U.S. Senate Judiciary Committee Subcommittee on Federal Courts, Oversight, Agency Action and Federal Rights:
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I am honored to speak to the Senate Judiciary Subcommittee on Federal Courts, Oversight, Agency Action and Federal Rights on what I believe to be one of the most important aspects of the challenge facing our republic today. Our nation stands at an important crossroad. It can be described as the intersection of law and democracy. What happens here, at this time, may determine the continued viability of what many are referring to as "the American experiment", suggesting that its success is not guaranteed. At least since the end of the Civil War, we have believed that the threat of disunion is no longer a danger, and that American democracy is vouchsafed by its Constitution, by the core principles in which its people believe, and by its institutions, including the Supreme Court. Recently that belief has been challenged and shaken, even here in these hallowed halls, where the sacred business of democracy is carried out. That belief is not only challenged by the political unrest and violence carried out by extremists on January 6th, 2021, as the Senate met to fulfill its Twelfth Amendment obligations, but also by at least two Supreme Court decisions that undermine democracy: *Citizens United v. FCC* in 2010 and *Shelby County v. Holder* in 2013.

Citizens United v. Federal Elections Commission[1] was a challenge to a law that prohibited corporations and private organizations from engaging in partisan electioneering. In 2008, when Hillary Clinton was a candidate for President of the United States, Citizens United, a conservative nonprofit organization, released in theatres and on DVD what purported to be a documentary film titled "Hillary: The Movie". Citizens United also explored a deal with an on demand online video streaming company which would make the film available for free.

The Bipartisan Campaign Reform Act of 2002 (the BCRA)[2] prohibited corporations and unions from making direct contributions to political candidates for certain qualified offices from general treasury funds. Corporations and unions are also barred from contributing to independent expenditures that, through any form of media, support or oppose political candidates for certain federal offices. The BCRA amended the Federal Elections Campaign Act of 1971 (FECA)[3], the Communications Act of 1934[4], and other parts of the U.S. Code[5]. In 2003, the Supreme Court described the BCRA as "the most recent federal enactment designed to ' purge national politics of what was conceived to be the pernicious influence of 'big money' campaign

[1] 558 U.S. 310 (2010).
[2] 116 Stat. 81; 2 U.S.C. §441 (b).
[3] 86 Stat. 11, as amended, 2 U.S.C.A. § 431, *et seq.*
[4] 48 Stat. 1088, as amended, 47 U.S.C.A. §315
[5] 18 U.S.C.A. §607 (Supp. 2003), 36 U.S.C.A. §§510-511; See *McConnell v. F.E.C.*, 540 U.S. (2003).

contributions."[6] The BCRA continued a century of national legislation aimed at limiting the influence of corporate wealth in American politics. The thread of this legislative intent weaves back through the Supreme Court's decision upholding the BCRA in *McConnell v. F.E.C.,* through *United States v. Automobile Workers*[7]*,* in which Justice Felix Frankfurter reached back to "President Theodore Roosevelt's call in 1907 for legislation forbidding all contributions by corporations "to any political committee or for any political purpose"[8]. Roosevelt's call led to the enactment of legislation aimed at keeping corporate money from corrupting democracy.

Frankfurter's opinion for the Court in *Automobile Workers* in 1957 pointed to "the integrity of our political process and … the responsibility of the individual citizen for the successful functioning of that process", matters "basic to a democratic society".[9] In sum, for more than a one hundred years, from the late Nineteenth Century through the Twentieth, and into the Twenty-first, Congress legislated, and the Supreme Court upheld, the principle that corporate money should not flow to electoral politics. It guided the Court's 1990 decision in *Austin v. Michigan Chamber of Commerce*[10]*, "*which held that political speech may be banned based on the speaker's corporate identity"[11]. That principle remained intact until the Supreme Court's 2010 *Citizens United* decision. Writing for a 5-4 Court, Justice Anthony Kennedy turned to the First Amendment, concluding that "*stare decisis* does not compel continued acceptance of *Austin*"[12], and that "[t]he Government may regulate corporate political speech through disclaimer and disclosure requirements, but it may not suppress that speech altogether"[13].

Thus, the Supreme Court has ruled that political speech by corporations is protected by the First Amendment, opening the floodgates of electoral politics to corporate money in a manner that gives thunderous voice to corporate creatures and dwarfs the voices of individual citizens. Corporations and wealthy individuals can give unlimited sums of money anonymously, distorting democratic processes and destroying democracy. The transmogrification of political speech is rendered complete by the role of "dark money", which hides the voices and identities of the powerful and the elite.[14] "Super PACs empower the wealthiest donors while hiding the identities of those who exercise outsized influence and control over the political system.

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[6] *McConnell v. FEC,* 540 U.S. (2003)
[7] 352 U.S. 567, 571 (1957)
[8] *Op cit.,* at .
[9] 352 U.S. at 570.
[10] 494 U.S. 652 (1990).
[11] 558 U.S. (2010).
[12] *Id*., at .
[13] Id., at .
[14] Jane Mayer, *Dark Money: The Hidden History of the Billionaires Behind the Rise of the Radical Right* (Doubleday, 2016)

Shelby County v. Holder

In 2006 I was the Director-Counsel and President of the NAACP Legal Defense Fund, the organization first led by Thurgood Marshall. During my time as Director-Counsel, the temporary provisions of the Voting Rights Act, originally enacted in 1965. The Voting Rights Act has been the crown jewel of civil rights legislation. As you know, some if its provisions are permanent; others periodically must be renewed if they are to continue in force. §5 of the VRA required jurisdictions with a history of racial discrimination in electoral politics to pre-clear electoral changes with either the U.S. District Court for the District of Columbia or with the Attorney General of the United States. Voting Rights advocates and lawyers came to the 2006 renewal process with a clear understanding that there would be opposition to renewal based on the passage of time and changed conditions. The record that was submitted to Congress was carefully constructed. Congress had before it substantial evidence that discrimination in electoral politics was a shape-shifting phenomenon which required constant recommitment to protection of the civil rights of African Americans.

Shelby County v. Holder did not come as a surprise. The author of the *Shelby County* spent a lifetime in opposition to the Voting Rights Act. While the vote to re-enact the expiring provisions of the VRA was overwhelming, it was always clear that the renewed Act would be challenged, and it would likely go to the Supreme Court.

Congress carefully reviewed all of the covered jurisdictions and considered the question of whether the bailout provision should change. Those of us who advocated for renewal of the expiring provisions of the VRA knew full well how important it was to ensure that the record in support of the renewed Act, in the name of Rosa Parks, Coretta Scott King, and Betty Shabazz, rested on strong evidence. I testified before both houses of Congress, and I have been no stranger to the Senate Judiciary Committee. Nothing was more important to those of us who advocated for the Act than to ensure that the Act would be upheld in Court.

Chief Justice John Roberts opined in Shelby County that fifty years after the passage of the VRA, things had changed drastically. There was truth in that statement, but not as much truth as the Chief Justice thought. Immediately after the Shelby County decision, a number of jurisdictions originally covered by §5, pursuant to the §4 coverage formula, enacted schemes intended to make voting more difficult for African Americans and Latinx people. It is clear beyond doubt that while there has been significant progress, the need for the VRA's §5 coverage pursuant to a new coverage formula was, and is, in fact, demonstrable. Rather than render §5 immune from review, as Chief Justice Roberts suggested, Congressional scrutiny of the VRA's temporary provisions, especially the now invalidated §4 coverage formula was intense and carefully calculated.

Chief Justice Roberts opined that "Today the nation is no longer divided along [race] lines, yet the Voting Rights Act treats it as if it were". One wonders, in this "George Floyd moment", and in this moment in which so many jurisdictions once covered by the §4 coverage formula, whether the Chief Justice still believes what he said in his *Shelby County* opinion. Our nation's

continuing struggle with race is still a central element of our identity. The renewal of the Voting Rights Act, and the negation of the Court's opinion in *Shelby County v. Holder*, is a national imperative. With all due respect, *Shelby County* was wrongly decided. It needs Congressional attention, and reconsideration by the United States Senate.