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FOR JUSTICE

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The Honorable Charles E. Schumer
313 Hart Senate Building
Washington, D.C. 20510

Dear Senator Schumer:

The Brennan Center for Justice at New York University School of Law greatly appreciates the opportunity to provide information regarding possible Congressional responses to the recent U.S. Supreme Court's decision in *Citizens United v. Federal Election Commission* on January 21, 2010. This letter will outline several of our proposals, highlighting our recently released policy proposal, *Corporate Campaign Spending: Giving Shareholder A Voice*, by Ciara Torres-Spelliscy.

The Brennan Center is a nonpartisan public policy and law institute that focuses on fundamental issues of democracy and justice. We extensively litigate in defense of public funding, disclosure and spending limit laws, including currently representing intervenors in cases now in federal court defending Connecticut's and Arizona's public funding laws.

In *Citizens United*, the Supreme Court gave an unequivocal green light for corporate money in elections, by outlawing under the First Amendment laws that heretofore banned corporate spending in elections. This radical decision defied more than 100 years of settled law. It rivals *Bush v. Gore* for the most aggressive intervention into politics by the Supreme Court in the modern era. Indeed, *Bush v. Gore* affected only one election – *Citizens United* will affect every election for years ahead.

The Court re-ordered the priorities in our democracy – amplifying special interests, and displacing the voices of the voters. It is true that there is already much money in politics. But the new ability of corporate managers to use funds from their treasuries to affect campaigns marks a breaking point: It is a difference in degree that has become a sharp difference in kind. As Justice Stevens powerfully warned, American citizens “may lose faith in their capacity, as citizens, to influence public policy” as a result.

To restore the primacy of voters in our elections and the integrity of the electoral process, the Brennan Center strongly endorses a four-step strategy to take back our democracy:

- Promote public funding of political campaigns
- Modernize voter registration
- Demand accountability
- Advance a voter-centric view of the First Amendment

We urge the Congress to take action to implement each of these four strategies.

Public Funding of Political Campaigns

Public funding is key to restoring confidence in American democracy and reducing the power of big money in elections. As the Court noted in *Buckley v. Valeo*, 424 U.S. 1, 92-93 (1976), such programs operate to “facilitate and enlarge public discussion and participation in the electoral process,” thus furthering First Amendment values for all. The recent explosion of small donations points toward an innovative approach to public funding that would boost the speech of ordinary citizens. Ideally, public funding systems should be structured like that in New York City, which awards multiple matching funds for small contributions. See Frederick A.O. Schwarz Jr., *Public Financing of Races: If It Can Make It There...*, Roll Call (Jan. 28, 2010).¹ Multiple matching funds amplify the voices of actual citizens, and can be an effective counterbalance to unrestrained corporate spending. Moreover, by encouraging candidates to seek donations from a large number of voters, such programs encourage broad participation in the election process. Passage of the *Fair Elections Now Act*, introduced by Senators Durbin and Specter, as well as reform of the presidential public financing system, would go a long way toward countering the likely fallout from *Citizens United*; we urge the Senate to take up this legislation immediately as one response to *Citizens United*.

Voter Registration Modernization

One critical way to counter the flood of corporate money into our electoral process is to add millions of new voters by bringing our voter registration system into the 21st century. Attorney General Eric Holder, in noting his support for this important democracy reform, said that modernizing the voter registration system would “remove the single biggest barrier to voting in the United States.” Remarks at the Brennan Center for Justice Brennan Legacy Awards Dinner on Indigent Defense Reform (Nov. 16, 2009).²

Under the system proposed by the Brennan Center and backed by a bipartisan coalition, as many as 65 million eligible Americans could join the electoral system permanently - while curbing potential for fraud and abuse. Such an approach would automatically and permanently register all eligible citizens who wish to be registered, and provide failsafe mechanisms to give voters the chance to correct their registrations before and on Election

¹ Available at http://www.rollcall.com/issues/55_83/ma_congressional_relations/42688-1.html.

² Available at <http://www.justice.gov/ag/speeches/2009/ag-speech-0911161.html>.

Day. A number of states have already implemented some or all of the recommendations for modernizing the voter registration system, and others are moving in that direction, because they realize improved registration will save substantial time and costs, reduce errors, and enable more eligible citizens to participate in our democracy. We commend you for your leadership and commitment to upgrading our voter registration system and urge this Committee to move forward with legislation as soon as possible.

Demanding Accountability

Under current laws regulating corporations, nothing requires corporations to disclose to shareholders whether funds are being used to fund politicians or ballot measures, or how the political money is being spent. With nearly one in two American households owning stock in publicly traded companies, the potential for increased corporate political spending could well impact shareholders' pockets. Mechanisms by which shareholders can hold corporations accountable for their political spending are imperative.

The Brennan Center has proposed a remedy in our recently-issued *Corporate Campaign Spending: Giving Shareholders a Voice* report.³ We suggest two specific reforms: first, require managers to obtain authorization from shareholders before making political expenditures with corporate treasury funds; and second, require managers to report corporate political spending directly to shareholders. These requirements will increase corporate accountability in two important ways. First, the authorization provisions place the power directly in the hands of the shareholders, thereby ensuring that shareholders' funds are used for political spending only if that is how the shareholders want their money spent. Second, the disclosure requirement serves valuable information interests, leaving shareholders better able to evaluate their investments and voters better-equipped to deliberate choices at the polls.

With greater amounts of corporate money flooding the political process, corporate accountability is more important than ever in a post-*Citizens United* era. The attached report includes model legislation toward this end, and we urge the Committee to consider this legislation as soon as possible. A copy of the full report is attached to this letter.

Advancing a Voter-Centric Vision of the First Amendment

The *Citizens United* decision represents the furthest extreme the Court has ever reached on the spectrum which balances the First Amendment rights of speakers – candidates, parties, and special interests – against the countervailing First Amendment interests of the electorate. As the Court has long recognized, “constitutionally protected interests lie on both sides of the legal equation.” *Nixon v. Shrink Missouri Government PAC*, 528 U.S. 377, 400 (2000) (Breyer, J., concurring); see also *United States v. Int'l Union United Auto. Workers*, 352 U.S. 567, 590 (1957) (noting “delicate process” of reconciling labor union’s rights with value in promoting “active, alert responsibility of the individual citizen in a democracy”). Our

³ Available at http://www.brennancenter.org/content/resource/corporate_campaign_spending_giving_shareholders_a_voice/.

constitutional jurisprudence incorporates a strong First Amendment tradition of deliberative democracy – recognizing that the overriding purpose of the First Amendment is to promote an informed, empowered, and participatory electorate.

Accordingly, our constitutional system has traditionally sought to maintain a balance between the rights of candidates, parties, and special interests to advance their own views, and the rights of the electorate to participate in public discourse and to receive information from a variety of speakers. *See, e.g., Shrink Missouri*, 528 U.S. at 390 (balancing candidate’s and political committee’s claims with threat that “the cynical assumption that large donors call the tune could jeopardize the willingness of voters to take part in democratic governance”); *Federal Election Commission v. Mass. Citizens for Life*, 479 U.S. 238, 257-58 & n.10 (1986) (balancing nonprofit organization’s interests with importance of protecting “the integrity of the marketplace of political ideas” necessary for citizens to “develop their faculties”); *Federal Election Commission v. National Right to Work Comm.*, 459 U.S. 197, 560 (1982) (balancing corporate interests against the value of promoting “the responsibility of the individual citizen for the successful functioning of that process”). In *Citizens United*, the now ascendant conservative block of the Roberts Court threw that balance dangerously off-kilter by holding, in essence, that whatever interest is willing to spend the most money has a constitutional right to monopolize political discourse. In awarding such monopoly power to corporate speakers, the majority ignored any countervailing interest on the part of the electorate.

Unfortunately, *Citizens United* will not be the last word. An armada of constitutional challenges to state and federal reforms is advancing rapidly toward the Supreme Court. *See* David Kirkpatrick, *A Quest to End Spending Rules for Campaigns*, N.Y. Times, Jan. 25, 2010, at A11.⁴ These challenges include attacks on disclosure statutes, public financing systems, “pay-to-play” restrictions on government contractors and lobbyists, and “soft money” restrictions on political parties and political action committees. Challengers seek to use the First Amendment as a constitutional “trump card” to strike down any reform that attempts to restrain special interest domination of politics. The First Amendment ideology advanced in these challenges – if adopted by the Court – would enshrine in law special interests over citizens, monologue over dialogue, and secrecy over transparency. It is crucial that courts recognize this one-sided view of the First Amendment as a distortion – one which threatens to erode fundamental First Amendment values under the guise of protecting them.

Because the Court grounded its decision in *Citizens United* in the Constitution, legislative repair is extraordinarily challenging. Along with the proposals to enact public financing, voter registration modernization, and shareholder disclosure laws, the Brennan Center urges this Committee – perhaps jointly with other interested Committees – to hold hearings to create a record demonstrating how the Supreme Court’s majority has distorted both the First Amendment as well as the political reality of how money in politics threatens to erode democratic values. Making such a record – and shining the public spotlight on the impact of the Court’s radicalization of the First Amendment – would prove valuable for the defense of existing reforms and the enactment of new safeguards, for the development of constitutional doctrine, and for the public’s understanding of this issue. While Congress

⁴ Available at <http://www.nytimes.com/2010/01/25/us/politics/25bopp.html?scp=1&sq=james%20bopp&st=cse>.

cannot directly repair the damage done by a case grounded in the Constitution, hearings like those we suggest could provide a critical forum to demonstrate the reach of this Court.

Conclusion

The Brennan Center stands ready to assist this Committee in its efforts to address the damage from *Citizens United*. We appreciate the opportunity to enter our views, and our report, into the record for the Committee's hearing on February 2, 2010.

Sincerely yours,



Michael Waldman
Executive Director



Susan Liss
Director, Democracy Program