

**Testimony of Ciara Torres-Spelliscy
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Before the Ways and Means Committee
Maryland House of Delegates
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The Brennan Center for Justice at New York University School of Law thanks the Committee for holding this hearing on the impact *Citizens United* may have on Maryland and for the invitation to offer written testimony.

Since its creation in 1995, the Brennan Center has focused on fundamental issues of democracy and justice, including research and advocacy to enhance the rights of voters and to reduce the role of money in our elections. That work takes on even more urgency after the United States Supreme Court's decision in *Citizens United v. Federal Election Commission* on January 21, 2010.

By largely ignoring the central place of voters in the electoral process, the *Citizens United* majority shunned the First Amendment value of protecting public participation in political debate. To restore the primacy of voters in our elections and the integrity of the electoral process, the Brennan Center strongly endorses four steps to take back our democracy:

- Promote public funding of political campaigns;¹
- Modernize voter registration;²
- Demand accountability through consent and disclosure;³ and
- Advance a voter-centric view of the First Amendment.⁴

¹ Frederick A.O. Schwarz Jr., *Public Financing of Races: If It Can Make It There...*, ROLL CALL, Jan. 28, 2010, available at

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

² VOTER REGISTRATION MODERNIZATION: COLLECTED BRENNAN CENTER REPORT AND PAPERS (The Brennan Center for Justice 2009), available at

http://brennan.3cdn.net/329ceaa2878946ba17_kwm6btu6r.pdf.

³ Ciara Torres-Spelliscy, CORPORATE CAMPAIGN SPENDING: GIVING SHAREHOLDERS A VOICE (The Brennan Center for Justice 2010), available at

http://brennan.3cdn.net/0a5e2516f40c2a33f6_3cm6ivqcn.pdf. Copies of CORPORATE CAMPAIGN SPENDING are attached to this testimony. Upon request, the Brennan Center is happy to provide additional hard copies of the report to this Committee.

I. What Did *Citizens United* Really Say?

Before discussing how *Citizens United* will impact Maryland's elections, it is important to understand what *Citizens United* did and did not say. Until *Citizens United*, a century's worth of American election laws prohibited corporate managers from spending a corporation's general treasury funds in *federal* elections.⁵ Pre-existing laws required corporate managers to make political expenditures via separate segregated funds, which are also commonly known as corporate political action committees, so that shareholders, officers and managers who wanted the corporation to advance a political agenda could contribute funds for that particular purpose.⁶

Citizens United, which was registered under Section 501(c)(4) of the U.S. Tax Code, wanted to air an on-demand 90-minute documentary criticizing Senator Hillary Clinton in the weeks leading up to her presidential primary and wanted to pay for this documentary using its general treasury funds, which included money from for-profit corporations. They sued the Federal Elections Commission, claiming that the requirement that they pay for the documentary from a separate segregated fund burdened their First Amendment right to speech.

Citizens United did...

- Hold that corporations have the same First Amendment rights to make independent expenditures as natural people.
- Hold that restrictions that prohibited corporations and unions from spending their general treasury funds on independent expenditures violated the First Amendment.
- Uphold disclosure requirements for political advertisements that mentioned a candidate and were made within 60 days of an election even if they did not expressly advocate for the defeat or election of a candidate.

⁴ Monica Youn, *Giving Corporations an Outsized Voice in Elections*, THE L.A. TIMES, Jan. 10, 2010, available at http://www.latimes.com/news/opinion/commentary/la-oe-youn10-2010jan10_0,1203910.story.

⁵ Until *Citizens United*, the Federal Elections Campaign Act (FECA) prohibited corporations (profit or nonprofit), labor organizations and incorporated membership organizations from making direct contributions or expenditures in connection with federal elections. 2 U.S.C. § 441b. The limits have a long vintage. For 63 years, since Taft-Hartley, corporation have been banned from spending corporate treasury money to expressively support or oppose a federal candidate and for 103 years, since the Tillman Act, corporations have been banned from giving contributions directly from corporate treasury funds to federal candidates. After *Citizens United*, corporations are still banned from direct contributions in federal elections.

⁶ 11 C.F.R. 100.6; FED. ELECTION COMM'N, SSFs AND NONCONNECTED PACS (May 2008), available at <http://www.fec.gov/pages/brochures/ssfvnonconnected.shtml>.

Citizens United did not....

- Rule on the constitutionality of contribution limits.
- Rule on the constitutionality of pay-to-play laws.
- Rule on the constitutionality of soft-money regulations.
- Rule on the constitutionality of the public financing of elections.

II. How Will *Citizens United* Impact Maryland's Elections?

Since Maryland does not ban or place source restrictions on corporate independent expenditures, *Citizens United* will have little direct impact on Maryland's campaign finance laws. However, the broader implications that *Citizens United* has on the role of individual voters in elections will undoubtedly change Maryland's democracy.

A. Corporate Spending

In Maryland, corporations have long been able to use their general treasury funds to finance independent expenditures in state elections. Thus, *Citizens United* has not opened up any new avenues for corporate political spending at the state level that did not already exist in Maryland.

However, *Citizens United* may increase corporate independent expenditures in Maryland's federal elections. An increase in corporate spending at the federal level may trickle down or even precipitate renewed corporate spending at the state level.

B. Pay-to-Play

The Supreme Court in *Citizens United* did not address the constitutionality of pay-to-play restrictions and leaves the case law in that area undisturbed. Narrow and well crafted pay-to-play restrictions have generally been upheld against speech related challenges.⁷ However, at least one federal

⁷ See *N.C. Right to Life, Inc. v. Bartlett*, 168 F.3d 705, 718 (4th Cir. 1999) (upholding sessional ban on lobbyist's contributions as constitutional); *Blount v. Sec. Exch. Comm'n*, 61 F.3d 938, 946-47 (D.C. Cir. 1995) (upholding constitutionality of SEC regulations that prohibit municipal finance underwriters from making campaign contributions over \$250 to officeholders who award government underwriting contracts); *Wachsman v. City of Dallas*, 704 F.2d 160, 173 (5th Cir. 1983) (upholding City charter provision prohibiting contributions by City employees to City council elections); *Ognibene v. Parkes*, No. 08 Civ. 1335 (S.D.N.Y. 2009) (upholding New York City's city contractor pay-to-play laws); *Green Party of Conn. v. Garfield*, 590 F. Supp. 2d 288 (D. Conn. 2008) (upholding Connecticut's state contractor pay-to-play laws); *Inst. of Governmental Advocates v. Fair Political Practices Comm'n*, 164 F. Supp. 2d 1183, 1192 (E.D. Cal. 2001) (upholding ban on contributions from lobbyists to offices lobbied); *Earle Asphalt Co.*, 198 N.J. 143 (NJ 2009) (upholding NJ's state contractor pay-to-play laws); *Casino Ass'n of La. v. State*, 820 So. 2d 494, 509 (La. 2002) (upholding ban on contributions from riverboat and

court has struck down a broad pay-to-play scheme where the state was unable to demonstrate that the law had been tailored to target the potential for corruption.⁸

It should be noted that past pay-to-play laws that have been upheld have either been bans on contractors' making direct contributions to candidates or bans on soliciting direct contributions to candidates. For example, Maryland's law permits lobbyists to give personal contributions to lawmakers and candidates, but disallows lobbyists' solicitations of contributions for lawmakers and candidates. Md. Code Ann. § 15-714(d)(1)(i). The pay-to-play bans that have been upheld by courts did not apply to independent expenditures.

Maryland H.B. 690 proposes a pay-to-play ban on state contractors' independent expenditures but allows state contractors to give direct contributions to candidates. This is a novel approach that has not yet been reviewed by the courts. If Maryland adopts pay-to-play restrictions for state contractors, we suggest including limits on contributions to candidates. Also, the legislature needs to fully document through public hearings and legislative findings, the particular problems of corruption and the appearance of corruption in Maryland that have prompted this change in the law.

C. The Role of the Voter

Perhaps the greatest threat to Maryland's elections posed by *Citizens United* is the case's displacement of the role of voters at the center of our political process. The law struck down by the Court in *Citizens United* represented over 100 years of state and Congressional efforts to wrest control over government out of corporate hands and to place it in the hands of the American people. Until *Citizens United*, campaign finance regulation had the effect of encouraging candidates to rely on support from individuals rather than corporations. Through innovative campaign strategies and the savvy use of technology, political parties and candidates seized on this people-based model, transforming donations from many individuals into significant money. The fruits of these efforts were evident in the 2004 and 2008 presidential elections. In the 2004 primary, 25% of the \$183 million raised by President

land-based casinos to all candidates and all PACs that support or oppose a candidate); *State v. Alaska Civil Liberties Union*, 978 P.2d 597, 619-20 (Ala. 1999) (upholding a restriction on lobbyists' giving contributions to candidates outside of their own district); *Kimbell v. Hooper*, 164 Vt. 80, 665 A.2d 44, 48 (1995) (upholding sessional ban on lobbyist's contributions); *Schiller Park Colonial Inn, Inc. v. Berz*, 349 N.E.2d 61, 67-68 (Ill. 1976) (upholding ban on contributions from members of liquor industry to any candidate or political party); *Soto v. State*, 565 A.2d 1088, 1098 (N.J. Super. Ct. App. Div. 1989) (upholding ban on political contributions from casino employees to any candidate or political committee).

⁸ See *Dallman v. Ritter*, No. 09CV1188 (Co. Dt. Ct. 2009) (Colorado state court invalidated a broad pay-to-play ban that banned contributions "to any candidate for any office at any level of government anywhere in Colorado, and to political parties" without any evidence that such a reach was necessary to combat corruption).

Bush came from contributions of \$200 or less. In the 2008 election cycle, Senator Obama's campaign raised \$750 million from over 400,000 individual donors.⁹

III. How to Reclaim A Voter-based Democracy?

Although the Supreme Court may have re-ordered the priorities in our democracy, there are ways to restore and strengthen the primacy of voters in our elections. The Brennan Center strongly endorses a four-step strategy to take back our democracy.

A. Public Funding of Political Campaigns

We urge Maryland to enact a fully-funded public financing system for statewide and legislative offices. Maryland currently has a public financing system for gubernatorial and lieutenant gubernatorial races, but it has not historically been sufficiently funded to be attractive to candidates, since the total amount of money in the funds is only a fraction of what a statewide candidate would require for a viable campaign.¹⁰ While this system has been on the books since 1974, it has only been used once in 1994.¹¹ This body should hold hearings to explore the creation of a public financing system modeled after New York City—a model that encourages candidates to seek out small donors throughout the duration of the election cycle through a six-to-one match.

Traditionally, public financing systems have been valued for their ability to “cleanse” politics by providing eligible candidates public, non-corrupting money to finance their campaigns in exchange for a participant's promise not to accept potentially corrupting contributions from lobbyists, PACs and corporations.

Moreover, innovative public financing systems can also make people, specifically small donors, the most valuable players in the political fundraising game. Multiple match public financing systems, like the system in New York

⁹ Michael J. Malbin, SMALL DONORS, LARGE DONORS AND THE INTERNET, *available at* http://www.cfinst.org/president/pdf/PresidentialWorkingPaper_April09.pdf.

¹⁰ Maryland State Board of Elections, Summary of Public Campaign Financing Laws (2010), http://www.elections.state.md.us/campaign_finance/public_funding.html (stating there was roughly \$5.2 million in the state public financing fund); *by comparison see* National Institute on Money in State Politics, Maryland 2006 Candidates (2010), http://www.followthemoney.org/database/StateGlance/state_candidates.phtml?s=MD&y=2006&f=G (stating that in 2006, both major gubernatorial candidates spent approximately \$12 million each).

¹¹ Common Cause, Public Financing in the States (June 2007), (noting “The source of the funds [in Maryland] is contributions from taxpayers (add-on) and revenue from fines related to the public financing law. The law has been in place since 1974, but since then only in the 1994 elections has a gubernatorial candidate from a major party opted into the system.”).

City and the current bill for Congressional public financing — the Fair Elections Now Act (FENA) — make citizens the central figures throughout the entire election. Early on in the election, candidates who wish to become eligible for public financing must raise a requisite amount of small donations from many individuals. However, these systems encourage candidates to seek out small donors throughout the election by creating an incentive structure that matches small donations from individuals. This structure rewards candidates for relying on people, and lets people know that they are the driving force of democracy.

Ever since public financing systems were enacted, they have faced constitutional challenges brought by those who claim that their First Amendment rights are violated when the state awards funds to qualified publicly-financed candidates.¹² Courts, agreeing that public financing furthers First Amendment values, have consistently upheld such systems against constitutional challenge.¹³

Indeed, *Citizens United* reaffirmed that “it is our law and our tradition that more speech, not less, is the governing rule.”¹⁴ The Court thus reiterated the “more speech” principle on which the Court upheld the presidential public financing system in *Buckley v. Valeo*. The *Buckley* Court broadly approved of public funding programs, finding that they represent a governmental effort, “not to abridge, restrict, or censor speech, but rather to use public money to facilitate and enlarge public discussion and participation in the electoral process, goals vital to a self-governing people.”¹⁵ By making it possible for candidates to run a viable, competitive campaign through grassroots outreach alone, public funding programs decrease the need for deep-pocketed supporters.

Recently, however, a new slew of challenges have been launched. These new challenges claim that the Court’s 2008 decision in *Davis v. FEC*, 128 S.Ct. 2759 (2008), has cast doubt on the use of matching funds provisions that are triggered by expenditures of a nonparticipating candidate or independent expenditures. As a result, lawsuits challenging the public funding programs in

¹² Matching fund provisions, that disburse additional money to participating candidates when they are targeted by independent expenditures or high spending opponents, have been particularly targeted. These mechanisms, usually known as matching funds, are used to encourage participation in public financing programs while still preserving public monies.

¹³ See *North Carolina Right to Life Comm. Fund v. Leake*, 524 F.3d 427 (4th Cir. 2008), cert. denied by *Duke v. Leake*, 129 S.Ct. 490 (Nov. 3, 2008) (affirming denial of preliminary injunction against North Carolina’s public financing system for appellate judicial elections); *Daggett v. Comm’n on Governmental Ethics & Election Practices*, 205 F.3d 445 (1st Cir. 2000) (upholding Maine’s Clean Election Act); *Rosenstiel v. Rodriguez*, 101 F.3d 1544, 1552 (8th Cir. 1996) (upholding Minnesota’s public funding system for elections); *Vote Choice, Inc. v. DiStefano*, 4 F.3d 26, 38 (1st Cir. 1993) (upholding Rhode Island’s public funding system).

¹⁴ *Citizens United*, Slip op. at 45.

¹⁵ *Buckley v. Valeo*, 424 U.S. 1, 92-93 (1976).

Connecticut and Arizona are pending before the Second and Ninth Circuits respectively; and two new challenges were recently launched in Wisconsin.¹⁶

B. Empowering Voters Through Transparency and Accountability

A troubling assumption adopted by the *Citizens United* majority is the adequacy of disclosure laws to safeguard democratic values against subversion. Justice Kennedy's argument that limits on corporate political spending are unnecessary is premised upon his unsupported assumption that disclosure laws allow both the electorate and corporate shareholders to make informed decisions and to give proper weight to different speakers and messages. As Justice Kennedy wrote:

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." The First Amendment protects political speech; and disclosure 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.¹⁷

Unfortunately, these assumptions are not born out in the current campaign finance system.¹⁸ In fact, in today's political environment, corporations regularly hide behind false names to disguise their true identity and agenda:

¹⁶ Matching fund provisions were struck down at the district court level in Connecticut and in Arizona. See *Green Party v. Garfield*, 648 F.Supp.2d 298 (D.Conn. Aug. 27, 2009), argued (2d Cir. Jan. 13, 2010); *McComish v. Brewer*, No. CV-08-1550 (D.Ariz. Jan. 20, 2010), appeal docketed (9th Cir. Jan. 26, 2010). In Wisconsin, recently-filed lawsuits challenge the mechanism by which Wisconsin's program distributes money to participants and the reporting requirements of the system. *Wisconsin Right to Life v. Brennan*, 09-cv-764 (W.D.Wi. 2009); *Koschnick v. Doyle*, 09-cv-767 (W.D.Wi. 2009).

¹⁷ *Citizens United*, Slip op. at 55 (citations omitted).

¹⁸ For example, independent expenditures – the very type of political expenditures unleashed by *Citizens United* – are underreported in most states. As one report explained, "holes in the laws – combined with an apparent failure of state campaign-finance disclosure agencies to administer effectively those laws – results in the poor public disclosure of independent expenditures. The result is that millions of dollars spent by special interests each year to influence state elections go essentially unreported to the public." Linda King, INDECENT DISCLOSURE PUBLIC ACCESS TO INDEPENDENT EXPENDITURE INFORMATION AT THE STATE LEVEL 4 (National Institute of Money in Politics 2007) available at <https://www.policyarchive.org/bitstream/handle/10207/5807/200708011.pdf?sequence=1>.

- In a recent Colorado election, a group called “Littleton Neighbors Voting No,” spent \$170,000 to defeat a restriction that would have prevented Wal-Mart from coming to town. Another group called “Littleton Pride” spent \$35,000 in support of the prohibition. When the disclosure reports for these groups were filed, however, voters discovered that “Littleton Neighbors” was not a grassroots organization but a front for Wal-Mart—the group was, in fact, exclusively funded by Wal-Mart. Behind a grassroots facade, Wal-Mart was able to outspend “Littleton Pride,” a true grassroots group, by a 5:1 ratio.¹⁹
- As the record in *McConnell* demonstrated, corporations commonly veil their political expenditures with misleading names—the “The Coalition-Americans Working for Real Change” was a business organization opposed to organized labor and “Citizens for Better Medicare” was funded by the pharmaceutical industry.²⁰

The *Citizens United* majority’s assumption that corporate political spending must be disclosed to shareholders or the public at large is similarly incorrect. Under current laws regulating corporations, nothing requires corporations to disclose to shareholders whether corporate dollars are being used to fund politicians or ballot measures.²¹ In short, corporate managers could be using shareholder funds for political spending, without the knowledge or consent of investors.

1. Improve Corporate Governance

Because roughly one out of two American households owns stocks,²² the Brennan Center has proposed a remedy to this disclosure gap in our recently-issued report *Corporate Campaign Spending: Giving Shareholders a Voice*.²³ We suggest two specific reforms: first, require managers to obtain authorization from shareholders before making political expenditures with corporate treasury

¹⁹ Def.’s Response Br. to Pls.’ Mot. for Summary Judgment, *Sampson v. Coffman*, 06-cv-01858 at 43-44 (D. Co. 2007) (Dkt. #34).

²⁰ See *McConnell v. FEC*, 540 U.S. 93, 128, 197 (2003).

²¹ See Jill Fisch, *The “Bad Man” Goes to Washington: The Effect of Political Influence on Corporate Duty*, 75 *FORDHAM L. REV.* 1593, 1613 (2006) (“Political contributions are generally not disclosed to the board or shareholders, nor are political expenditures generally subject to oversight as part of a corporation’s internal controls.”).

²² See Joint Economic Committee, 106th Cong., *The Roots of Broadened Stock Ownership* 1 (2000), www.house.gov/jec/tax/stock/stock.pdf; Investment Company Institute, U.S. Household Ownership of Mutual Funds in 2005, 2 (2005), <http://www.ici.org/pdf/fm-v14n5.pdf>; THE INVESTMENT COMPANY INSTITUTE, 2009 INVESTMENT COMPANY FACT BOOK 8 (49th ed. 2009), http://www.icifactbook.org/pdf/2009_factbook.pdf (noting “[h]ouseholds are the largest group of investors in [investment] funds, and registered investment companies managed 19 percent of households’ financial assets at year-end 2008.”).

²³ See Torres-Spelliscy, *supra* n. 3.

funds; and second, require managers to report corporate political spending directly to shareholders.

These requirements will increase corporate accountability by placing 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. Moreover, 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.

Our *Corporate Campaign Spending* Report is aimed at Congress, urging a change in the U.S. securities law. However, we do not know that Congress will take up this call in a timely manner, if at all. Furthermore, while Congress can amend the laws that apply to publicly-traded companies, Maryland has power to regulate all corporations that are incorporated in Maryland and can reach both publicly-held as well as privately-held corporations. Maryland is well within its rights to adopt bills similar to Maryland H.B. 986, which seeks to give shareholders in Maryland corporations the ability to consent to corporate political expenditures as well as to require better disclosure to shareholders of corporate political expenditures. Moreover, these two factors can be handled through separate means. For example, disclosure of past corporate expenditures to shareholders could happen on a quarterly basis, while approval of future political budgets could happen at the annual general meeting of shareholders.

For Congress, we suggested two targeted reforms, but states have broad authority to change their own corporate law and to dictate the rules of corporate governance. Maryland is not limited to the reforms we suggested to Congress. For example, in Missouri and Louisiana, boards are required to approve corporate political spending.²⁴ In addition to shareholder notice and consent, Maryland could also require board approval of corporate political spending. This will provide internal controls over such spending which often goes on without board sanction.²⁵

For those who may argue that shareholders do not care about corporate political spending, the evidence demonstrates the contrary. A recent survey of shareholders found that shareholders do care about corporate political spending and want greater disclosure.²⁶ Shareholders have demonstrated their

²⁴ The lack of board approval is the norm. However two states (Louisiana and Missouri) do require board approval of political donations before they are made. See La. Rev. Stat. Ann. §18:1505.2(F) (also allowing officers of the corporation to make such contributions if empowered to do so by the board of directors); Mo. Ann. Stat. §130.029.

²⁵ Fisch, *supra* note 21, at 1613.

²⁶ Press Release, Center for Political Accountability, *Shareholders See Risky Corporate Political Behavior As Threat to Shareholder Value, Demand Reform, CPA Poll Finds*, (April 5, 2006),

interest in disclosure of corporate political activity by filing shareholder resolutions requesting more corporate transparency on this very topic. As the Committee for Economic Development (CED) reports, disclosure of political expenditures has become the second most popular shareholder resolution.

After climate change, the leading category of social issue proposals filed by shareholders in 2007 dealt with political contributions, according to an analysis by the governance rating firm RiskMetrics. Proposals on political contributions usually ask companies to issue semi-annual reports on political contributions and to provide guidelines for making contributions.²⁷

In the past few years, there have been numerous shareholder resolutions requesting the disclosure of political expenditures by corporations. In 2006 such resolutions gained the support of 20% or more of the vote at 11 major companies, including Citigroup (20%), American Financial Group (20.5%), Clear Channel Communications (20.5%), General Dynamics (21%), Washington Mutual (22%), Wyeth (25.2%), Charles Schwab (27%), Marsh and McLennan (30.5%), Verizon (33%) and Home Depot (34%).²⁸ At Amgen, a political expenditure disclosure resolution received 75.5% of the vote following endorsement by the company's directors.²⁹ At least 56 disclosure resolutions were filed during the 2009 proxy season, including at major financial institutions such as Charles Schwab, Goldman Sachs, JPMorgan Chase, Regions Financial and Wells Fargo.³⁰ Such resolutions have been strongly supported by major institutional investors, including the New York City pension fund.³¹ In 2008, the proxy voting advisory service RiskMetrics Group supported a disclosure resolution calling on AT&T to disclose its political spending, after opposing a similar resolution at AT&T the three previous proxy

<http://www.politicalaccountability.net/index.php?ht=a/GetDocumentAction/i/1267> (announcing a "poll found a striking 85 percent [of shareholders] agreed that the 'lack of transparency and oversight in corporate political activity encourages behavior' that threatens shareholder value. 94 percent supported disclosure and 84 percent backed board oversight and approval of 'all direct and indirect [company] political spending.'").

²⁷ Committee for Economic Development, *Rebuilding Corporate Leadership: How Directors Can Link Long-Term Performance with Public Goals* 18 (2009),

http://www.ced.org/images/library/reports/corporate_governance/cgpt3.pdf (citing Carolyn Mathiasen, "2008 Preview: Social Issues," *RiskMetrics Risk & Governance Blog* (Mar. 28, 2008), http://blog.riskmetrics.com/2008/03/2008_preview_social_issuessubm.html).

²⁸ Timothy Smith and Bruce Freed, *Social Investment—Highlights from 2006 Proxy Season*, GreenMoneyJournal.com, Oct. 10, 2006, available at

<http://www.politicalaccountability.net/index.php?ht=d/ArticleDetails/i/373>.

²⁹ *Id.*

³⁰ Jeanne Cummings, *Companies Try to Clean Up Their Act*, Politico, Mar. 24, 2009, <http://www.politico.com/news/stories/0309/20401.html>.

³¹ Francesco Guerrera, *Investors Want Facts on Political Donations*, Financial Times, Apr. 1, 2007, available at

<http://www.politicalaccountability.net/index.php?ht=d/ArticleDetails/i/532>.

seasons.³² For example, a typical resolution requests periodic disclosure of political expenditures including payments to trade associations and other tax exempt organizations.³³

2. Empowering Voters Through Disclosure

After the Supreme Court's decision in *Citizens United*, the importance of disclosure to the health of our democracy cannot be overstated. Unfortunately, there is currently a sustained and unrelenting wave of legal challenges aimed at eliminating disclosure of independent expenditures. Indeed, the *New York Times* recently quoted the attorneys who brought the *Citizens United* suit as stating that disclosure was their next target in a ten-year strategy to eliminate campaign finance regulations.³⁴ The Supreme Court has already granted *certiorari* in *Doe v. Reed*, a case brought by the same lawyers who brought *Citizens United*, and the case will be fully briefed this spring.³⁵ Although that case, which involves the disclosure of ballot petition signatures, does not implicate campaign finance disclosures directly, the plaintiffs advance a broad conception of a right to anonymous speech which would undermine campaign finance disclosure regimes.

To be sure, *Citizens United* upheld BCRA's disclosure requirements against the plaintiffs' challenge, and expressly affirmed the importance of disclosure as a means of "provid[ing] the electorate with information' about the sources of election-related spending." ³⁶

In order to have meaningful disclosure for voters, they must know who is funding political advertisements, whether they are independent expenditures which contain express advocacy (direct appeals to vote for or against a given candidate); or whether they are electioneering communications, *i.e.*, broadcast ads aired directly before an election, that mention a candidate, and are targeted at that candidate's electorate.

³² *Key Proxy Advisor Recommends Vote Against AT&T Management on Political Contributions Disclosure*, Center for Political Accountability, Apr. 21, 2008, <http://www.politicalaccountability.net/index.php?ht=a/GetDocumentAction/i/1275>.

³³ Shareholder Resolution filed by Trillium Asset Management Corporation Requesting Political Contributions by Ford Motor Company (2010), <http://www.onlineethicalinvestor.org/eidb/wc.dll?eidbproc~reso~9143> (asking for semi-annual reporting on Ford's political expenditures).

³⁴ See David Kirkpatrick, *A Quest to End Spending Rules for Campaigns*, N.Y. TIMES, Jan. 25, 2010, at A11, available at <http://www.nytimes.com/2010/01/25/us/politics/25bopp.html?scp=1&sq=james%20bopp&st=cse>.

³⁵ *Doe v. Reed*, 586 F.3d 671 (9th Cir. 2009), *cert. granted*, __ S.Ct.__, 2010 WL 144074 (2010) (No. 09-559).

³⁶ *Citizens United*, Slip op. at 52 (quoting *Buckley v. Valeo*, 424 U. S. 1, 66 (1976)).

Maryland’s definition of independent expenditures is limited to express advocacy. According to Md. Code Ann., Elec. Law § 1-101 (bb), an independent expenditure is “an expenditure by a person to aid or promote the success or defeat of a candidate if the expenditure is not made in coordination with, or at the request or suggestion of, the candidate, a campaign finance entity of the candidate, or an agent of the candidate.” This definition is problematic because it does not cover so-called “sham issue ads” – advertisements that avoid the language of express advocacy, but mention a candidate by name in an attempt to influence the outcome of an upcoming election. Furthermore, Maryland does not presently require reports of the independent expenditures that are made.³⁷

Maryland should clarify its law such that no matter who funds either independent expenditures or electioneering communications, they must be subject to disclosure and must reveal who provided the funding for the advertisements. Maryland H.B. 1029, which requires disclosure of independent expenditures, should be expanded to capture “electioneering communications”; otherwise, corporate “sham issue ads” may evade regulation.

Lastly, as a result of the *Citizens United* decision, there is a risk that corporations that want to make political expenditures without having to disclose their identity may funnel their money through benign sounding social welfare organizations (501(c)(4)’s) and/or trade associations (501(c)(6)’s). Under current tax law, these organizations are not required to publically disclose the identity of their contributors to the IRS.³⁸ Maryland may pass legislation which, like the regulations promulgated by the Federal Election Commission, would require disclosure from anyone or any entity that funds an independent expenditure or an “electioneering communication,” as that term is defined under federal law, over a certain dollar threshold.³⁹

³⁷ The one exception to this general rule is independent expenditures about slot machines. Maryland Office of the Attorney General, *Reporting of Contributions Under Chapter 620* (June 3, 2008) (“Effective January 1, 2008, Section 10, Chapter 4 of the Special Session Laws of 2007 required a ballot issue committee formed to promote the success or defeat of the slot machine gaming constitutional amendment to file an additional campaign finance report on or before the fourth Friday immediately preceding the 2008 general election. In addition, Section 10 required that a corporation that cumulatively spends more than \$10,000 on campaign material to promote the success or defeat of the referendum file a campaign finance report on the same dates as a ballot issue committee and to provide the “authority line” information required by Election Law Article (“EL”) §13-401 on all campaign material it publishes or distributes relating to the referendum.”)

³⁸ Shayla Kasel, *Show Us Your Money: Halting the Use of Trade Organizations as Covert Conduits for Corporate Campaign Contributions*, 33 J. CORP. L. 297, 312 (Fall 2007) (internal citations omitted). (“The 501(c)(6) organizations, like most other 501(c) organizations, are not required to disclose their itemized contributors and expenditures; they only have to report net income and expenditures to the IRS.”).

³⁹ See 2 U.S.C. 431(17) (defining independent expenditure); 11 C.F.R. 109.102 (requiring disclosure of \$250 contributors towards a federal independent expenditure of \$10,000 or

C. Voter Registration Modernization

Bringing new eligible voters into the political process is another “more speech” solution to *Citizens United*. This can be accomplished by bringing Maryland’s voter registration system into the 21st century, an initiative which, in the words of Attorney General Eric Holder, would “remove the single biggest barrier to voting in the United States.”⁴⁰ Indeed, if today’s system were modernized, it could bring as many as 65 million eligible Americans nationwide into the electoral system permanently – while curbing the potential for fraud and abuse.

Voter registration modernization (“VRM”) holds the government responsible for automatically and permanently registering all eligible citizens. VRM also provides failsafe mechanisms to ensure same-day registration. A bipartisan coalition at the federal level actively supports VRM legislation, and a number of states around the country are currently moving to implement the idea. A dozen states have already adopted internet registration; at least nine have implemented parts of automated registration; eight (including Maryland) have permanent registration; and another eight have Election Day registration.

We at the Brennan Center applaud Maryland for its portable voter registration, which was highlighted in our 2009 Brennan Center Report, *Permanent Voter Registration*.⁴¹ Under Maryland’s system of portable or permanent registration, a voter who has recently moved within Maryland and is registered to vote in the state may cast a provisional ballot that counts on Election Day, even if she has not yet updated her address with election officials. Her provisional ballot will count she is confirmed to be registered in the state, votes in the correct polling place for her new address, and signs an oath upon filling out the provisional ballot.⁴² We encourage Maryland to take further steps such as automating voter registration transactions at government agencies and implementing Election Day Registration (EDR). Maryland already has the building blocks for a modern and universal voter registration system in place, with its statewide voter registration database and electronic poll books.

more); U. S. C. § 434(f)(2)(F) (requiring disclosure of contributors who paid \$1,000 or more towards a federal electioneering communication valued at \$10,000 or more).

⁴⁰ Eric Holder, Attorney General, Remarks at the Brennan Center for Justice Brennan Legacy Awards Dinner on Indigent Defense Reform (Nov. 16, 2009), *available at* <http://www.justice.gov/ag/speeches/2009/ag-speech-0911161.html>.

⁴¹ See Adam Skaggs and Jonathan Blitzer, PERMANENT VOTER REGISTRATION (Brennan Center 2009), *available at* http://brennan.3cdn.net/1a1ce9f2a1e87c216a_yjm6iv2uo.pdf

⁴² See Md. Code Ann. § 11-303(d)(4) (defining eligibility to cast a provisional ballot), Md. Code Ann. § 11-303(e)(1) (outlining methods for counting provisional ballots). See Lawyers’ Committee for Civil Rights under Law, 2008 Election Protection Manual: Maryland 21-23 (Oct. 22, 2008), *available at* <http://tinyurl.com/c4t86h>. See generally, Md. Code Ann. § 9-404 (specifying requirements for casting provisional ballots).

Voter registration modernization would help us live up to our ideal of being a nation governed with the consent of the governed. We should aspire to get as close to full registration of eligible voters as possible. If enacted, voter registration modernization could be the most significant voting measure since the Voting Rights Act.

D. Advancing A Voter-Centric View of the First Amendment

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.⁴³ First Amendment jurisprudence incorporates a strong tradition of deliberative democracy – an understanding that the overriding purpose of the First Amendment is to promote an informed, empowered, and participatory electorate. This is why our electoral process must be structured in a way that “build(s) public confidence in that process,” thereby “encouraging the public participation and open discussion that the First Amendment itself presupposes.”⁴⁴

In this post-*Citizens United* era, a robust legislative response will be critical. It is similarly imperative, however, that we reframe our constitutional understanding of the First Amendment value of deliberative democracy. In the longer term, reclaiming the First Amendment for the voters will be the best weapon against those who seek to use the “First Amendment” for the good of the few, rather than for the many.

IV. The Need for a Rich Legislative Record

Courts reviewing laws that impact political speech are likely to use heightened constitutional scrutiny, which will demand that the law is properly tailored to address a particular harm. Therefore, it is imperative that the Senate develop a rich legislative record that demonstrates the factual underpinning of any new regulations.

⁴³ See, e.g., *Nixon v. Shrink Missouri Government PAC*, 528 U.S. 377, 390 (2000) (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”); *FEC 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”); *FEC 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”).

⁴⁴ *Shrink Missouri*, 528 U.S. at 400.

V. Conclusion

In the aftermath of *Citizens United*, there are still several ways to empower voters and return to a citizen-centric democracy. The Brennan Center urges Maryland to enact public financing, automate its voter registration system, adopt shareholder consent to corporate political spending, improve robust disclosure of political expenditures, and continue to advocate for a voter-centric vision of the First Amendment. We also urge the legislature to enact legislation that is strongly supported by a rich factual record.