total expenditures in a tax year on campaign activity. The new regulations should include a bright-line standard to make clear that an "insubstantial amount" of campaign activities means a minimal amount, not 49 percent, of its activities. The bright-line standard should place a ceiling on campaign expenditures of no more than 5 or 10 percent of total annual expenditures in order to comply with the standard used by the courts that a section 501(c)(4) organization may engage in no more than an insubstantial amount of non-exempt activity.

7. Such a bright-line standard is necessary to ensure that the public and the regulated community have clear and proper guidance on the total amount of campaign activity that a section 501(c)(4) organization can conduct and to assist the IRS in obtaining compliance with, and in properly enforcing, the IRC.

8. If a section 501(c)(4) organization wants to engage in more than the insubstantial amount of campaign activities permitted by the IRC and court decisions, the organization can

establish an affiliated section 527 organization to do so. The IRS regulations, however, must make clear that a section 527 organization (or any other person) cannot be used by a section 501(c)(4) organization to circumvent the limit on how much a 501(c)(4) organization can spend on campaign activities. Accordingly, the new regulations should provide that a section 501(c)(4) organization may not obtain or maintain tax-exempt status if the section 501(c)(4) organization transfers funds to a section 527 organization or to any other person during its taxable year with the intention or reasonable expectation that the funds will be used to intervene or participate in campaigns, and if the transferred funds, when added to the amount directly spent by the section 501(c)(4) organization on campaign activities during the same taxable year exceeds the insubstantial amount restriction imposed by the IRC and the courts.

9. The petition calls on the IRS to act promptly to ensure that new regulations are put in place and made effective on a timely basis for the 2012 elections. The IRS must recognize the urgent need to prevent section 501(c)(4) organizations from being improperly used to spend hundreds of millions of dollars in secret contributions to influence the 2012 presidential and congressional elections.

Petitioners

10. Democracy 21 is a nonpartisan, nonprofit organization that works to strengthen our democracy, protect the integrity of our political system against corruption and provide for honest and accountable elected officeholders and public officials. The organization promotes campaign finance reform, lobbying and ethics reforms, transparency and other government integrity measures, conducts public education efforts to accomplish these goals, participates in litigation involving the constitutionality and interpretation of campaign finance laws and engages in efforts to help ensure that campaign finance laws are properly enforced and implemented.

11. The Campaign Legal Center is a nonpartisan, nonprofit organization that works in the areas of campaign finance and elections, political communication and government ethics. The Campaign Legal Center offers nonpartisan analyses of issues and represents the public interest in administrative, legislative and legal proceedings. The Campaign Legal Center also participates in generating and shaping our nation's policy debate about money in politics, disclosure, political advertising, and enforcement issues before the Congress, the Federal Communications Commission, FEC and the IRS.

Factual Background

12. The *Citizens United* decision was issued by the Supreme Court on January 21, 2010. According to one published report, "[O]utside groups were able to adapt quickly and take advantage of the *Citizens United* decision in early 2010 to spend enough to impact congressional elections just nine months later."[2] Much of this outside spending was done by section 501(c)(4) organizations that made campaign expenditures without disclosing the sources of these funds.

13. Section 501(c)(4) organizations played an important overall role in the 2010 campaign. A recent article in *Roll Call* states:

> Republican political operatives bestow immense credit for their party's competitiveness in 2010 on organizations such as Crossroads GPS and the American Action Network, both 501(c)(4) organizations. These groups can accept large donations they do not have to disclose, and Republicans believe their participation in the campaign brought the party to parity with Democrats, who typically benefit from the largesse of organized labor.[3]

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[2] K. Doyle, "2010 Battle Over Citizens United Ruling Still Unresolved as 2012 Campaign Looms," *BNA Money & Politics Report* (Jan. 12, 2011)

[3] A. Becker and D. Drucker, "Members Weigh in on Draft Disclosure Order," *Roll Call* (May 24, 2011).

14. The role of secret money in the 2010 congressional races is illustrated by the activities of Crossroads GPS ("GPS" stands for "Grassroots Policy Strategies"), which was organized in July 2010 under section 501(c)(4) and was one of the organizations that engaged in the greatest amount of independent spending to influence the 2010 congressional races.[4] Crossroads GPS is affiliated with American Crossroads, a non-profit political organization registered under 26 U.S.C. §527. American Crossroads is registered with the Federal Election Commission as a political committee under the Federal Election Campaign Act.

15. According to a report in *Time*, "American Crossroads was the brainchild of a group of top Republican insiders, including two of George W. Bush's closest White House political advisers, Karl Rove and Ed Gillespie, both of whom remain informal advisers."[5] Another published report referred to American Crossroads and Crossroads GPS as "a political outfit conceived by Republican operatives Karl Rove and Ed Gillespie."[6] According to the *Los Angeles Times*, both groups "receive advice and fundraising support from Rove."[7]

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[4] Democracy 21 and the Campaign Legal Center filed an IRS complaint against Crossroads GPS on October 5, 2010, requesting the IRS to investigate whether Crossroads GPS was operating in violation of the current requirements for obtaining or maintaining section 501(c)(4) tax status. Even under the existing, overly permissive IRS regulations, the complaint said the IRS "should investigate whether Crossroads GPS has a primary purpose of 'participation or intervention in political campaigns on behalf of or in opposition to' candidates for public office, which is not a permissible primary purpose for a section 501(c)(4) organization." Complaint at 15.

[5] M. Crowley, "The New GOP Money Stampede," *Time* (Sept. 16, 2010).

[6] K. Vogel, "Rove-tied group raises $2 million," *Politico* (Aug. 21, 2010).

[7] M. Reston and A. York, "Karl Rove-linked group launches new hit against Boxer," *The Los Angeles Times* (Aug. 25, 2010).

16. According to the Center for Responsive Politics, Crossroads GPS spent a total of $17.1 million on campaign activity, including both independent expenditures and electioneering communications, in the 2010 federal elections.[8]

17. According to published reports, Crossroads GPS was created as a section 501(c)(4) group to receive contributions to pay for campaign expenditures from donors who wanted to secretly influence federal elections and did not want their names disclosed, as they would have been if the contributions had gone instead to its section 527 affiliate, American Crossroads, which is required to disclose its donors.

18. As one published report states:

> A new political organization conceived by Republican operatives Karl Rove and Ed Gillespie formed a spin-off group last month that – thanks in part to its ability to promise donors anonymity – has brought in more money in its first month than the parent organization has raised since it started in March.[9]

The same article quotes Steven Law, the head of both American Crossroads and Crossroads GPS as saying that "the anonymity of the new 501(c)(4) GPS group was appealing for some donors." *Id.* The article also states:

> [A] veteran GOP operative familiar with the group's fundraising activities said the spin-off was formed largely because donors were reluctant to see their names publicly associated with giving to a 527 group, least of all one associated with Rove, who Democrats still revile for his role in running former President George W. Bush's political operation.

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[8] *See* http://www.opensecrets.org/outsidespending/detail.php?cmte=Crossroads+ Grassroots+ Policy+Strategies&cycle=2010.

[9] K. Vogel, "Rove-linked group uses secret donors to fund attacks," *Politico* (July 21, 2010) (emphasis added).

Id. In another article, Law is quoted as saying, "I wouldn't want to discount the value of confidentiality to some donors."[10]

19. Another published report calls Crossroads GPS a "spinoff of American Crossroads" and states that "this 501-c-4 group can keep its donor list private – a major selling point for individuals and corporations who want to anonymously influence elections."[11] At a public appearance, Carl Forti, the political director for Crossroads GPS and its affiliate, American Crossroads, made clear that campaign spending was directed through a 501(c)(4) arm precisely because American Crossroads is seeking to provide donors with the opportunity to secretly finance these campaign expenditures:

> Forti acknowledged that his group relied heavily on its nonprofit arm, which isn't required to name the sources of its funding, simply because "some donors didn't want to be disclosed. . . .I know they weren't comfortable."[12]

In another article, Forti is quoted as saying, "You know, disclosure was very important to us, which is why the 527 was created. But some donors didn't want to be disclosed, and, therefore, the (c)(4) was created."[13]

20. According to press reports, Crossroads GPS will remain very active in the 2012 elections. One report states that American Crossroads, the section 527 arm, engaged in heavy

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[10] K. Vogel, "Crossroads hauls in $8.5M in June," *Politico* (June 30, 2010).

[11] H. Bailey, "A guide to the 'shadow GOP': the groups that may define the 2010 and 2012 elections," *The Upshot-Yahoo News* (Aug. 5, 2010).

[12] S. Peoples, "Groups Target Democrats Using Nancy Pelosi," *Roll Call* (Dec. 14, 2010).

[13] P. Overby, "Group Behind Election Ads Weighs In On Tax Deal," *National Public Radio* (Dec. 14, 2010).

spending in a special congressional election in New York State held in May, 2011. According to this report:

> Crossroads and its nonprofit affiliate, Crossroads GPS, have vowed to raise $120 million for the 2012 cycle.
>
> Crossroads spokesman Jonathan Collegio said. . .Crossroads will continue to spend heavily in many competitive races through next November.
>
> "The Crossroads groups have stated that we'll be involved heavily in 2012, both in congressional races and the presidential side as well," Collegio said.[14]

The statement by the Crossroads spokesman makes clear that Crossroads GPS, the section 501(c)(4) arm, will be "heavily" involved in spending to influence the 2012 federal elections. According to another recent report, "American Crossroads and Crossroads GPS, two groups that have relied heavily on fundraising help from political guru Karl Rove, have said they're aiming to raise $120 million for the next election, versus the $71 million they raised in 2010. . . .In an early sign of its financial strength, Crossroads GPS announced Friday that it was launching a two-month, $20 million television ad blitz attacking Obama's record on jobs, the deficit and the overall economy. The first ads will start June 27 and run in key battleground states such as Colorado, Florida, Missouri, Nevada and Virginia."[15]

21. Section 501(c)(4) groups will be used by both Democratic and Republican groups in 2012 as vehicles to allow anonymous donors to secretly finance campaign expenditures. (In the 2010 congressional races, the section 501(c)(4) groups were primarily pro-Republican groups.) According to an article in the *Los Angeles Times* (April 29, 2011), former Obama

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[14] D. Eggen, "Political groups, now free of limits, spending heavily ahead of 2012," *The Washington Post* (May 21, 2011) (emphasis added).

[15] P. Stone, "Obama groups raise $4-5 million in first two months," *iWatch News – The Center for Public Integrity* (June 24, 2011) (http://www.iwatchnews.org/2011/06/24/5025/obama-groups-raise-4-5-million-first-two-months).

White House officials and Democratic political operatives Bill Burton and Sean Sweeney have formed a new section 501(c)(4) group to participate in the 2012 presidential election:

> Priorities USA has been formed as a 501(c)(4) organization – a nonprofit social welfare group that can raise unlimited amounts of money without disclosing the identity of its donors. It putatively is designed to focus on issues – in this case, "to preserve, protect and promote the middle class" – but can spend up to half its money on political activities.[16]

An article in the *New York Times* states:

> The groups are to be called Priorities USA and Priorities USA Action, and, as such, are modeled after the Republican groups American Crossroads and Crossroads GPS that were started with the help from the strategist Karl Rove and were credited with helping greatly in the party's takeover of the House of Representatives this year – and, it happens, with facilitating a waterfall of anonymous donations from moneyed interests in the November elections.
>
> Like Crossroads GPS, Democrats connected to the groups – including a close onetime aide to Mr. Obama, the former deputy White House spokesman Bill Burton, and Sean Sweeney, a former aide to the former White House chief of staff Rahm Emanuel – said that Priorities USA would be set up under a section of the tax code that allows its donors to remain anonymous if they so choose (as most usually do).[17]

22. According to information compiled by the Center for Responsive Politics, there were 45 groups organized under section 501(c) of the Internal Revenue Code that reported making "independent expenditures" of $100,000 or more in the 2010 congressional elections, and which in aggregate totaled more than $50 million. These groups, with minor exceptions, did not disclose their donors.[18] "Independent expenditures" are defined as expenditures for

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[16] M. Gold, "Former Obama aides launch independent fundraising groups," *Los Angeles Times,* April 29, 2011.

[17] J. Rutenberg, "Democrats Form Fund-Raising Groups," *The New York Times* (April 29, 2011) (emphasis added).

[18] *See* http://www.opensecrets.org/outsidespending/summ.php?cycle=2010&chrt= D&disp= O&type=I.

communications that contain "express advocacy" or the "functional equivalent" of express advocacy. 2 U.S.C. § 431(17)(a). The top section 501(c)(4) groups in this category included:

501(c)(4) Corporation	Amount Spent on Independent Expenditures in 2010 Elections	Disclosure of Contributors Funding Independent Expenditures in 2010
Crossroads GPS	$16 Million	None
American Future Fund	$7.4 Million	None
60 Plus Association	$6.7 Million	None
American Action Network	$5.6 Million	None
Americans for Tax Reform	$4.1 Million	None
Revere America	$2.5 Million	None

23. According to the Center for Responsive Politics, there were 20 section 501(c) groups that reported spending $100,000 or more for "electioneering communications" in the 2010 congressional elections, expenditures that in aggregate totaled more than $70 million. These groups, with minor exceptions, did not disclose their donors.[19] "Electioneering communications" are defined as expenditures for broadcast ads that refer to federal candidates and are aired in the period 60 days before a general election or 30 days before a primary election. 2 U.S.C. § 434(f)(3). The top section 501(c)(4) groups in this category included:

501(c)(4) Corporation	Amount Spent on Electioneering Communications in 2010 Elections	Disclosure of Contributors Funding Electioneering Communications in 2010
American Action Network	$20.4 Million	None
Center for Individual Freedom	$2.5 Million	None
American Future Fund	$2.2 Million	None
CSS Action Fund	$1.4 Million	None
Americans for Prosperity	$1.3 Million	None
Crossroads GPS	$1.1 Million	None

[19] *See* http://www.opensecrets.org/outsidespending/summ.php?cycle=2010&chrt=V&disp=O&type=E.

24. The Center for Responsive Politics reports that, in aggregate, section 501(c) groups that disclosed none of their donors spent a total of more than $137 million on independent expenditures and electioneering communications to influence the 2010 elections.[20]

25. Campaign spending by section 501(c)(4) organizations is expected to greatly increase in the 2012 presidential and congressional races. As one published report states,

> [W]ith a full two years instead of a few months to adapt to the changed legal landscape, such outside groups may be poised to have even bigger impact, experts say. Additionally, Democratic-leaning groups were somewhat subdued in 2010, due at least partly to the public stance of Obama and top congressional Democrats in opposition to the *Citizens United* ruling and its impact on campaign spending. This may not be the case in 2012, as many observers predict that Democratic-leaning groups will gear up to compete more effectively.[21]

Since 2012 involves a presidential election as well as congressional races, and since it is expected that Democratic and Republican groups will use section 501(c)(4) organizations to make campaign expenditures in 2012, section 501(c)(4) organizations are expected to spend far greater amounts of secret contributions in the 2012 elections than they did in 2010, absent the IRS adopting new regulations on a timely basis to ensure that section 501(c)(4) organizations can engage in no more than an "insubstantial" amount of campaign activities, in compliance with the IRC and court decisions.

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[20] *See* http://www.opensecrets.org/outsidespending/summ.php?cycle=2010&chrt= D&disp =O&type=U.

[21] Doyle , *BNA Report, supra.*

Basis for New Rulemaking

26. Section 501(c)(4) of the Internal Revenue Code establishes tax-exempt status for "[c]ivic leagues or organizations not organized for profit but operated exclusively for the promotion of social welfare. . . ." 26 U.S.C. § 501(c)(4) (emphasis added).

27. IRS regulations state that spending to intervene or participate in campaigns does not constitute promotion of social welfare. Section 1.501(c)(4)-l(a)(2)(ii) of the IRS regulations states, "The promotion of social welfare does not include direct or indirect participation or intervention in political campaigns on behalf of or in opposition to any candidate for public office." 26 C.F.R. § 1.501(c)(4)–1(a)(2)(ii).

28. Contrary to the statutory language of the IRC, IRS regulations construe the requirement that a 501(c)(4) organization be "operated exclusively" for the promotion of social welfare to be met if the organization is "primarily engaged" in social welfare activities. This is a highly unusual interpretation of the word "exclusively." According to the IRS regulations, "An organization is operated exclusively for the promotion of social welfare if it is primarily engaged in promoting in some way the common good and general welfare of the people of the community. An organization embraced within this section is one which is operated primarily for the purpose of bringing about social betterments and civic improvements." 26 C.F.R. § 1.501(c)(4)–1(a)(2)(i) (emphasis added).

29. In a revenue ruling, the IRS has stated, "Although the promotion of social welfare within the meaning of section 501(c)(4)-1 of the regulations does not include political campaign activities, the regulations do not impose a complete ban on such activities for section 501(c)(4) organizations. Thus, an organization may carry on lawful political activities and remain exempt under section 501(c)(4) as long as it is engaged primarily in activities that promote social

welfare." Rev. Rul. 81–95, 1981–1 C.B. 332 (emphasis added). The "primarily engaged" standard established by the IRS regulation is not further defined by the IRS. Instead, a revenue ruling explains that "all facts and circumstances are taken into account in determining a § 501(c)(4) organization's primary activity." Rev. Rul. 68-45, 1968-1 C.B. 259.

30. In the absence of guidance from the IRS, practitioners have interpreted the "primarily engaged" standard to mean that a section 501(c)(4) organization can spend as much as 49 percent of its total expenditures in a taxable year on campaign activities and still be in compliance with the IRC. A report by the Congressional Research Service (CRS), for instance, states with regard to the "primarily engaged" standard, "some have suggested that primary simply means more than 50%. . . ."[22] The report notes that "others have called for a more stringent standard," but explains that even this "more stringent" standard would still permit substantial campaign expenditures of up to 40% of total program expenditures. *Id.*

31. Under the IRS "primarily engaged" standard, section 501(c)(4) groups have engaged in substantial campaign activity. This is contrary to the language of the IRC, which requires (c)(4) organizations to be "operated exclusively" for social welfare purposes and contrary to court rulings interpreting the IRC to mean that section 501(c)(4) organizations are not allowed to engage in a substantial amount of an activity that does not further their exempt purposes. As IRS regulations have made clear, intervention or participation in campaigns does not further the "social welfare" purposes of section 501(c)(4) organizations, and so the court rulings mean that section 501(c)(4) organizations cannot engage in more than an insubstantial amount of campaign activities.

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[22] Congressional Research Service, "501(c)(4) Organizations and Campaign Activity: Analysis Under Tax and Campaign Finance Law," R40183 (January 29, 2009) at 2.

32. The courts have interpreted the section 501(c)(4) standard that requires an organization to be "operated exclusively" for social welfare purposes the same way they have interpreted a parallel provision of section 501(c)(3) that requires an organization that is tax exempt under that provision to be "organized and operated exclusively" for charitable, education or similar purposes. In *Better Business Bureau v. U.S.*, 326 U.S. 279, 283 (1945), the Supreme Court construed a requirement that a non-profit organization be "organized and operated exclusively" for educational purposes to mean that "the presence of a single non-educational purpose, *if substantial in nature*, will destroy the exemption regardless of the number or importance of truly educational purposes." (emphasis added).

33. Based on the *Better Business Bureau* decision, the courts have concluded that the word "exclusively" in the context of sections 501(c)(3) and 501(c)(4) is "a term of art" that does not mean "exclusive" as that term is normally understood and used. The courts instead have said that, in the context of section 501(c)(4) of the IRC, this term means "that the presence of a single substantial non-exempt purpose precludes tax-exempt status regardless of the number or importance of the exempt purposes." *Contracting Plumbers Coop. Restor. Corp. v. U.S.*, 488 F.2d 684, 686 (2d. Cir. 1973) (section 501(c)(4)); *American Ass'n of Christian Sch. Vol. Emp. v. U.S.*, 850 F.2d 1510, 1516 (11th Cir. 1988) ("the presence of a substantial non-exempt purpose precludes exemption under Section 501(c)(4)"); *Mutual Aid Association v. United States,* 759 F.2d 792, 796 (10th Cir. 1985) (same; section 501(c)(4)). The courts have similarly held, in the context of section 501(c)(3) organizations, that "operated exclusively" test means that "not more than an insubstantial part of an organization's activities are in furtherance of a non-exempt purpose." *Easter House v. United States,* 12 Ct. Cl. 476, 483 (1987) (group not organized exclusively for a tax exempt purpose under section 501(c)(3)); *New Dynamics Foundation v.*

United States; 70 Fed. Cl. 782, 799 (Fed. Cl. Ct. 2006) (same); *Nonprofits Ins. Alliance of California v. U.S.,* 32 Fed. Cl. 277, 282 (Fed. Cl. Ct. 1994) (same).

34. Under these court rulings, a section 501(c)(4) organization cannot engage in more than an insubstantial amount of campaign activity and remain in compliance with the statutory requirements for tax-exempt status under section 501(c)(4). Any "substantial, non-exempt purpose" (such as campaign activity) will defeat an organization's tax-exempt status under section 501(c)(4). *Christian Sch. Vol. Emp., supra* at 1516.

35. Given that a number of section 501(c)(4) organizations have spent millions of dollars on campaign activities, and that it is reasonable to anticipate more will do so in 2012, it is clear that the current regulations are not preventing section 501(c)(4) organizations from impermissibly engaging in "substantial" campaign activities.

36. Accordingly, this petition calls on the IRS to promptly issue new regulations that properly define the statutory requirement for section 501(c)(4) organizations to be "operated exclusively" for social welfare purposes to mean that campaign activity may not constitute more than an insubstantial amount of the activities of a group organized under section 501(c)(4). These regulations are necessary to bring IRS rules into compliance with the IRC and with court rulings interpreting the IRC. The regulations also would have the effect of greatly diminishing the practice of section 501(c)(4) groups being improperly used to spend large amounts of secret contributions in federal elections.

37. In order to provide a clear definition of what constitutes an insubstantial amount of campaign activity, the IRS regulations should include a bright-line standard that specifies a cap on the amount that a section 501(c)(4) organization can spend on campaign activities. *See, e.g.,* 26 U.S.C. §501(h) (providing specific dollar limits on spending for lobbying activities by

section 501(c)(3) organizations). In order to comply with court decisions that limit spending for non-exempt purposes to an insubstantial amount, the bright line standard in the regulations should limit campaign expenditures to no more than 5 or 10 percent of the expenditures in a taxable year by a section 501(c)(4) organization.

38. The new regulations should ensure that a section 501(c)(4) organization cannot do indirectly through transfers what it is not permitted to do directly through its own spending. In order to accomplish this, the new regulations should provide that a section 501(c)(4) organization may not obtain or maintain its tax-exempt status if the it transfers funds to a section 527 organization or to any other person with the intention or reasonable expectation that the recipient will use those funds to intervene or participate in campaigns if, during the same taxable year, the amount of funds so transferred, when added to the amount spent directly for campaign activity by the section 501(c)(4) organization, exceeds an insubstantial amount of the total spending for the taxable year by the section 501(c)(4) organization.

Conclusion

39. Political operatives have established, and are continuing to establish, section 501(c)(4) organizations for the explicit purpose of providing a vehicle for donors to secretly finance campaign expenditures by these organizations. The overriding purpose of a number of these 501(c)(4) organizations is to conduct full-scale campaign activities in the guise of conducting "social welfare" activities.

40. IRS regulations that are contrary to law are enabling section 501(c)(4) organizations to conduct impermissible amounts of campaign activities and in doing so to keep secret from the American people the sources of tens of millions of dollars being spent by the

section 501(c)(4) organizations to influence federal elections. In so doing, the IRS regulations are serving to deny citizens essential campaign finance information that the Supreme Court in *Citizens United* said "permits citizens and shareholders to react to the speech of corporate entities in a proper way. This transparency enables the electorate to make informed decisions and give proper weight to different speakers and messages." 130 S.Ct. at 916.

41. The Supreme Court in *Citizens United* explained the importance to citizens of this disclosure, stating:

> With the advent of the Internet, prompt disclosure of expenditures can provide shareholders and citizens with the information needed to hold corporations and elected officials accountable for their positions and supporters.
>
> Shareholders can determine whether their corporation's political speech advances the corporation's interest in making profits, and citizens can see whether elected officials are "'in the pocket' of so-called moneyed interests."

Id. By an 8-1 vote, the Supreme Court in *Citizens United* held that disclosure of campaign activities by corporations, including tax-exempt corporations, is constitutional and serves important public purposes. Such disclosure, however, is being widely circumvented and evaded by section 501(c)(4) organizations as a result of improper IRS regulations and the failure of the IRS to properly interpret and enforce the IRC to prohibit section 501(c)(4) organizations from making substantial expenditures to influence political campaigns. This failure comes at great expense to the American people who have a right to know who is providing the money that is being spent to influence their votes.

42. The large scale spending of secret contributions in federal elections by section 501(c)(4) organizations is doing serious damage to the integrity and health of our democracy and political system. The IRS needs to act promptly to address this problem by issuing new regulations to stop section 501(c)(4) organizations from being improperly used to inject tens of

millions of dollars in secret contributions into federal elections. The new regulations must conform with the IRC and with court rulings interpreting the IRC. The regulations should provide a bright-line standard that implements the insubstantial expenditures standard set forth by the courts and specifies a limit on the amount of campaign activity that a section 501(c)(4) organization may undertake consistent with its tax-exempt status. The IRS needs to act expeditiously to ensure that the new regulations are in effect in time for the 2012 elections.

Respectfully submitted,

/s/ Fred Wertheimer

Fred Wertheimer
DEMOCRACY 21
2000 Massachusetts Ave, N.W.
Washington, D.C. 20036
(202) 355-9610

Donald J. Simon
SONOSKY CHAMBERS SACHSE
ENDRESON & PERRY, LLP
1425 K Street, N.W.
Suite 600
Washington, D.C. 20005
(202) 682-0240

Counsel for Democracy 21

J. Gerald Hebert
Paul S. Ryan
Tara Malloy
CAMPAIGN LEGAL CENTER
215 E Street NE
Washington, D.C. 20002
(202) 736-2200

Counsel for the Campaign Legal Center

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