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SMALL-DONOR PUBLIC FINANCING IN THE POST-*CITIZENS UNITED* ERA

MONICA YOUN*

With *Citizens United v. FEC*,¹ the age-old problem of big money in politics has reached a historic inflection point. In that case, the Court overturned decades of law restricting corporate campaign spending. In doing so, the Court re-ordered the priorities in our democracy—amplifying special interests while displacing the voices of the voters.

The 2010 midterm elections gave us a preview of what we can expect in 2012 and beyond. In the first post-*Citizens United* election, tens of millions of dollars from corporate treasuries were spent to influence the electoral process, leaving voters and grassroots groups consigned to the political margins. Many big spenders—including corporate interests—were able to shield their identities through gaping loopholes in federal disclosure law. In fact, thirty-five percent of all independent spending was done in the dark.²

Indeed, a detailed study on political spending in the 2010 elections by New York City Public Advocate Bill de Blasio illustrates the pernicious impact of *Citizens United* on accountability and transparency in American politics. De Blasio's report focused on the races where *Citizens United* had the most pronounced impact—namely, elections to the U.S. Senate. After

* Brennan Center Constitutional Fellow at NYU School of Law. A version of this Article was presented as hearing testimony to the Subcommittee on the Constitution, Civil Rights and Human Rights of the U.S. Senate Judiciary Committee for their hearing on S. 750 on April 12, 2011. *Fair Elections Now Act: A Comprehensive Response to Citizens United, Hearing on S.750 Before the Subcomm. on the Const., Civ. Rts. and Hum. Rts. of the S. Comm. on the Judiciary, 112th Cong.* (2011) (statement of Monica Youn, Brennan Center for Justice). I would like to acknowledge the substantial contributions of my colleagues Ciara Torres-Spelliscy, Mark Ladov, Mimi Marziani and Elizabeth Kennedy to the research and drafting of this Article.

1. *Citizens United v. FEC*, 130 S. Ct. 876 (2001). This Article had been submitted prior to the Supreme Court's decision in *Arizona Free Enter. Club v. Bennett*, 131 S. Ct. 2806 (2011), so this Article does not discuss that decision.

2. BILL DE BLASIO, PUBLIC ADVOCATE FOR THE CITY OF NEW YORK, *CITIZENS UNITED AND THE 2010 MIDTERM ELECTIONS* 9 (2010), available at <http://advocate.nyc.gov/files/12-06-10CitizensUnitedReport.pdf>.

examining the ten most expensive Senate races, De Blasio discovered that:

- “Anonymous or uncapped entities” (that is, organizations taking advantage of the lifting of restrictions on political spending by *Citizens United*) spent over \$85 million on U.S. Senate races—of which \$65.4 million was spent on the top ten races alone.³
- Over 30% of outside spending in these Senate races was funded by anonymous donations.⁴ These funds included single donations totaling millions of dollars.

In other words, in the last federal election cycle, more spending than ever was made by outside organizations that are wholly unaccountable to voters—indeed, such organizations routinely fail to publicly disclose the names of the corporations and wealthy individuals who are bankrolling their campaigns. This influx of secret money poses major risks of corruption, since such independent spending has been used as a quid pro quo for favorable political treatment for large spenders, as explained below.

Moreover, an electoral system dominated by secret spending threatens a crisis of accountability. Voters have lost faith that their government is serving their interests. According to a recent Gallup poll, “[a] record-low 36% of Americans have a great deal or fair amount of trust and confidence in the legislative branch of government, down sharply from the prior record low of 45% set last year.”⁵ Meanwhile, the public—by overwhelming numbers—believes that our government’s policies are more likely to benefit large corporations and wealthy individuals than middle-class or poor Americans.⁶ A 2010 poll by the Pew Research Center found that while 70% of respondents agreed that government policies helped large corporations, only 27% believed that government policies helped the middle class.⁷ The increasing influence of populist movements reflects a pervasive sense among the electorate that our government is for sale to the highest bidder.

Former Justice John Paul Stevens foresaw this state of affairs in his powerful *Citizens United* dissent, warning that American

3. *Id.* at 5.

4. *Id.* at 6.

5. Frank Newport, *Trust in Legislative Branch Falls to Record-Low 36%*, GALLUP (Sept. 24, 2010), <http://www.gallup.com/poll/143225/Trust-Legislative-Branch-Falls-Record-Low.aspx>.

6. PEW RESEARCH CTR. FOR THE PEOPLE & THE PRESS, GOVERNMENT ECONOMIC POLICIES SEEN AS BOON FOR BANKS AND BIG BUSINESS, NOT MIDDLE CLASS OR POOR (2010), *available at* <http://pewresearch.org/pubs/1670/large-majorities-say-govt-stimulus-policies-mostly-helped-banks-financial-institutions-not-middle-class-or-poor>.

7. *Id.*

citizens “may lose faith in their capacity, as citizens, to influence public policy”⁸ as a result of that decision. As the days pass, it is clear that Justice Stevens’ prediction is being realized. In one survey, 72% of respondents worried that the decision will negatively impact the political process.⁹ At a moment of such clear public disenchantment, there is a pressing need for reforms that better effectuate the ability of voters to hold their representatives accountable and that demonstrate that members of Congress are accountable to the electorate, not to big-money backers. The integrity of our electoral process is a necessary ingredient for a healthy democracy.

Small-donor public financing systems, such as New York City’s public financing system and the congressional Fair Elections Now Act (S.750 and H.R. 1404), are key to restoring accountability to American democracy. Such systems are based on a multiple match of small donations, making it possible for candidates to run competitive campaigns, while rewarding the grassroots outreach that spurs greater citizen participation. In short, political candidates can run competitive campaigns relying only on small individual donations, not large infusions of special interest cash.

I. *CITIZENS UNITED* RELEASED A TORRENT OF CORPORATE SPENDING AND SECRETIVE SPECIAL-INTEREST MONEY INTO THE 2010 ELECTION—AND EVEN MORE IS EXPECTED IN 2012

In *Citizens United v. FEC*, decided in January 2010, the Supreme Court ruled that the First Amendment does not permit distinctions between the electoral speech of corporations and that of natural persons. In one swift stroke, the Court rendered unconstitutional more than sixty years of federal law restricting corporate electioneering expenditures, and overthrew the statutes of twenty-two states that previously prohibited election spending from corporate general-treasury funds.¹⁰ The Court reached this radical result, and reversed decades of precedent, by rejecting the long-standing doctrine that corporate electoral spending creates unique risks of corruption and the appearance of corruption in the political process. As recently as 2003, in *McConnell v. FEC*,¹¹ the

8. *Citizens United*, 130 S. Ct. at 974.

9. PUBLIC CITIZEN, 12 MONTHS AFTER: THE EFFECTS OF *CITIZENS UNITED* ON ELECTIONS AND THE INTEGRITY OF THE LEGISLATIVE PROCESS 18 (2011), available at <http://www.citizen.org/documents/Citizens-United-20110113.pdf>.

10. The federal ban on direct corporate spending in elections goes back to the 1907 Tillman Act, which prohibited corporate contributions in federal campaigns (it was assumed to cover “independent expenditures” too). In 1947, the Taft-Hartley law made explicit that corporations and unions could not directly spend their treasury funds on electioneering. Congress—every time it has passed a law to deal with this—only has strengthened this prohibition.

11. See *McConnell v. FEC*, 540 U.S. 93, 233 (2003) (holding unconstitutional amendments to the Federal Election Campaign Act of 1971

Supreme Court had reaffirmed this holding. The Supreme Court made this abrupt about-face without any new legal or factual basis; as Justice John Paul Stevens observed in dissent, “the only relevant thing that has changed... is the composition of this Court.”¹² The Court simply assumed that independent expenditures posed no risk of corruption, whether or not such independent expenditures were funded from corporate treasuries.

Overall, *Citizens United* gave an unequivocal green light for unlimited corporate spending in elections. A corporation may now spend its shareholders’ money on direct electoral advocacy. This game-changing decision has already made its effects felt in the 2010 midterm elections, and the reverberations of *Citizens United* will only grow in the years to come.

Since *Citizens United*, we have seen very little *direct* spending on political ads by for-profit corporations. According to the Center for Responsive Politics, during the 2010 election cycle only three corporations ran their own independent expenditures.¹³ Instead, wealthy corporations and individuals are taking advantage of *Citizens United* to funnel political spending through political committees such as super PACs and other nonprofit organizations. Undisclosed spending has reached record-breaking levels even in the first post-*Citizens United* election, and political operatives are gearing up to flood the 2012 elections with cloaked campaign cash.

A. Political Spending by Corporations and Wealthy Special Interests Has Increased Exponentially Since Citizens United

As noted above, corporate cash swamped federal, state, and local elections in 2010, relegating voters to a position at the margins of political power.¹⁴

- According to the Campaign Finance Institute, independent spending and electioneering in Congressional elections grew to \$280.2 million in 2010.¹⁵ This was more than

and the Communications Act of 1934, which placed restrictions on campaign spending).

12. *Citizens United*, 130 S. Ct. at 942 (Stevens, J. dissenting).

13. Michael Beckel, *Influx of Corporate Political Cash Followed Pivotal Federal Court Decision*, OPENSECRETS.ORG (Mar. 25, 2011, 5:40 PM), <http://www.opensecrets.org/news/2011/03/influx-of-corporate-political-cash.html> (“These three companies—DGS Construction, Penneco Oil and Central Arizona Block Co.—spent a combined \$54,500 to aid . . . four federal-level Republican candidates.”).

14. See, e.g., Michael Luo, *Money Talks Louder than Ever in Midterms*, N.Y. TIMES, Oct. 8, 2010, <http://www.nytimes.com/2010/10/08/us/politics/08donate.html>.

15. Press Release, Campaign Fin. Inst., Non-Party Spending Doubled in 2010 But Did Not Dictate the Results (Nov. 5, 2010), available at http://www.cfinst.org/Press/PReleases/10-11-05/Non-Party_Spending_Doubled_But_Did_Not_Dictate_Results.aspx (follow “Table 1” hyperlink).

double the \$119.9 million spent by outside groups on Congressional elections in 2008, and more than five times the \$53.9 million spent by outside groups in 2006.¹⁶

- The U.S. Chamber of Commerce alone spent more than \$32 million on federal electioneering communications during the 2010 election cycle, more than any other outside organization.¹⁷ This nearly doubled the amount the Chamber spent in the 2008 cycle.¹⁸

This state of affairs was not solely due to *Citizens United*, since even prior to *Citizens United*, a series of deregulatory decisions had opened up loopholes in federal campaign finance regulation.¹⁹ *Citizens United*, however, put the stamp of Supreme Court approval on corporate campaigning, so that the effect of the decision extended far beyond its narrow holding. Campaign finance lawyers have described *Citizens United* as a “psychological green light,” granting corporations a greater comfort level with inserting themselves into the heart of political campaigns.²⁰ We can only expect these trends to worsen in the upcoming 2012 election cycle, as other interests follow the paths blazed by the early adopters of corporate electioneering. Indeed, prominent special interests have already announced plans to smash spending records in the 2012 election cycle.²¹

Such high levels of corporate campaign spending carry a

16. *Id.*

17. Ctr. for Responsive Politics, *U.S. Chamber of Commerce: Outside Spending Summary 2010*, OPENSECRETS.ORG, <http://www.opensecrets.org/outsidespending/detail.php?cmte=C30001101&cycle=2010> (last visited Sept. 12, 2011).

18. Ctr. for Responsive Politics, *U.S. Chamber of Commerce: Outside Spending Summary 2008*, OPENSECRETS.ORG, <http://www.opensecrets.org/outsidespending/detail.php?cmte=C30001101&cycle=2008> (last visited Sept. 12, 2011).

19. See, e.g., *FEC v. Wis. Right to Life, Inc.*, 551 U.S. 449 (2007) (holding that federal restrictions on electioneering communications were unconstitutional unless such communications were the “functional equivalent” of express advocacy).

20. Luo, *supra* note 14.

21. See, e.g., Eliza Newlin Carney, *Democrats Join the Battle*, NAT'L J. (Feb. 27, 2011, 12:00 PM), <http://www.nationaljournal.com/columns/rules-of-the-game/democrats-join-the-battle-20110227> (last updated Feb. 28, 2011, 9:20 PM); Tom Hamburger & Matea Gold, *Some Democrats Favor a Shift to More Outside Campaign Spending*, L.A. TIMES, Nov. 4, 2010, <http://articles.latimes.com/2010/nov/04/nation/la-na-money-politics-20101104>; Andy Kroll, *Will Secret Spending Divide Democrats?*, MOTHER JONES (Nov. 15, 2010, 3:00 AM), <http://motherjones.com/politics/2010/11/obama-outside-spending-2012-election>; Peter H. Stone, *Democrats Desperately Seek Their Own Rove: Democrats Try Catching GOP in Outside Money Chase*, HUFFPOST POLITICS (Mar. 14, 2011, 8:44 AM), http://www.huffingtonpost.com/2011/03/14/democratic-fundraising-moneychase_n_835243.html.

substantial risk of corruption, as explained *infra*, Section II.A.1. Corporate campaign spending has historically involved attempts to purchase quid pro quo favorable political treatment, often at taxpayers' expense.

B. Citizens United Has Exacerbated Preexisting Problems of Undisclosed Spending by Wealthy Special Interests

The *Citizens United* majority wrongly assumed that current disclosure laws allow both the electorate and corporate shareholders "to make informed decisions and give proper weight to different speakers and messages."²² However, that vision of transparency and free flow of information bears no relation to what occurs in real life.²³ Most corporations are not required to disclose political spending, either to the general public, or to their own shareholders and corporate boards.²⁴ Contrary to the Court's expectations, recent elections have shown a sharp decline in the disclosure of political expenditures.

- Among groups making "electioneering communications" (campaign advertisements that mention a candidate), disclosure of donors has dropped from 96.8% in 2006, to 49.3% in 2008, to a scant 34% in 2010.²⁵
- Among groups making independent expenditures, disclosure of donors dropped from 96.7% in 2006, to 83.3% in 2008, to 70% in 2010.²⁶

These numbers are hardly surprising: under the current laws, corporations can hide their political spending in several different ways.

First, it is perfectly legal for businesses that want to influence federal elections to funnel money through nonprofit trade

22. *Citizens United*, 130 S. Ct. at 916.

23. 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, NAT'L INST. ON MONEY IN STATE POLITICS, INDECENT DISCLOSURE: PUBLIC ACCESS TO INDEPENDENT EXPENDITURE INFORMATION AT THE STATE LEVEL 4 (2007), <http://www.followthemoney.org/press/Reports/200708011.pdf>.

24. See CLARA TORRES-PELLISCY, CORPORATE CAMPAIGN SPENDING: GIVING SHAREHOLDERS A VOICE 10 (2010), available at http://brennan.3cdn.net/54a676e481f019bfb8_bvm6ivakn.pdf ("As U.S. law stands now, corporate managers can spend corporate money on politics without notifying shareholders either before or after the fact and they can make this political spending without any authorization from shareholders.").

25. KING, *supra* note 23, at 4.

26. PUBLIC CITIZEN, *supra* note 9, at 11.

associations such as the Chamber of Commerce to avoid disclosure.²⁷ For example, in a 2000 Michigan senate race, Microsoft used the Chamber of Commerce to fund \$250,000 in attack ads against a candidate; this undisclosed donation would have remained hidden but for a newspaper investigation that exposed Microsoft's contribution.²⁸

Similarly, America's Health Insurance Plans (AHIP), a trade association, was found to have solicited \$10 million to \$20 million from six leading health insurers, and funneled this money secretly to the U.S. Chamber of Commerce to underwrite anti-health reform attack ads.²⁹ Although businesses must reveal their identities to the Federal Election Commission if they spend large amounts of money directly, they can give money to trade associations and other nonprofits anonymously. These nonprofits, in turn, only have to disclose the source of their advertising money if the donors specified that their contributions were intended for political ads—a requirement that almost all sophisticated players avoid.³⁰

Second, corporations and wealthy individuals often cloak their political spending by utilizing conduit organizations to avoid disclosing their true identity. As the Supreme Court observed in its 2003 decision in *McConnell v. FEC*, veiled spending is not a

27. TORRES-SPELLISCY, *supra* note 24, at 12.

28. See BRUCE F. FREED AND JAMIE CARROLL, CTR. FOR POLITICAL ACCOUNTABILITY, HIDDEN RIVERS: HOW TRADE ASSOCIATIONS CONCEAL CORPORATE POLITICAL SPENDING, ITS THREAT TO COMPANIES, AND WHAT SHAREHOLDERS CAN DO 13 (2006), <http://www.politicalaccountability.net/index.php?ht=a/GetDocumentAction/i/932> (explaining that Microsoft made these “unregulated ‘soft money’ contributions” to pay for ads attacking the candidate (Debbie Stabenow (D)) who was challenging the incumbent Spencer Abraham (R) for the Michigan Senate seat); John R. Wilke, *Microsoft Is Source of “Soft Money” Funds Behind Ads in Michigan’s Senate Race*, WALL ST. J., Oct. 16, 2000.

29. Brad Jacobson, *Exclusive: How Corporations Secretly Move Millions to Fund Political Ads*, RAW STORY (Feb. 4, 2010), <http://www.rawstory.com/v3/2010/02/04/exclusive-trade-groups-swiss-bank-accounts-campaign-finance/>.

30. See Ciara Torres-Spelliscy, *Hiding Behind the Tax Code, the Dark Election of 2010 and Why Tax-Exempt Entities Should Be Subject to Robust Federal Campaign Finance Disclosure Laws*, 16 NEXUS CHAPMAN’S J. OF L. & PUB. POL’Y 59, 61 (2011) (“If for-profit corporations are purposefully using non-profits to hide the true source of their funds, then it is possible that the degree of disclosure required of non-profits in the future may have an impact on whether for-profits give money to ideological and politically active non-profits.”). Although trade associations must report contributions received from other corporations to the Internal Revenue Service, the document itself remains confidential and is not made available to the public. See generally INTERNAL REVENUE SERVICE (I.R.S.), INSTRUCTIONS FOR FORM 990 RETURN OF ORGANIZATION EXEMPT FROM INCOME TAX 4 (2010), available at <http://www.irs.gov/pub/irs-pdf/i990.pdf> (providing a step-by-step account of how non-profits disclose income).

new problem.³¹ But *Citizens United* gave corporations and other political spenders more cover to hide behind nonprofits and trade associations than ever before. So while spending surged in 2010, the public's knowledge about that spending plummeted. For example:

- In September 2010, a mysterious group called Concerned Taxpayers of America started running ads targeting Rep. Peter A. DeFazio (D-Ore.).³² It was only after the organization's FEC filings were made public that the truth came to light. The Concerned Taxpayers of America turned out to be only *two* concerned taxpayers—a privately-owned construction corporation based in Maryland, and a New York hedge fund executive—who poured nearly \$1 million into this super PAC.³³
- The American Future Fund—based in Des Moines, Iowa—is a 501(c)(4) non-profit corporation that spent over \$9.6 million in the 2010 election cycle, ranking fifth among independent spenders nationwide.³⁴ The group paid for a variety of ads targeting candidates on issues such as the so-called “Ground Zero Mosque.” Media reports suggest, however, that the organization was in fact funded by ethanol interests, and that its true agenda was to target members sitting on energy and agricultural policy committees.³⁵ Because the American Future Fund was organized as a 501(c)(4), it has no obligation to disclose its funders publicly, and the interests and identities of its funders may never be known for certain.

This lack of accountability endangers the entire legislative process by allowing corporate special interests to hide behind

31. See McConnell, 540 U.S. at 128, 197 (citing record evidence that corporations commonly veil their political expenditures with misleading names such as “The Coalition-Americans Working for Real Change” (a business organization opposed to organized labor) and “Citizens for Better Medicare” (funded by the pharmaceutical industry)).

32. Karen Tumulty, *An Anonymous Group Tries to Ignite a Sleepy Congressional Race*, WASH. POST (Sept. 24, 2010, 9:55 PM), <http://www.washingtonpost.com/wp-yn/content/article/2010/09/24/AR2010092406362.html>.

33. Dan Eggen, *Concerned Taxpayers of America Supported by Only Two Donors*, WASH. POST (Oct. 16, 2010, 6:35 PM), <http://www.washingtonpost.com/wp-dyn/content/story/2010/10/13/ST2010101306021.html>; FEDERAL ELECTION COMMISSION (F.E.C.), SUMMARY REPORT - 2009-2010 ELECTION CYCLE: CONCERNED TAXPAYERS OF AMERICAN (2010), available at http://query.nictus.a.com/cgi-bin/cancomsrs/?_10+C00488437.

34. PUBLIC CITIZEN, *supra* note 9, at 9-10.

35. Editorial, *Secret Money in Iowa*, N.Y. TIMES, Oct. 26, 2010, <http://www.nytimes.com/2010/10/27/opinion/27wed1.html>; Jim Rutenberg, Don Van Natta, Jr. & Mike McIntire, *Offering Donors Secrecy, and Going on Attack*, N.Y. TIMES, Oct. 12, 2010, <http://www.nytimes.com/2010/10/12/us/politics/12donate.html>.

political campaigns that claim to speak for the general welfare. As explained above, this hidden spending impairs the ability of voters to make informed decisions on election day. Inadequate disclosure of corporate spending similarly limits the ability of legislators and policy makers to evaluate the true interests behind lobbying campaigns. Take one example: Recently, the nonprofit Institute for Liberty—claiming an affiliation with the Tea Party movement—launched an extensive campaign against a proposed tariff on paper imported from Indonesia.³⁶ The Institute's campaign invokes the Declaration of Independence to defend the rights of foreign corporations and attacks American businesses, unions, and environmentalists who have criticized Indonesian paper manufacturers. Suspiciously, this campaign coincided with a massive public relations push by Asia Pulp & Paper—a huge Indonesian paper manufacturer. But, because the Institute for Liberty is not required to disclose its donors, it is impossible to know whether Asia Pulp & Paper is actually funding this effort. Our chronic lack of transparency prevents citizens and legislators from knowing whether this purported grassroots campaign is actually being funded by corporate special interests and may lead voters to be misled in their choices at the ballot box.

C. Citizens United Led to the Creation of "Super PACs"

Citizens United also led directly to the creation of massive new independent expenditure vehicles nicknamed "super PACs." After *Citizens United*, the D.C. Court of Appeals extended the Supreme Court's logic to strike down contribution limits imposed on federal PACs that only engage in independent spending (as opposed to donating directly to candidates' campaigns).³⁷ In other words, these independent expenditure "super PACs" can take in and spend unlimited amounts, including monies from corporate treasury funds.

Such super PACs can function as "shadow parties," sharing personnel, office space, and strategies with each other, but without being subject to the federal campaign finance laws' restrictions on political parties and candidates.³⁸ Thus, super PACs offer a ready-made vehicle to circumvent federal contribution limits which place a ceiling on individual contributions and bar corporate contributions. As Republican political strategist Karl Rove, the founder of American Crossroads—perhaps the best known super

36. Mike McIntire, *Odd Alliance: Business Lobby and Tea Party*, N.Y. TIMES, Mar. 30, 2011, <http://www.nytimes.com/2011/03/31/us/politics/31liberty.html>.

37. *SpeechNow.org v. FEC*, 599 F.3d 686 (D.C. Cir. 2010).

38. Jonathan D. Salant & Kristin Jensen, *The Ties that Bind GOP Fundraisers*, BUS. WEEK (Oct. 21, 2010, 5:00 PM), http://www.businessweek.com/magazine/content/10_44/b4201034335872.htm.

PAC—told Fox News, “What we’ve essentially said is, if you’ve maxed out to the Senate committee, the congressional committee, or the R.N.C. and you’d like to do more, under the *Citizens United* decision you can give money to American Crossroads.”³⁹ Indeed, Rove’s two organizations—American Crossroads and Crossroads GPS—raised \$71 million in the 2010 cycle. During August 2010 alone, American Crossroads raised \$2.4 million from just three billionaire donors.⁴⁰ Such unlimited contributions to outside spending groups raise the risks of corruption and the appearance of corruption that federal contribution limits were enacted to prevent.

Moreover, according to Politifact, the Pulitzer Prize winning fact-checking website of the *St. Petersburg Times*, super PACs and other outside groups “overwhelmingly spread[] exaggerations and falsehoods.”⁴¹ If a candidate or political party were to have such a dismal record for accuracy, voters could hold that candidate or party accountable at the ballot box. However, with such distortions attributable only to supposedly independent outside groups, voters are powerless to react as our electoral discourse is flooded with misleading and deceptive advertisements funded by undisclosed backers.

D. The Outlook for 2012 Is Bleak

These troubling trends will continue—and likely worsen—in 2012. Observers predict that outside political spending may double again during the upcoming election cycle.⁴² Candidates are already gearing up for the most expensive federal election cycle in American history.⁴³ Both political parties have announced plans to include super PACs as a major component of their 2012 fundraising strategies. American Crossroads and Crossroads GPS have announced a target of \$120 million for the 2012 cycle.⁴⁴

39. Jeffrey Toobin, Commentary, *Money Talks*, NEW YORKER, Apr. 11, 2011, http://www.newyorker.com/talk/comment/2011/04/11/110411taco_talk_toobin.

40. Justin Elliott, *Billionaires Give 91 Percent of Funds for Rove-tied Group*, SALON.COM (Sept. 20, 2010, 6:30 PM), http://www.salon.com/news/politics/war_room/2010/09/20/rove_group_more_millionaire_donations.

41. Bill Adair, ‘Super PACs’ and Other Groups Have Poor Record for Accuracy, POLITIFACT.COM (Oct. 14, 2010, 12:16 PM), <http://www.politifact.com/truth-o-meter/article/2010/oct/14/super-pacs-and-other-groups-have-poor-record-accur/>.

42. See Shane D’Aprile, *Midterms May Have Just Tested the Waters of Campaign Finance Ruling*, THE HILL (Nov. 13, 2010, 7:00 AM), <http://thehill.com/blogs/ballot-box/fundraising/129005-ultimate-impact-of-outside-campaign-spending-remains-to-be-seen>.

43. See, e.g., Glenn Thrush, *Barack Obama Reelection Starts Cash Chase*, POLITICO (Mar. 5, 2011, 4:55 PM), <http://www.politico.com/news/stories/0311/50643.html>.

44. Brian Montopoli, *Karl Rove-Linked Group Seeks to Raise \$120 million*

Democratic strategists have announced their own super PACs, such as the “Majority PAC,” which will operate in tandem with issue advocacy nonprofits (organized under 501(c)(4) of the tax code), enabling big donors to make contributions in secret.⁴⁵ Some have warned that—given the amount of secret money inundating our elections—there is a serious likelihood of future political and ethical scandals of Watergate-sized proportions.⁴⁶ All in all, the full impact of *Citizens United* is almost certainly still yet to come.

II. SMALL-DONOR PUBLIC FINANCING CAN HELP RESTORE ACCOUNTABILITY TO ELECTIONS

Public financing generally, and small-donor based public financing in particular, can help restore our democracy, even in the face of the torrent of special interest money post-*Citizens United*. Most importantly, by allowing candidates to run viable campaigns through reliance on small donations and public funds alone, public funding programs restore integrity and accountability to the electoral process. By doing so, public financing reduces the threat that big money will have a corrupting influence on the political process. Moreover, public financing programs—particularly small-donor public financing systems—incite political participation by candidates and by voters, thus promoting electoral debate and competition and allowing more of the electorate to have a stake in our campaigns.

A. Public Financing of Campaigns Reduces Corruption

1. Reducing Actual Corruption

Our system of private financing for congressional races carries a significant risk of corruption. Members who receive significant donations from particular special interests may feel compelled to support their biggest donors’ interests, creating a quid pro quo where legislative decisions are implicitly exchanged for campaign funds.⁴⁷ As Senator John McCain (R-Arizona) explained in defense of the enactment of federal soft-money restrictions, “it would be hard to find much legislation enacted by any Congress that did not contain one or more obscure provision that served no legitimate national or even local interest, but which

for 2012 elections, CBS NEWS (Mar. 1, 2011, 11:56 AM), http://www.cbsnews.com/8301-503544_162-20037742-503544.html.

45. Carney, *supra* note 21.

46. Albert Hunt, *Watergate Return Inevitable as Cash Floods Elections*, BLOOMBERG (Oct. 17, 2010, 10:00 AM), <http://www.bloomberg.com/news/2010-10-17/more-cash-blots-out-sunlight-in-u-s-elections-albert-hunt.html>.

47. CTR. FOR GOV'TAL STUDIES, INVESTING IN DEMOCRACY 6-7 (2003) [hereinafter CGS STUDY], available at <http://www.policyarchive.org/handle/10207/bitstreams/231.pdf>.

was intended only as a reward for a generous campaign supporter.”⁴⁸ In addition to generating favors for special interests, large donations can lead to inaction on legislation that would benefit the public good. As Senator McCain explained, “There’s a terrible appearance when the Generic Drug Bill, which passes by 78 votes through the Senate, is not allowed to be brought up in the House shortly after a huge fundraiser with multimillion dollar contributions from the pharmaceutical drug companies who are opposed to the legislation.”⁴⁹ Former Senator Russ Feingold (D-Wisconsin) similarly warned of the appearance of quid pro quo corruption that emerges when “a \$200,000 contribution [was] given 2 days after the House marked up a bankruptcy bill by MBNA.”⁵⁰

Indeed, business leaders readily acknowledge that corporate political spending is intended as a quid pro quo to win influence and favorable treatment, rather than to merely express an opinion on political issues. This is why corporations routinely spend money supporting both major parties, and why corporate political spending generally flows to the party in power and tracks changes in the partisan make up of legislatures.⁵¹ A recent poll of 301 business opinion leaders confirmed that most believe that corporate political spending serves a non-ideological function:

- Fifty-five percent said that corporate America engages in campaign spending “to gain access to influence the legislative process.”⁵²
- Only 16% said that corporate political spending was intended “to promote a certain ideological position.”⁵³
- And, 17% of business leaders complained that corporate political donations were primarily necessary “to avoid adverse legislative consequences.”⁵⁴

This problem is fostered by political candidates, whose reliance on big-money donations leads them to reinforce the understanding that corporate campaign spending translates into

48. 143 CONG. REC. S9994-02 (daily ed. Sept. 26, 1997) (statement of Sen. John McCain), 1997 WL 593557, at *S10000 (Westlaw).

49. *McConnell*, 251 F. Supp. 2d at 515 (D.D.C. 2003) (quoting statement of Sen. John McCain).

50. *Id.* (quoting statement of Sen. Russell Feingold).

51. Brief of the Committee for Economic Development as Amicus Curiae Supporting Respondents at 11-12, *McComish v. Bennett*, 131 S. Ct. 2806 (2011) (Nos. 10-238 & 10-239), 2011 WL 661709, at *11-12 [hereinafter CED Amicus Brief].

52. CHERYL KORN, ZOGBY INT’L, COMM. FOR ECON. DEV., OCTOBER BUSINESS LEADER STUDY 8 (2010), available at <http://www.ced.org/images/content/issues/moneyinpolitics/2010/zogbypoll2010.pdf>.

53. *Id.*

54. *Id.*

political access.⁵⁵

Many business leaders believe that the pressure for corporations to enter the political fray has increased since *Citizens United*. According to an October 2010 poll by the Committee for Economic Development, “48% of business leaders state that the level of pressure placed on them to make political contributions has increased since 2008, with 28% saying it has ‘increased a lot.’”⁵⁶ The same poll found that 29% of business leaders describe the amount of money solicited as “excessive” and another 22% say it is “high, but not excessive.”⁵⁷

Our current campaign finance system is particularly problematic where lawmakers on key committees benefit from campaign spending by the very interests they are charged with regulating. For example, during the passage of the Medicare Prescription Drug, Improvement, and Modernization Act in 2003, Rep. Walter Jones (R-North Carolina) decried the House vote as “political Sodom and Gomorrah on Capitol Hill.”⁵⁸ As Members entered the House chamber, lobbyists representing prescription drug companies who had given millions in political contributions stood at the entrance to the chamber, pressuring legislators for their support.⁵⁹ In the aftermath of the extremely close vote, allegations of bribery swirled, as one of the deciding votes claimed he had been offered campaign funds in exchange for his support.⁶⁰

Direct political contributions are not the only cause of potential corruption in our current campaign finance system. Independent political spending, of the type that has been unleashed by *Citizens United*, can also create substantial risks of corruption. Indeed, independent campaign ads—or even the threat of unleashing such an ad—may be a more direct route than lobbying for special interests to pressure elected officials. Such campaign ads allow outside spenders to threaten politicians’ ability to remain in office. For example, in 1998, a Native American tribe offered to undertake a substantial independent spending campaign on behalf of a Kansas Congressman in an extremely close reelection race, if the Congressman would switch his position on—and subsequently support—legislation that would

55. CED Amicus Brief, *supra* note 50, at 11.

56. *Id.* at 17.

57. *Id.*

58. *A Look at H.R. 1826 and the Public Financing of Congressional Campaigns: Hearing on H.R. 1826 Before the Comm. on H. Admin.*, 111th Cong. 48 (2009) [hereinafter H.R. 1826 Hearing] (statement of Rep. Walter Jones), available at http://frwebgate.access.gpo.gov/cgi-bin/getdoc.cgi?dbname=111_house_hearings%20&docid=f:52711.pdf.

59. *Id.*

60. Sheryl Gay Stolberg, *Inquiry Set on Bribery Claim in Medicare Vote*, N.Y. TIMES, Mar. 18, 2004, <http://www.nytimes.com/2004/03/18/politics/18BRIB.html>.

allow the tribe to build a casino.⁶¹

Corporations may be able to use their new ability to run campaign attack ads to coerce elected officials into compliance with a particular agenda, even if the corporations never have to make good on their threats by actually running the ads. One egregious example arose in North Carolina and is discussed at length in Judge M. Blane Michael's dissenting opinion in the 4th Circuit case of *North Carolina Right to Life, Inc. v. Leake*:

The campaign waged in North Carolina by the independent group Farmers for Fairness (Farmers) provides another example of the corruptive influence of independent expenditures. Farmers created advertisements directly opposing certain legislative candidates. Instead of simply running the advertisements during election time, Farmers scheduled meetings with legislators and screened the advertisements for them in private. Farmers then explained that, unless the legislators supported its positions, it would run the advertisements that attacked the candidates on positions unrelated to those advocated by Farmers. . . . The record reveals that Farmers did not discuss its central issue, deregulation of the hog industry, in its advertisements. Instead, it threatened and coerced candidates to adopt its position, and, if the candidate refused, ran negative advertisements having no connection with the position it advocated.⁶²

As this example demonstrates, the *Citizens United* decision gives corporations a new and powerful weapon—whether they ever actually use this weapon is, arguably, beside the point. A corporation's explicit or implied threat to use its general treasury funds as a political war chest places great pressure on legislators and can be expected to distort the decision-making of elected officials in ways that will often be difficult to trace.

Public financing can help break this vicious cycle of corruption. When special interest political spending carries less weight, legislation can be considered on its merits rather than by its fundraising consequences. As former Arizona governor Janet Napolitano explained with regard to that state's prescription drug bill:

If I had not run [using public financing], I would surely have been paid visits by numerous campaign contributors representing pharmaceutical interests and the like, urging me either to shelve the idea or to create it in their image. All the while, they would be wielding the implied threat to yank their support and shop for an opponent in four years. [Instead,] I was able to create this program based on one and only one variable: the best interests of Arizona's

61. Defendant FEC's Proposed Findings of Fact at ¶¶ 288-97, *SpeechNow.org v. FEC*, 599 F.3d 686 (D.C. Cir. 2010), No. 1:08-cv-00248-JDB.

62. *N.C. Right to Life, Inc. v. Leake*, 525 F.3d 274, 335 (4th Cir. 2008) (Michael, J., dissenting) (citation omitted).

senior citizens.⁶³

Similarly, the Center for Governmental Studies, which has studied campaign finance programs across the nation, has catalogued numerous other instances (in New Jersey, Maine, Los Angeles and elsewhere) where candidates and legislators endorse public financing for this very reason: public financing enables elected officials to place their constituents' interests above special interests.⁶⁴

2. *Reducing Perceived Corruption*

As the Supreme Court has often reaffirmed, "Of almost equal concern as the danger of actual quid pro quo arrangements is the impact of the *appearance* of corruption stemming from public awareness of the opportunities for abuse inherent in a regime of large individual financial contributions."⁶⁵ Public polling confirms that the current system of private fundraising fosters the appearance of corruption, eroding trust in government and leading the public to believe that political spending buys political favors.

- A Greenberg-McKinnon national survey in February 2010 found that 79% believed members of Congress are "controlled" by those who fund their campaigns as opposed to just 18% who thought voters were in charge.⁶⁶
- A Rasmussen national survey in August 2010 found that 70% of voters believe that "most members of Congress [are] willing to sell their vote for either cash or a campaign contribution."⁶⁷

A shift to a system of public financing could help restore this lost faith in government. Already, participants in state public financing systems have seen a change in public opinion. "Overall people are excited about [public financing] because they feel that their particular legislator will not be tied to special interest dollars and that means a lot to them," said Leah Landrum Taylor, an

63. *Why Fair Elections?*, RHODE ISLANDERS FOR FAIR ELECTIONS, <http://www.fairelectionsri.org/benefits.php> (last visited Sept. 12, 2011).

64. Brief for Center for Governmental Studies as Amici Curiae Supporting Respondents at 11-12, *McComish v. Bennett*, 131 S. Ct. 2806 (2011) (Nos. 10-238 & 10-239), 2011 WL 639368, at *11-12 (U.S. Feb. 17, 2011) [hereinafter CGS Amicus Brief].

65. *Buckley v. Valeo*, 424 U.S. 1, 27 (1976) (emphasis added).

66. STAN GREENBERG ET AL., GREENBERG QUINLAN ROSNER, STRONG CAMPAIGN FINANCE REFORM: GOOD POLICY, GOOD POLITICS 2 (2010), available at http://www.greenbergresearch.com/articles/2425/5613_Campaign%20Finance%20Memo_Final.pdf.

67. *Toplines - Campaigns - August 7-8*, RASMUSSEN REPORTS, http://www.rasmussenreports.com/%20public_content/politics/questions/pt_survey_questions/august_2010/toplines_campaigns_august_7_8_2010 (last visited Sept. 12, 2011).

Arizona state representative who participated in her state's public financing program.⁶⁸ Even candidates who chose not to participate in the state's program have noticed the shift. In a recent GAO survey, an anonymous nonparticipating Arizona candidate wrote, "I believe the program has helped restore the public's faith in the integrity of candidates. Hopefully, many other states, and eventually Congress, will adopt public funding of elections."⁶⁹ Public financing can ease voters' distrust and suspicion of their elected officials, fostering greater trust in the government.

B. Public Financing Reduces Elected Officials' Dependence on Large-Donor Fundraising and Encourages Constituent-Focused Campaigns

Under the existing system of private campaign contributions, fundraising monopolizes a candidate's time, with elected officials spending many of their hours "dialing for dollars" or attending closed-door fundraisers. For instance, Representative Chellie Pingree (D-Maine) reported spending nearly twenty hours a day on the phone, trying to coax donations, not from her constituents, but from wealthy out-of-state interests.⁷⁰ Senator Tom Harkin (D-Iowa) recently estimated that, "[o]f any free time you have, I would say fifty per cent, maybe even more," is spent on fundraising.⁷¹ Senator Lamar Alexander (R-Tennessee) has stated that fundraising "sucks up time that a senator ought to be spending getting to know other senators, working on issues."⁷² On average, federal congressional candidates in contested elections report spending about thirty-four percent of their time raising money.⁷³

Crucially, public financing permits candidates to spend less time fundraising, allowing those who are elected officials to spend a greater percentage of their time legislating in their constituents' interest. Indeed, a 2003 University of Maryland study confirmed that candidates who participate in robust public funding programs spend significantly less time raising money than other

68. CGS STUDY, *supra* note 46, at 4.

69. U.S. GEN. ACCOUNTING OFFICE, GAO-03-453, CAMPAIGN FINANCE REFORM: EARLY EXPERIENCE OF TWO STATES THAT OFFER FULL PUBLIC FUNDING FOR POLITICAL CANDIDATES 122 (2003), *available at* <http://www.gao.gov/new.items/d03453.pdf>.

70. H.R. 1826 Hearing, *supra* note 57, at 43 (statement of Rep. Chellie Pingree).

71. George Packer, *The Empty Chamber: Just How Broken is the Senate*, NEW YORKER, Aug. 9, 2010, http://www.newyorker.com/reporting/2010/08/09/100809fa_fact_packer?currentPage=all.

72. *Id.*

73. Peter Francia & Paul Hernnson, *The Impact of Public Finance Laws on Fundraising in State Legislative Elections*, 31 AM. POLITICS RESEARCH 520, 531 (Sept. 2003), *available at* <http://apr.sagepub.com/content/31/5/520.short>.

candidates.⁷⁴ Another study recently concluded that candidates with full public financing are able to devote ten percent more of their time to direct engagement with voters compared to traditional candidates.⁷⁵

And, candidates around the country report that public financing improves their ability to connect with voters. For example, Albuquerque, New Mexico Councilor M. Debbie O'Malley, an incumbent who ran as a publicly funded candidate in 2007, stated that with public funding, "you do a lot more outreach and the voters have a lot more ownership of the election process, because many of them have given \$5 to help get a candidate qualified."⁷⁶ Running for Governor of Arizona, Janet Napolitano had a similar experience. "[Public financing is] the difference between being able to go out and spend your time talking with voters, meeting with groups, . . . traveling to communities that have been underrepresented in the past, as opposed to being on the phone selling tickets to a \$250 a plate fundraiser"⁷⁷

In short, in a system with less emphasis on large contributions, the focus returns to the candidate's ability to connect with his or her potential constituents.

C. *By Incentivizing Grassroots Fundraising, Public Financing Increases Political Participation*

Notably, the goal of small-donor public financing is not to "get money out of politics," or any such unrealistic objective. Instead, by using small-donor matching funds to incentivize grassroots fundraising, such programs can broaden and deepen the donor pool and allow new voters to have a stake in the electoral process. As the former New York City Campaign Finance Board Chair Frederick A.O. ("Fritz") Schwarz, Jr. has put it:

In their understandable disgust with large contributions, many reformers missed a big point—and a big opportunity. Political contributions are *not* inherently tainted. Political contributions do not always raise the specter of corruption. Large ones may. But small financial contributions are a natural part of a healthy participatory democracy. New York's system should be a model for

74. *Id.*

75. Michael Miller, *Clean Elections vs. Political Speech*, THE MONKEY CAGE (Mar. 23, 2011), http://www.themonkeycage.org/blog/2011/03/23/clean_elections_vs_political_s/; see also Ezra Klein, *The Importance of Campaign-Finance Reform in One Graph*, WASH. POST, (Mar. 23, 2011, 05:58 PM ET), http://www.washingtonpost.com/blogs/ezra-klein/post/the-importance-of-campaign-finance-reform-in-one-graph/2011/03/18/ABka8iKB_blog.html (discussing clean-election funds and their impact in campaigning).

76. CGS Amicus Brief, *supra* note 64, at 16 (quoting MOLLY MILLIGAN, CTR. FOR GOV'TAL STUDIES, PUBLIC CAMPAIGN FINANCING IN ALBUQUERQUE: CITIZENS WIN WITH CLEAN MONEY ELECTIONS 23 (2011)).

77. CGS STUDY, *supra* note 46, at 3.

reform nationwide.⁷⁸

The vast majority of political contributions currently come from a small segment of the wealthiest Americans, particularly in federal congressional campaigns. In 2008, U.S. Senate candidates received only 14% of their funding from donors who gave an aggregate of \$200 or less, while U.S. House of Representative candidates received only 8% of their funding from this pool of small donors.⁷⁹ Moreover, Senate candidates received only 23% of their funding from donors who gave less than \$1000, while House candidates received only 17% of their funding from donors who gave less than \$1000.⁸⁰ For incumbents, the reliance on small donors is even lower.⁸¹

A shift to public financing—particularly, moving to a system that matches small donations with public funds—can dramatically increase the influence of small donors and thus widen the scope of political participation. Small-donor participation in Arizona's gubernatorial races increased after the implementation of the state's public financing system: "a study of Arizona gubernatorial contributions found a 3-fold increase from 11,234 in 1998 to 38,579 in 2002, with the majority of contributors earning \$50,000 or less."⁸² In Connecticut, most state legislative candidates who participated in the public financing program received money from a larger number of individual donors in 2008 than the predecessor candidate of the same party and district in 2006, the last year without the program.⁸³ Similarly, under New York's system, which features a multiple match of small donations:

- The number of overall contributors and the number of small donors has increased.⁸⁴ In particular, the number of contributors has risen dramatically—by an average of 35%—since the enactment of the multiple match. In 1997,

78. Frederick A.O. Schwarz, Jr., *Foreword* to ANGELA MIGALLY & SUSAN LISS, BRENNAN CTR. FOR JUSTICE, *SMALL DONOR MATCHING FUNDS: THE NYC ELECTION EXPERIENCE* (2010), available at http://brennan.3cdn.net/8116be236784cc923f_iam6benvw.pdf. Mr. Schwarz is senior counsel at the Brennan Center.

79. ANTHONY J. CORRADO ET AL., *CAMPAIGN FIN. INST., REFORM IN AN AGE OF NETWORKED CAMPAIGNS 20* (2010), available at http://www.cfinst.org/books_reports/Reform-in-an-Age-of-Networked-Campaigns.pdf.

80. *Id.* at 21.

81. *Id.* at 20.

82. AMS. FOR CAMPAIGN REFORM, *FAIR ELECTIONS: STATE TRACK RECORD OF SUCCESS* (2010), available at <http://www.accreform.org/wp-content/uploads/2010/12/Fair-Elections-State-Track-Record.pdf>.

83. Press Release, Campaign Fin. Inst., *CFT's Review of Connecticut's Campaign Donors in 2006 and 2008 Finds Strengths in Citizen Election Program but Recommends Changes* (Mar. 2, 2010), available at http://www.cfinst.org/Press/PRelases/10-0302/Analysis_of_Connecticut_Citizen_Election_Program.aspx.

84. MIGALLY & LISS, *supra* note 78, at 2.

the last year before the enactment of the multiple match, 72,082 donors gave to participating candidates. In 2001, the first year of the multiple match, the number of donors skyrocketed to 146,949 donors.⁸⁵

- Participating candidates rely on more donors, and on more small donors, than do nonparticipants. In 2009, the typical participating City Council candidate enlisted the support of almost triple the number of small donors than did her nonparticipating counterpart; the median number of small donors for participating candidates was 269 and 91 for nonparticipants. In 2005, participants garnered support from more than double the small donors than nonparticipants; the median number of small donors for participating candidates was 239 and 98 for nonparticipants.⁸⁶
- In 2009, the average contribution to a participating City Council candidate was \$199, less than one-third the \$690 average contribution for non-participating candidates. In 2005, the average contribution to participating City Council candidates was \$321, significantly lower than the \$804 average contribution for non-participants.⁸⁷

Over half of the individuals who contributed to city campaigns during the last three election cycles were first-time donors.⁸⁸

Including more voters in the electoral process naturally leads to a larger, more diverse pool of donors. For instance, the share of donor activity has risen in New York City's outer boroughs; in 2009, donor activity increased almost six-fold in Flushing, a heavily Asian-American neighborhood that is home to Queens' Chinatown.⁸⁹ Similarly, a scan of the occupations of 2009 donors to New York City elections reveals a surprisingly diverse group: amidst the traditional lawyers and businesspeople, contributors included a significant number of artists, administrative assistants, barbers and beauticians, cab and bus operators, carpenters, police officers, students, nurses, and clergy.⁹⁰

Just as it creates new contributors, public financing can also lead to a more diverse candidate pool. When extensive private fundraising is no longer a barrier to entry, running for office becomes accessible to community leaders with popular support,

85. *Id.* at 12 & 34 n.94.

86. *Id.* at 15 & 35 n.113.

87. *Id.* at 15 & 35 n.114.

88. CGS Amicus Brief, *supra* note 64, at 19 (citing NYC CAMPAIGN FIN. BD., NEW YORKERS MAKE THEIR VOICES HEARD: A REPORT ON THE 2009 ELECTIONS 104-05 (2009)).

89. *Id.* (citing NYC CAMPAIGN FIN. BD., *supra* note 88, at 109-10).

90. MIGALLY & LISS, *supra* note 78, at 13.

but who may lack big-money backers.⁹¹ Thanks to Maine's system of public financing, for example, challengers have run "who never thought they'd have the chance to represent the people who are their friends and neighbors—young people, people from minority communities, people who thought they would never be able to afford the cost of running for public office."⁹² Indeed, once they remove the nearly prohibitive costs of candidacy, states with public financing inevitably see a rise in non-traditional candidates. For example:

- The number of women running for office in Connecticut is at an all-time high, and many credit public financing with allowing them to run.⁹³
- In Arizona, the number of Native American and Latino candidates nearly tripled in just two election cycles after public financing was implemented.⁹⁴
- In New York City, the system has been tied to a series of "firsts" in New York City politics: The City's first African-American mayor, David Dinkins, participated in the program, as have the City Council's first Dominican-American, first Asian-American, and first Asian-American woman members.⁹⁵

On a national level, the presidential public financing system has enabled candidates to translate widespread popular support into viable—and, often ultimately successful—campaigns. Since Watergate, three incumbent presidents have been defeated by challengers who benefited from the presidential public financing system, with the largest beneficiary of public financing being the insurgent candidacy of Ronald Reagan.⁹⁶

In sum, small-donor public financing systems provide critical incentives to broaden and deepen political participation in elections.

91. See CGS Amicus Brief, *supra* note 64, at 21-24.

92. H.R. 1826 Hearing, *supra* note 57, at 46 (statement of Rep. Chellie Pingree).

93. *A Look at H.R. 1826 and the Public Financing of Congressional Campaigns: Hearing on H.R. 1826 Before the Comm. on H. Admin.*, 111th Cong. 206 (2009) (statement of Jeffrey Garfield, Exec. Dir., Conn. State Elections Enforcement Comm'n), available at http://frwebgate.access.gpo.gov/cgi-bin/getdoc.cgi?dbname=111_house_hearings&docid=f:52711.pdf.

94. CGS Amicus Brief, *supra* note 64, at 24.

95. MIGALLY & LISS, *supra* note 78, at 21.

96. Brief for Anthony Corrado, Thomas Mann and Norm Ornstein as Amici Curiae Supporting Respondents at 16-17, *McComish v. Bennett*, Nos. 10-238 & 10-239, 2011 WL 661708, at *16-17 (U.S. Feb. 22, 2011).

D. Publicly Financed Candidates Can Remain Competitive Even in the Post-Citizens United Era

Multiple states and jurisdictions have had great success with their public financing systems. Indeed, a shining example has operated on the national level for more than thirty-five years: the presidential public financing system. It was adopted after the Watergate scandal as an effort to address the corruption of the Nixon administration and the abuses of the 1972 presidential election.⁹⁷ And it has succeeded in combating corruption—presidential elections since Watergate have been free of large-scale corruption scandals.

Even in the post-*Citizens United* world of increased, often corporate-backed, independent spending, public financing continues to be a viable option. Questions have been raised about the efficacy of public financing program in an environment of unlimited corporate independent expenditures.⁹⁸ But the experiences of jurisdictions with public financing demonstrates that, as long as such systems offer candidates sufficient funds to run viable campaigns, publicly financed candidates can run competitive and successful races even in the face of high levels of hostile independent spending.

- Maine has never banned corporate-funded independent expenditures in state elections. Thus, candidates participating in the state's 10-year-old public financing system have regularly conducted campaigns in the midst of heavy independent spending from the National Organization for Marriage and other well-financed outside groups.⁹⁹ Despite this, the vast majority of Republican and Democratic candidates participate in public financing. In the 2010 state senate elections, 94% of Republican candidates, and 82% of Democratic candidates ran their campaigns on public funding. In state house campaigns, 89% of Democratic candidates and 68% of Republican candidates participated.¹⁰⁰

97. 1974 Federal Election Campaign Act, Pub. L. 92-225, 86 Stat. 3 (codified as amended in scattered sections of 2 U.S.C § 431, 26 U.S.C. §§ 9001, 9031).

98. See R. SAM GARRETT, CONG. RESEARCH SERV., CAMPAIGN FINANCE POLICY AFTER CITIZENS UNITED V. FEDERAL ELECTION COMMISSION: ISSUES AND OPTIONS FOR CONGRESS (2010), available at http://assets.opencrs.org/rpts/R41054_20100201.pdf; Colin McEnroe, *The Extreme Court*, HARTFORD COURANT (Jan. 22, 2010, 8:55 a.m.), http://blogs.courant.com/colin_mcenroe_to_wit/2010/01/the-extreme-court.html.

99. See *Nat'l Org. for Marriage v. McKee*, 723 F. Supp. 2d 245, 251-52 (D. Me. 2010) (highlighting the contributions of the National Organization for Marriage).

100. MAINE COMM'N ON GOV'TAL ETHICS AND ELECTION PRACTICES, MAINE CLEAN ELECTION ACT: OVERVIEW OF PARTICIPATION RATES AND PAYMENTS

- Arizona's 13-year old public financing system has also enjoyed a strong bipartisan majority of candidates participating in public financing. Again, publicly financed candidates there have run successful campaigns despite hundreds of thousands of dollars in opposing independent expenditures.¹⁰¹ In 2008, 72% of Democrats and 50% of Republicans used public financing in their primary elections, and 82% of Democrats and 52% of Republicans used public financing in the general election.¹⁰²

Publicly financed candidates have also been able to compete and win in the nation's costliest municipal races—in New York City and Los Angeles, as well as San Francisco.

- In New York City in 2009, 66% of the general election candidates and 93% of primary candidates financed their elections through the City's program. "These rates have been consistent for over a decade. Indeed, nearly every credible candidate participates: in 2009's contest, the Public Advocate, the Comptroller, all five Borough Presidents, and all but two of the 51 City Council candidates who were elected to office participated."¹⁰³
- In San Francisco, 45% of candidates in 2008 and 48% of candidates in 2010 participated in the public financing program. Of the candidates who won their elections, 71% were publicly financed in 2008, and 60% were publicly financed in 2010.¹⁰⁴
- In Los Angeles, between 1993 and 2005, more than 75% of all citywide candidates have chosen to participate in the City's public matching funds program, and 83% of all Council candidates have participated. "A sizable majority, or 71 percent, of those elected to City office between 1993 and 2005 have had the advantage of public funding in their campaigns."¹⁰⁵

2000-2010 1 (2011), *available at* http://www.maine.gov/ethics/pdf/publications/2010_MCEA_Summary.pdf.

101. In 2006, gubernatorial candidate Janet Napolitano faced \$430,000 in directly opposing independent expenditures, yet still won the election. Jan Brewer was similarly successful in 2010, facing \$200,451 in directly opposing independent expenditures. *See Campaign Finance Reporting Database*, OFFICE OF THE ARIZ. SEC'Y OF STATE, <http://www.azsos.gov/cfs/CandidateSummarySearch.aspx> (demonstrating expenditures against candidates).

102. U.S. GOV'T ACCOUNTABILITY OFFICE, CAMPAIGN FIN. REFORM: EXPERIENCES OF TWO STATES THAT OFFERED FULL PUBLIC FUNDING FOR POLITICAL CANDIDATES 30-31 (2010), *available at* <http://www.gao.gov/new.items/d10390.pdf>.

103. MIGALLY & LISS, *supra* note 78, at 10.

104. S.F. ETHICS COMM'N, REPORT OF THE BOARD OF SUPERVISORS PUBLIC FINANCING PROGRAM OF 2010 9 (forthcoming 2011) (on file with Brennan Center).

105. L.A. CITY ETHICS COMM'N, INVESTING IN THE PUBLIC TRUST: CAMPAIGN

In sum, there is little doubt that public financing systems can succeed in providing sufficient funds to viable candidates so that candidates who wish to participate can compete vigorously and win.¹⁰⁶

III. CONCLUSION

As the Supreme Court explained in *Buckley*, a public funding system aims, “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.”¹⁰⁷ The Court further noted that:

[T]he central purpose of the Speech and Press Clauses was to assure a society in which “uninhibited, robust, and wide-open” public debate concerning matters of public interest would thrive, for only in such a society can a healthy representative democracy flourish. Legislation to enhance these First Amendment values is the rule, not the exception. Our statute books are replete with laws providing financial assistance to the exercise of free speech.¹⁰⁸

Public financing promotes “uninhibited, robust, and wide-open public debate” not only through direct subsidies for speech but also through more indirect means. Instead of relying on the deep pockets of special interests, public financing makes it possible for candidates to run a viable, competitive campaign through grassroots outreach alone, leaving them indebted to no one but their constituents. In this way, a public financing system serves key anti-corruption interests, combating “both the actual corruption threatened by large financial contributions and the erosion of public confidence in the electoral process through the appearance of corruption.”¹⁰⁹ Moreover, “[b]ecause the electoral process is the very ‘means through which a free society democratically translates political speech into concrete governmental action,’ . . . measures aimed at protecting the integrity of the process . . . tangibly benefit public participation in political debate.”¹¹⁰

Small-donor public financing systems, such as the

FINANCE REFORM IN THE CITY OF LOS ANGELES 15 YEARS AFTER PROPOSITION H 59, 83 (2006), available at http://ethics.lacity.org/pdf/2005ElectionStudy/Investing_in_the_Public_Trust.pdf.

106. Michael J. Malbin & Peter W. Bruscoe, *Small Donors, Big Democracy: New York City's Matching Funds as a Model for the Nation and States* 20 (Campaign Fin. Inst., Working Paper, 2010), available at http://www.cfinst.org/pdf/state/NYC-as-a-Model_Malbin-Brusoe_RIG_Dec2010.pdf.

107. *Buckley*, 424 U.S. at 92-93.

108. *Id.* at 93 n.127 (citations omitted).

109. *McConnell v. FEC*, 540 U.S. at 136 (2003) (internal quotation omitted).

110. *Id.* at 137 (quoting *Nixon v. Shrink Mo. Gov't PAC*, 528 U.S. 377, 401 (2000) (Breyer, J., concurring)).

presidential primary public financing program and those in several states, further First Amendment values by directly enlarging public discussion, preventing corruption and its appearance, providing candidates an alternative to special interest money, and encouraging candidates to reach out to a broader grassroots network of constituents. In these and many other ways, small-donor public financing systems advance the core values of the First Amendment—more political participation and more speech. As the Supreme Court declared in *Citizens United*, these values are at the heart of our constitutional democracy: “[I]t is our law and our tradition that more speech, not less, is the governing rule.”¹¹¹

111. *Citizens United*, 130 S. Ct. at 911.