



**Testimony of Adam Lioz, Counsel at Demos
The United States Senate Committee on the Judiciary
Subcommittee on the Constitution, Civil Rights and Human Rights**

“Taking Back Our Democracy: Responding to Citizens United and the Rise of Super PACs.”

July 24, 2012

Introduction

Thank you for this opportunity to submit testimony regarding the damage that *Citizens United* and the rise of Super PACs has done to our system of democratic government. In the text below I will discuss why rules that govern the role of money in politics are important to our democracy; the impact of *Citizens United* and related decisions on our electoral system; and what Congress can and must do to promote the core American value of political equality.

What’s at Stake

Before delving into the specific problems caused by the U.S. Supreme Court’s misinterpretation of the First Amendment and the current Super PAC system, it is useful to take a step back and highlight why campaign finance laws are important in the first place.

We live in a representative democracy with a capitalist economy. This means that we hold different values dear in the economic and political spheres.

Most Americans will tolerate some economic inequality so long as it results from meritocratic competition, because we respect that other values such as efficiency and proper incentives have a role to play in structuring our economy. One’s political ideology to a certain extent determines how much inequality one is willing to sanction in the name of other values—with, all else being equal, self-identified conservatives comfortable with a wider income gap than self-identified liberals or progressives. Few argue that everyone should receive the same income regardless of effort, talent, or other factors.

CONNECT WITH DÉMOS AT: WWW.DEMOS.ORG

FOLLOW US AT: [@DEMOS_ORG](https://twitter.com/DEMOS_ORG)

[FACEBOOK.COM/DEMOSIDEASACTION](https://www.facebook.com/demosideasaction)

KEEP ON TOP OF THE LATEST TRENDS AND ANALYSIS
FROM DÉMOS AT OUR NEW BLOG, POLICYSHOP.NET

MEDIA CONTACT

Communications Department

Lauren Strayer

lstrayer@demos.org

(212) 389-1413

Political equality, on the other hand, is a core American value. Regardless of partisan or ideological affiliation, the vast majority of Americans agree that it is critical that we all come to the political table as equals. Through multiple amendments and Supreme Court decisions, the concept of political equality (“one person, one vote”) has become a core constitutional principle.

But, we cannot maintain a democracy of equal citizens in the face of significant economic inequality if we allow those who are successful (or lucky) in the economic sphere to translate wealth directly into political power. Our democratic public sphere is where we set the terms for economic competition. It is where we decide—as equals—how much inequality, redistribution, regulation, pollution we will tolerate. These choices gain legitimacy from the fact that we all had the opportunity to have our say. If incumbents are able to rig the rules in favor of their own success it undermines the legitimacy of the economic relations in society.

In short, democracy must write the rules for capitalism, not the other way around. And, the only way to ensure this happens is to have some mechanism for preventing wealthy individuals and institutions from translating their wealth into political power. Campaign finance rules are that mechanism. These common sense restrictions on the unfettered use of private wealth for public influence are the bulwarks or firewalls that enable us to maintain our democratic values and a capitalist economy simultaneously. When we remove these protections, we risk creating a society in which private wealth and public power are one and the same.

The Problem:

The core problem with our electoral system is that it gives a small number of wealthy individuals and institutions vastly outsized influence over who runs for office, who wins elections, and therefore who makes policy in the United States.

We know that financial resources make a huge difference in election campaigns. For decades, candidates who have raised the most money have won the vast majority of races—often more than 90% in a given year.¹ And, for decades, candidates have raised the majority of their funds from a tiny minority of very wealthy Americans.²

¹ Bob Biersack, *The Big Spender Always Wins?*, Center for Responsive Politics: Open Secrets Blog, <http://www.opensecrets.org/news/2012/01/big-spender-always-wins.html>.

² Adam Lioz, *The Role of Money in the 2002 Congressional Elections*, U.S. PIRG Education Fund (2003).

This means that Americans who can afford to give thousands of dollars to political candidates or outside groups that support them are more likely to see candidates who share their views on the key issues of the day win office and assume positions of power. This is the influence of money on elections, rather than on politicians.

A second problem is the influence of money on politicians—the danger that winning candidates will feel more accountable to a narrow set of large donors than to the broad swath of constituents they are supposed to represent. This can lead to *quid pro quo* corruption—an officeholder supporting or opposing certain policies at the request of a donor. Or it can lead to a more subtle desire to please a political patron. A third and related problem is the appearance of corruption and the public's loss of confidence in the political system.

Wealthy contributors helping their favored candidates win elections or demanding their loyalty afterwards would not systemically skew politics or policy outcomes if these well-heeled donors were like the rest of us, if on average they had the same life experiences, opinions about issues, and political views as average-earning citizens.

But, unsurprisingly, this is not the case. We have long known that large campaign contributors are more likely to be wealthy, white, and male than average Americans. And recent research confirms that wealthy Americans have different opinions and priorities than the rest of the nation.

According to a nationwide survey funded by the Joyce Foundation during the 1996 congressional elections, 81% of those who gave contributions of at least \$200 reported annual family incomes greater than \$100,000. This stood in stark contrast to the general population at the time, where only 4.6% declared an income of more than \$100,000 on their tax returns.³ Ninety-five percent of contributors surveyed were white and 80% were men.⁴

We also know that wealthy Americans hold different views than average-earning citizens. Investigators for the Joyce study cited above found that large donors are significantly more conservative than the general public on economic matters, tending to favor tax cuts over anti-poverty spending.⁵

³ John Green, Paul Herrnson, Lynda Powell, and Clyde Wilcox. *Individual Congressional Campaign Contributors: Wealthy, Conservative and Reform-Minded* (1998).

⁴ *Id.*

⁵ *Id.*

A recent report by the Russell Sage Foundation confirms this finding. The authors surveyed “a small but representative sample of wealthy Chicago-area households.”⁶ They found meaningful distinctions between the wealthy respondents they surveyed and the general public on economic issues such as the relative importance of deficits and unemployment.

For example, wealthy respondents “often tend to think in terms of ‘getting government out of the way’ and relying on free markets or private philanthropy to produce good outcomes.”⁷ More wealthy respondents than average Americans listed deficits as the most important problem facing our country. Among those who did, “none at all referred only to raising revenue. Two thirds (65%) mentioned only cutting spending.”⁸ In spite of majority public support for raising taxes on millionaires, among respondents, “[t]here was little sentiment for substantial tax increases on the wealthy or anyone else.”⁹ And, in spite of recent scandals on Wall Street, “more than two thirds of [survey] respondents said that the federal government ‘has gone too far in regulating business and the free enterprise system.’”¹⁰

Ultimately, it is harder for working and middle class families to get ahead in the U.S. because our political system causes our national priorities to be set by and for the wealthy minority who funds campaigns.

The Rise of Super PACs and (Sometimes Secret) Outside Spending

A long line of Supreme Court decisions have restricted Americans’ ability to curb the influence of wealthy donors through the democratic process. Recent court decisions have made a bad problem worse, and introduced two new problems as well: direct business spending on elections and overall lack of transparency of political spending.

Since the 1976 Supreme Court decision *Buckley v. Valeo*,¹¹ individuals have been permitted to spend unlimited money to support favored candidates. The 2010 decision in *Citizens United v.*

⁶ Benjamin I. Page, Fay Lomax, Cook, and Rachel Moskowitz, *Wealthy Americans, Philanthropy, and the Common Good*, September 25, 2011 at 6; available at <http://www.scribd.com/doc/75022549/Wealthy-Americans-Philanthropy-and-the-Common-Good>.

⁷ *Id.* at 11.

⁸ *Id.* at 12.

⁹ *Id.* at 13.

¹⁰ *Id.* at 15.

¹¹ *Buckley v. Valeo*, 424 U.S. 1 (1976).

FEC¹² allowed corporations to spend general treasury funds—wealth they have aggregated through the benefits of the corporate form—to influence elections. This decision, along with D.C. Circuit Court of Appeals decision in *SpeechNow.org v. Federal Election Commission*¹³ and a subsequent FEC advisory opinion,¹⁴ gave rise to Super PACs and opened the floodgates to record levels of private money, much of which cannot be traced to an original source.

Super PACs may raise unlimited funds from virtually any source as long as they do not contribute to or “coordinate” directly with a candidate or political party. They are fast becoming a favored tool for wealthy individuals and interests to use to drown out the voices of average citizens. At the end of the 2010 election cycle, there were 84 active super PACs.¹⁵ As of July 10, 2012, there are more than 657 registered Super PACs which have raised a combined \$242,335,123.¹⁶

In February 2012, Demos partnered with the U.S. PIRG Education Fund to release *Auctioning Democracy: The Rise of Super PACs and the 2012 Election*, an in-depth analysis of Super PAC fundraising. We found that Super PACs raised the lion’s share of their funds from very wealthy individuals and for-profit businesses, and a small but significant portion of their funding is secret money, not traceable to its original source.

Wealthy individuals account for the biggest portion of Super PAC funding. Just 37 people, giving at least \$500,000 each, were responsible for more than half the itemized funds Super PACs raised from individuals between the advent of Super PACs in 2010 and the end of 2011.¹⁷ Fully 93% of the itemized funds raised by Super PACs from individuals came in contributions of at least \$10,000, from just twenty-three out of every 10 million people in the U.S. population.¹⁸

Not surprisingly, recent Sunlight Foundation research shows that these ultra-elite \$10,000+ donors—“The One Percent of the One Percent”—are quite different than average Americans.

¹² 130 S.Ct. 876 (2010).

¹³ *SpeechNow.org v. FEC*, 599 F.3d 686 (2010).

¹⁴ Federal Election Commission, Advisory Opinion 2010-11, available at <http://saos.nictusa.com/aodocs/AO%202010-11.pdf>.

¹⁵ Super PACs & the Corporations Who Love Them, Coalition for Accountability in Political Spending (January 2012), available at <http://politicalspending.org/docs/CAPS-SuperPAC-report.pdf>.

¹⁶ *2012 Outside Spending, by Super PACs*, OpenSecrets.org at the Center for Responsive Politics, <http://www.opensecrets.org/outsidespending/summ.php?cycle=2012&chrt=V&type=S> (last visited July 10, 2012).

¹⁷ Adam Lioz, Demos, & Blair Bowie, U.S. PIRG, *Auctioning Democracy: The Rise of Super PACs and the 2012 Election*, (2012) available at <http://www.demos.org/publication/auctioning-democracy-rise-super-pacs-and-2012-election>.

¹⁸ *Id.*

In the 2010 election cycle, these 26,783 individuals were responsible for nearly a quarter of all funds contributed to politicians, parties, PACs, and independent expenditure groups.¹⁹ Nearly 55% of these donors were affiliated with corporations and nearly 16% were lawyers or lobbyists.²⁰ More than 32% of them lived in New York City, Los Angeles, Chicago, or San Francisco, or Washington, DC.²¹ The Super PAC system has further skewed political outcomes by giving even more power to even fewer people—who don't live, work, or think like the rest of us.

But in *Citizens United* the Roberts Court introduced new problems as well. More than 17% of the funds raised by Super PACs from their inception through the end of 2011 came from for-profit businesses.²² Businesses play a critical role in our society and our national economy. But, contrary to the *Citizens United* ruling, for-profit businesses should not be permitted to spend treasury funds to influence elections. First, most businesses are constrained to participate only to maximize private profit, rather than out of regard for the public good. More important, this spending undermines political equality by allowing those who have achieved success in the economic sphere to translate this success directly into the political sphere.

In addition, our political system has become considerably less transparent as a result of *Citizens United*. In his opinion for the Court, Justice Kennedy relied on the proposition that voters would know who was funding campaign advertisements and thus would be able to judge the message accordingly.²³ But current federal disclosure laws do not provide shareholders and citizens with the “the information needed to hold corporations and elected officials accountable for their positions and supporters.”²⁴ On the contrary, undisclosed political spending is on the rise, and Americans are increasingly in the dark about the money driving legislative and electoral outcomes.

Non-profit groups with meaningless names such as “Americans for Freedom” can accept unlimited contributions from anonymous donors. Their financial backers can remain anonymous because FEC regulations only require the identification of donors who specify that their funds were to be used for a particular political ad. “Americans for Freedom” can spend

¹⁹ <http://sunlightfoundation.com/blog/2011/12/13/the-political-one-percent-of-the-one-percent/>

²⁰ *Id.*

²¹ *Id.*

²² Adam Lioz & Blair Bowie, *Auctioning Democracy*, *supra* note 8 at 6.

²³ *Citizens United*, 130 S.Ct. at 916 (2010).

²⁴ *Id.*

this dark money itself. Or it can direct the money to independent or affiliated political committees. While political committees are required to disclose their funders, there is no true informational value for a voter to learn that “Americans Who Love Freedom” (a Super PAC) is funded by “Americans for Freedom” (a nonprofit). The real identity of the source of the money remains hidden.

A small but significant portion of the money raised by Super PACs cannot be traced back to its original source. As mentioned above, Super PACs are required to report their donors, but they are permitted to accept contributions from organizations—such as 501(c)(4) nonprofits and trade associations—that are not legally required to report theirs. Six point four percent of the funds given to Super PACs between 2010 and the end of 2011 were secret, not traceable to an original source.²⁵ Nearly 20% of active Super PACs received money from untraceable sources in 2011.²⁶

The 6.4% figure cited above greatly underestimates the total amount of secret money in the system. “Dark money” outside groups often spending directly rather than through Super PACs. In the 2010 election, undisclosed political spending by outside groups was already revealing some troubling trends. Groups such as 501(c)(4) and 501(c)(6) non-profit organizations reported spending over \$130 million that cycle, meaning that over 46 percent of the outside spending in the election was unaccountable.²⁷ Moreover, seven of the top ten outside spending groups did not disclose the identities of their funders, which accounted for almost three-quarters of all of the outside spending directed to influence the 2010 election.²⁸

The FEC recently projected that the total amount spent during the 2012 election cycle could top \$11 billion—shattering previous records.²⁹ The sources of much of this money will not be fully disclosed. As Norman Ornstein of the American Enterprise Institute recently observed, “We’re back to the Nixon era, the era of undisclosed money, of big cash amounts and huge interests that are small in number dominating American politics.”³⁰ This denies voters the opportunity to

²⁵ Adam Lioz & Blair Bowie, *Auctioning Democracy*, supra note 8 at 4.

²⁶ *Id.*

²⁷ Public Citizen, *12 Months After: The Effects of Citizens United on Elections and the Integrity of the Legislative Process* (2011), available at <http://www.citizen.org/documents/Citizens-United-20110113.pdf>.

²⁸ *Id.*

²⁹ Message from FEC Chair Caroline C. Hunter, January 15, 2012, available at <http://www.fec.gov/pages/fecrecord/2012/january/messagefrom2012chair.shtml>.

³⁰ Andy Kroll, *Follow the Dark Money*, *Mother Jones Magazine*, (July/August 2012), available at <http://www.motherjones.com/politics/2012/06/history-money-american-elections>.

“follow the money” and understand the motives behind the messages that are flooding their airwaves during the weeks leading up to an election.

In addition to giving the wealthy an outsized political voice and skewing policy outcomes, large contributions and secret spending are demonstrably eroding public confidence in our political system. In *Citizens United*, Justice Kennedy confidently predicted that “[t]he appearance of influence or access, furthermore, will not cause the electorate to lose faith in democracy.”³¹

Unfortunately, Justice Kennedy’s confidence was misplaced. Polling has shown time and again that that big money in elections reduces Americans’ trust in government. From 2001 to 2011, the United States fell from the 16th least-corrupt country on Transparency International’s Corruption Perceptions Index to 24th place, and “nearly three in four Americans believe that corruption has increased over the last three years.”³² The World Bank also reported recently that corruption controls in the United States had weakened since the late 1990s and that it now trails most developed nations.³³

Solutions

Congress, the President, federal agencies, and state legislatures can all act to reform our system. Because the Supreme Court had tied its hands, the U.S. Congress cannot immediately ban Super PACs or limit outside spending—but there is plenty it can do. Congress should:

Propose a constitutional amendment to clarify that Congress and the states may regulate individual and corporate political contributions and spending. Short of a dramatic shift in Supreme Court jurisprudence, the only way to break the dominance of wealthy individuals and institutions over our elections is to amend the U.S. Constitution to clarify that the First Amendment was never intended as a tool for use by corporations and the wealthy to dominate the political arena. To truly solve the problem, an amendment must overturn *Buckley*, not just *Citizens United*.

³¹ *Citizens United*, 130 S.Ct. at 910.

³² Eduardo Porter, The Spreading Scourge of Corporate Corruption, THE NEW YORK TIMES, (July 10, 2012), available at <http://www.nytimes.com/2012/07/11/business/economy/the-spreading-scourge-of-corporate-corruption.html>.

³³ *Id.* See also “Worldwide Governance Indicators: Country Data Report for United States, 1996-2010,” THE WORLD BANK, available at <http://info.worldbank.org/governance/wgi/pdf/c228.pdf>.

Amending the Constitution will require the support of two-thirds of both the House of Representatives and the Senate and then ratification by three-fourths of the state legislatures. This is, admittedly, a very high bar. But, we have reached this high bar in the past, often specifically to expand political participation and vindicate the core value of political equality. The Fourteenth, Fifteenth, Nineteenth, and Twenty-Sixth Amendments all extended the right to political participation to previously disempowered groups while limiting the disproportionate political influence of existing stakeholders.

In addition, public opinion is clearly on the side of reform. Since *Citizens United* was handed down, large majorities of Americans from both parties have indicated that they opposed the ruling.³⁴ Polls from around the time of the decision showed that 72% of Americans supported "backed congressional action to curb the ruling"³⁵ and nearly 80% would support a constitutional amendment.³⁶

Propose and confirm only judges and justices who understand the importance of political equality and who will interpret the First Amendment properly. The vast majority of Americans understand that the First Amendment was intended to promote robust political participation by all the people, not lock in the privileges of wealthy individuals and institutions. We need the next generation of judges and justices to break from the Roberts Court's antiregulatory orthodoxy and give Congress, states, and localities more flexibility to promote political equality, safeguard our democracy, and strike the proper balance between liberty and equality.

Encourage small political contributions by providing vouchers or tax credits. Encouraging millions of average-earning Americans to make small contributions can help counter-balance the influence of the wealthy few. Several states provide refunds or tax credits for small political contributions, and the federal tax code did the same between 1971 and 1986.³⁷ Past experience suggests that a well-designed program can motivate more small donors to

³⁴ Stan Greenberg and James Carville, Democracy Corps, Erica Seifert, Greenberg Quinlan Rosner, & David Donnelly, Public Campaign Action Fund, "Two years after Citizens United, voters fed up with money in politics," (January 19, 2012), available at <http://campaignmoney.org/files/DemCorpPCAFmemoFINAL.pdf>; Dan Egan, *Poll: Large majority opposes Supreme Court's decision on campaign financing*, WASHINGTON POST, (February 17, 2010), available at <http://www.washingtonpost.com/wp-dyn/content/article/2010/02/17/AR2010021701151.html>.

³⁵ *Id.*

³⁶ Hart Research Associates poll available at <http://freespeechforpeople.org/>

³⁷ Thomas Cmar, *Towards a Small Donor Democracy: The Past and Future of Incentives for Small Political Contributions*, U.S. PIRG Education Fund (2004).

participate.³⁸ An ideal program would provide vouchers to citizens up front, eliminating disposable income as a factor in political giving.³⁹

Match small contributions with public resources to encourage small donor participation and provide candidates with additional clean resources. Candidates who demonstrate their ability to mobilize support in their districts should receive a public grant to kick-start their campaign, and be eligible for funds to match further small donor fundraising. This would both encourage average citizens to participate in campaigns and enable candidates without access to big-money networks to run viable campaigns for federal office.

Require robust disclosure of all contributions and expenditures used to influence elections. Voters have the right to know who is attempting to influence our elections and to whom their elected officials may feel accountable once elected.

Protect the interests of shareholders whose funds may currently be used for political expenditures without their knowledge or approval. Congress should require for-profit corporations to obtain the approval of their shareholders before making any electoral expenditures; and require any for-profit corporation to publicly disclose any contributions to a 501(c)(4) organization that either makes an independent expenditure or contributes to a Super PAC.

Tighten rules on coordination. Current rules prohibiting coordination between Super PACs and candidates are riddled with loopholes. The Federal Election Commission should issue stronger regulations that establish legitimate separation between candidates and Super PACs. For example, the Commission could prevent candidates from raising money for Super PACs; prevent a person from starting or working for a Super PAC supporting a particular candidate if that person has been on the candidates official or campaign staff within two years; and prevent candidates from appearing in Super PAC ads (other than through already-public footage). If the FEC refuses to act, Congress can pass legislation codifying these common-sense rules.

Conclusion

³⁸ Id.

³⁹ See Bruce Ackerman and Ian Ayres, *VOTING WITH DOLLARS: A NEW PARADIGM FOR CAMPAIGN FINANCE* (2002).

For decades wealth individuals and interests have dominated the American political landscape. The *Citizens United* case and related rulings led to the rise of Super PACs and made a bad situation worse. Congress can and must act to vindicate the core American value of political equality by creating a democracy that is truly of, by, and for the people. Congress should refer a constitutional amendment to the states to overturn *Buckley* and *Citizens United*, move past the Roberts Court's anti-regulatory orthodoxy, and restore balance and common sense to our First Amendment. And, it can move forward on several other critical fronts, such as providing clean resources to qualified grassroots candidates, while advocates work to ratify the amendment in three-quarters of the states.