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CITIZENS UNITED SPURRED INCREASE IN SPENDING BY NONPROFIT GROUPS

Jonathan D. Salant*

The top four campaign spenders in 2012 aside from the political parties and candidates did not exist before 2010.¹ That is because in 2010, the United States Supreme Court removed limits on independent corporate and union spending in its *Citizens United v. Federal Election Commission*² decision.

Citizens United paved the way for both an explosion of spending by groups that kept their donors hidden and the creation of a new category of political groups, so-called super-political action committees (super-PACs). These super-PACs are required to disclose their contributors but may accept unlimited donations.³

* © 2014, Jonathan D. Salant. All rights reserved. B.A., political science, State University of New York at Stony Brook, 1976; M.S., journalism, Columbia University, 1978. Mr. Salant is currently a reporter in the Washington bureau of Bloomberg News specializing in campaign finance and lobbying. The Author wishes to thank Jessica Ronay and other editors of the *Stetson Law Review* for their careful and thorough editing of this Article.

1. Ctr. for Responsive Pol., *Political Nonprofits: Top Election Spenders*, https://www.opensecrets.org/outsidespending/nonprof_elec.php (accessed Feb. 26, 2014) (according to a list of outside groups compiled by the Center for Responsive Politics).

2. 558 U.S. 310, 365 (2010).

3. The United States Court of Appeals for the District of Columbia Circuit cited *Citizens United* in throwing out contribution limits to a political committee that would only engage in independent spending and not make any contributions to candidates. *SpeechNow.org v. Fed. Election Comm'n*, 599 F.3d 686, 698 (D.C. Cir. 2010). The Federal Election Commission (FEC) cited *SpeechNow* in voting to allow the creation of what

United States political campaigns are awash in an unprecedented amount of campaign cash. An increasing portion of this campaign money is spent by nonprofit organizations that have been able to keep the sources of their money hidden from public view. That secret money has poured into political campaigns, helping favored candidates close any spending gaps with their opponents. Candidates seeking federal office can now receive millions of dollars of support from a single individual, including one who might have business before the government.

Super-PAC spending totaled \$609 million for the 2012 elections, according to the Center for Responsive Politics, a Washington-based research group that is the source for most of the figures used in this Article.⁴ That is up from zero in 2008⁵ when super-PACs did not exist.⁶ Spending by nonprofit groups that do not have to disclose their donors increased to \$311 million in 2012 from \$69 million in 2008.⁷ And outside spending by all independent groups exceeded \$1 billion in 2012, almost triple what they spent in 2008.⁸

"*Citizens United*, and the court decisions which followed it, have dramatically changed the course of money in U.S. politics," said former Federal Election Commission (FEC) Chairman Trevor Potter,⁹ a Republican election lawyer and president of the Campaign Legal Center, which is a Washington-based advocacy group that filed an amicus brief in the case.¹⁰ The Supreme Court "was demonstrably wrong in holding that all independent

became known as super-PACs. Fed. Election Comm'n Advisory Op. AO 2010-09, 2010 WL 3184267 at **2-3 (July 22, 2010).

4. Ctr. for Responsive Pol., *2012 Outside Spending, by Group*, <http://www.opensecrets.org/outsidespending/summ.php?cycle=2012&chrt=V&disp=O&type=P> (accessed Feb. 26, 2014) [hereinafter *2012 Outside Spending, by Group*].

5. Ctr. for Responsive Pol., *2008 Outside Spending by Group*, <http://www.opensecrets.org/outsidespending/summ.php?cycle=2008&chrt=V&disp=O&type=P> (accessed Feb. 26, 2014) [hereinafter *2008 Outside Spending, by Group*].

6. Spencer MacColl, Ctr. for Responsive Pol., *Who's Who in the World of Super PACs?* <http://www.opensecrets.org/news/2011/08/world-of-super-pacs.html> (Aug. 24, 2011, 4:25 p.m.).

7. *2012 Outside Spending, by Group*, *supra* n. 4; *2008 Outside Spending, by Group*, *supra* n. 5.

8. *2012 Outside Spending, by Group*, *supra* n. 4; *2008 Outside Spending, by Group*, *supra* n. 5.

9. Interview with Trevor Potter, Pres., Campaign Leg. Ctr. (2012).

10. Memo. of Campaign Leg. Ctr. & Democracy 21 as Amicus Curiae in Support of Def. Fed. Election Comm'n, *Citizens United v. Fed. Election Comm'n*, 2008 WL 2518197 (June 11, 2008) (No. 07-2240 (RCL), 530 F. Supp. 2d 274 (2008)).

spending would be disclosed, that it would be 'totally' independent of candidates and parties, and that it would not corrupt anybody," Potter said.¹¹ "What we have seen instead is a tidal wave of spending through groups that do not disclose their donors and are closely tied to candidates and parties. This opens new ways to secretly buy influence and affect the legislative process, and pushes candidates and parties into an even more frantic money chase. Only someone who wishes American democracy ill would favor the situation we're in now."¹²

Groups that did not exist before *Citizens United* poured hundreds of millions of dollars into the 2012 elections. The top four biggest spenders, excluding candidates and parties, spent as follows. American Crossroads, the super-PAC founded with the help of Republican strategist Karl Rove, and its aligned nonprofit, Crossroads GPS, spent more than \$176 million in 2012.¹³ The super-PAC Restore Our Future spent more than \$142 million in 2012.¹⁴ Both super-PACs spent heavily to support Republican presidential nominee Mitt Romney, helping him to close the fundraising gap with President Barack Obama. The President was supported by the super-PAC Priorities USA Action and its sister nonprofit, Priorities USA, which spent \$65 million.¹⁵ The fourth biggest spender was Majority PAC, a super-PAC that helped elect Democratic Senate candidates.¹⁶

The super-PACs served as the attack arms of the candidates. All but \$14 million of the total funds Restore Our Future spent on the presidential campaign went to attack Romney's opponents in both the primary and general election.¹⁷ Every penny Priorities USA Action spent was on anti-Romney efforts.¹⁸

11. Interview with Trevor Potter, *supra* n. 9.

12. *Id.*

13. *2012 Outside Spending*, by Group, *supra* n. 4.

14. Hans Nichols, *Bloomberg News*, *Bloomberg Politics*, *Obama Raised \$45 Million Last Month as Aide Briefs Donors*, <http://www.bloomberg.com/news/2012-03-19/obama-re-election-organizations-raised-45-million-in-february.html> (Mar 20, 2012, 1:05 a.m. ET); *2012 Outside Spending*, by Group, *supra* n. 4.

15. *2012 Outside Spending*, by Group, *supra* n. 4.

16. *Id.*

17. Heidi Przybyla, *Bloomberg News*, *Bloomberg Businessweek*, *Pro-Romney PAC Killing Machine with Attack Ads*, <http://www.businessweek.com/news/2012-03-26/pro-romney-pac-killing-machine-with-attack-ads> (Mar. 27, 2012).

18. Bloomberg News analysis of data from Campaign Media Analysis Group, Kantar Media.

In some cases, the outside groups supported candidates who otherwise might have been forced to withdraw earlier than they did because they lost primaries and ran out of money. The Winning Our Future super-PAC, primarily funded by casino magnate Sheldon Adelson and his wife Miriam, spent more than \$15 million on behalf of former House Speaker Newt Gingrich's candidacy for the 2012 Republican presidential nomination.¹⁹ Along with the \$24 million Gingrich personally raised for his campaign, the money spent on his behalf by Winning Our Future helped keep him competitive.²⁰ Winning Our Future funded a documentary that called Romney a "corporate raider" and accused him of being like others on Wall Street—motivated solely by greed.²¹

All that outside money helped inflate the price tag of the 2012 elections to \$7 billion, according to the 2013 FEC chairwoman, Ellen Weintraub.²² That made the 2012 campaign the most expensive in United States history.²³ Others say that the increased spending translated to more political speech.²⁴ The

19. Ctr. for Responsive Pol., *Winning Our Future*, <http://www.opensecrets.org/outsidespending/recips.php?cmte=C00507525&cycle=2012> (accessed Feb. 26, 2014).

20. Jonathan D. Salant, *Bloomberg News*, *Adelson Gives \$5 Million to Pro-Gingrich PAC*, *Person Says*, <http://www.bloomberg.com/news/2012-01-08/las-vegas-sands-adelson-said-to-donate-5-million-to-pro-gingrich-group.html> (Jan. 8, 2012, 3:37 p.m. ET).

21. Jonathan D. Salant & Julie Bykowicz, *Bloomberg News*, *Perry Backer's Anti-Romney Film to Be Run by Gingrich Ally*, <http://www.bloomberg.com/news/2012-01-10/perry-backer-s-anti-romney-film-to-be-aired-by-gingrich-ally.html> (Jan. 10, 2012, 3 p.m. ET).

22. Jonathan Salant, *Bloomberg News*, *Bloomberg Politics*, *2012 Elections Cost Will Hit \$7 Billion*, *FEC Chair Weintraub Says*, <http://go.bloomberg.com/political-capital/2013-01-31/fec-head-weintraub-says-2012-elections-cost-will-hit-7-billion/> (Jan. 31, 2013, 8:28 p.m. EST).

23. Gregory Giroux, *Bloomberg News*, *Bloomberg Politics*, *Bloomberg by the Numbers: \$7 Billion*, <http://go.bloomberg.com/political-capital/2013-02-01/bloomberg-by-the-numbers-7-billion/> (Feb. 1, 2013, 6 a.m. EST). Also contributing to the high cost of campaigning: the 2012 presidential race was the first one to be completely privately funded since the current campaign finance system was put in place for the 1976 contest. The changes followed the Watergate scandal that led to the resignation of President Richard Nixon. Jonathan D. Salant, *Bloomberg News*, *Bloomberg Politics*, *Romney Shunning Federal Funds in Post-Watergate Election*, <http://www.bloomberg.com/news/2012-04-26/romney-shunning-federal-funds-in-post-watergate-election.html> (Apr. 27, 2012, 12 a.m. ET).

24. Jonathan D. Salant, *Bloomberg Businessweek*, *Why the 2012 Election Will Cost \$6 Billion*, <http://www.businessweek.com/magazine/why-the-2012-election-will-cost-6-billion-09292011.html> (Sept. 29, 2011) [hereinafter *Why the 2012 Election Will Cost \$6 Billion*]; e.g. *Buckley v. Valeo*, 424 U.S. 1, 39–50 (1976) (invalidating the Federal Election Campaign Act of 1971 limits on campaign expenditures as violating the First Amendment because such limitations substantially and directly restrict the ability of candidates, citizens, and associations to engage in protected political expression).

effort to strike down laws limiting donations and expenditures has been led by lawyer James “Jim” Bopp, who initially filed the *Citizens United* case.²⁵ Limits on donations and limits on spending are restrictions on how much someone can exercise his or her constitutional right to speak, he said.²⁶ The First Amendment, Bopp said, “ensure[s] robust participation by citizens [in our democracy].”²⁷

As a result of the *Citizens United* decision, nonprofits felt, and continue to feel, free to spend more money on political campaigns to make their presence felt, primarily on the Republican side.²⁸ That spending was felt particularly in competitive House districts in 2010 and contributed to the Republicans taking back the chamber they lost in 2006. An example was the Syracuse, New York-area congressional district represented by Dan Maffei. More than \$500,000 was spent by outside groups against the Democratic incumbent, compared with \$5,000 spent against the Republican challenger, Ann Marie Buerkle.²⁹ She won, though Maffei reclaimed the seat in a rematch two years later.³⁰ Maffei said he would have won the 2010 race “if it were not for the outside advertising which came in exclusively for my opponent late in the campaign.”³¹ A Siena University poll taken October 10, 2010, through October 12, 2010, gave Maffei a twelve-point lead, fifty-one percent in Maffei’s favor compared to thirty-nine percent in Buerkle’s favor.³²

This outside spending also has helped challengers like Ted Cruz in Texas defeat candidates backed by the Republican Party establishment. Senator Cruz’s biggest lifetime donor was the Club

25. *Why the 2012 Election Will Cost \$6 Billion*, *supra* n. 24.

26. *Id.*

27. *Id.*

28. Jonathan D. Salant & Lorraine Woellert, *Bloomberg News*, *High Court Decision May Bring ‘Cascade’ of Spending (Update1)*, <http://www.bloomberg.com/apps/news?pid=newsarchive&sid=acVfQNEL88UI> (Jan. 22, 2010, 12:37 EST).

29. John Crewdson, Alison Fitzgerald, Jonathan D. Salant & Charles R. Babcock, *Bloomberg News*, *Secret Donors Multiply in U.S. Election Spending*, <http://www.bloomberg.com/news/2011-05-19/secret-donors-multiply-in-u-s-with-finances-dwarfing-watergate.html> (May 19, 2011, 6:01 a.m. ET).

30. *Id.*

31. *Id.*

32. Steven Greenberg, *Siena Research Institute*, *Syracuse Post-Standard/Siena College 25th Congressional District Poll: Dan Maffei Has 12-Point Lead over Ann Marie Buerkle*, http://www.siena.edu/uploadedfiles/home/Parents_and_Community/Community_Page/SRI/SNY_Poll/25th%20CD%202010%20Poll%20Release%201%20--%20Final.pdf (Oct. 17, 2010).

for Growth,³³ a Republican-leaning advocacy group that calls for reductions in government spending and taxes.³⁴ The support Cruz received from such groups as Club for Growth, Tea Party Express, FreedomWorks, and the Senate Conservatives Fund helped offset the \$6 million spent by another outside group, Texas Conservatives Fund, on behalf of his Republican primary opponent, Lieutenant Governor David Dewhurst.³⁵

Business groups, which usually support Republicans, found their pleas ignored when they called on their traditional allies to drop the fight over healthcare, pass a spending bill, and reopen the government. “Most business PACs have assumed that any Republican is generally acceptable on business issues,” said David French, senior vice president for government relations at the Washington-based National Retail Federation. “That’s an assumption we are reconsidering.”³⁶

Even before the shutdown, companies indirectly backed candidates whose later votes had the potential to hurt their bottom lines. For example, the Pharmaceutical Research and Manufacturers of America (PhRMA), of which four of the seven biggest sellers of birth control drugs and devices are members, gave \$4.8 million to Republican-leaning nonprofits in 2010.³⁷ The nonprofits contributed to twenty-three Republican candidates later elected to the United States House of Representatives. All twenty-three later voted for legislation that limited access to birth control and reduced federal funding for it.³⁸ The money helped elect candidates whose votes threatened to hurt the bottom line of companies that earned \$1.7 billion selling contraceptives.³⁹

33. Ctr. for Responsive Pol., *Senator Ted Cruz*, <http://www.opensecrets.org/politicians/otherdata.php?cycle=2012&cid=N00033085&newMem=Y&type=I> (accessed Feb. 26, 2014) [hereinafter *Ted Cruz*].

34. Club for Growth, *Pro-Growth Tax Policy: Our Philosophy*, <http://www.clubforgrowth.org/philosophy/> (accessed Feb. 26, 2014).

35. *Ted Cruz*, *supra* n. 33.

36. Michael Tackett, *Bloomberg News*, *Bloomberg Politics*, *Tea Party Vows Future Fights as Republicans Assess Damage*, <http://www.bloomberg.com/news/2013-10-16/tea-party-vows-future-fights-as-republicans-assess-damage.html> (Oct. 17, 2013, 12 a.m. ET).

37. PhRMA, *Member Companies*, <http://www.phrma.org/about/member-companies> (accessed Feb. 26, 2014); Jonathan D. Salant, *Bloomberg News*, *Bloomberg Sustainability*, *Merck, Pfizer Back Lawmakers Who Oppose Company Products*, <http://www.bloomberg.com/news/2012-05-31/merck-pfizer-back-lawmakers-who-oppose-company-products.html> (May 31, 2012, 12:18 p.m. ET) [hereinafter *Merck, Pfizer Back Lawmakers Who Oppose Company Products*].

38. *Merck, Pfizer Back Lawmakers Who Oppose Company Products*, *supra* n. 37.

39. *Id.*

In February 2011, House Republicans voted to end funding for the \$317 million program Title X, which provides family-planning services, such as contraceptives, to lower-income individuals.⁴⁰ “That same legislation eliminated all federal funding for Planned Parenthood, of which contraceptive services accounted for one-third of its patient visits in 2010.”⁴¹ That was second only to the number of patients seeking testing for sexually transmitted diseases, according to the group’s annual report.⁴² According to the report, forty percent of the 2.2 million patients who sought birth control from Planned Parenthood obtained oral contraceptives.⁴³ As for abortion procedures, they accounted for just three percent of Planned Parenthood services.⁴⁴

The biggest funders of nonprofits that spent money on campaigns included other nonprofits linked to billionaire energy executives Charles and David Koch.⁴⁵ They transferred money to other nonprofits that in turn spent it on campaigns, making it more difficult to trace the original sources of the funds.⁴⁶

This technique was described by Bill Allison, editorial director of the Sunlight Foundation, a Washington-based watchdog group: “What you can do is create this daisy chain where every group is passing around the same million as the other groups.”⁴⁷

For example, the Center to Protect Patient Rights (the Center) is headed by Sean Noble, who has ties to the Kochs, including speaking at a Koch-sponsored gathering of wealthy donors that discussed how to help Republicans win the White House and control of Congress.⁴⁸ Noble shared a podium with Tim Phillips, president of the Koch-backed Americans for Prosperity (AFP).⁴⁹ Other ties include the Center and an organization called

40. *Id.*

41. Planned Parenthood, *Annual Report 2009–2010*, <http://proliferation.org/docs/PPFA2010AnnualReport.pdf> (June 30, 2010).

42. *Id.*

43. *Id.*

44. *Id.*

45. Alison Fitzgerald & Jonathan D. Salant, *Bloomberg News, Bloomberg Politics, Secret Political Cash Moves through Nonprofit Daisy Chain*, <http://www.bloomberg.com/news/2012-10-15/secret-political-cash-moves-through-nonprofit-daisy-chain.html> (Oct. 15, 2012, 3:52 p.m. ET).

46. *Id.*

47. *Id.*

48. *Id.*

49. *Id.*

Patients United Now, created by the Americans for Prosperity Foundation that David Koch chairs, working together in opposition to Obama's healthcare law.⁵⁰

According to the Center's 2010 Internal Revenue Service (IRS) disclosure, more than half of its spending went to four other nonprofits—the American Future Fund, 60 Plus Association, Americans for Job Security, and Americans for Tax Reform—that in turn spent \$30 million to help elect Republicans.⁵¹ None of their donors were named. Another nonprofit with ties to the Kochs is Freedom Partners, which contributed \$3 million to help fund the United States Chamber of Commerce.⁵² In the 2012 elections, the chamber spent \$35.7 million, primarily in support of Republicans.⁵³ Freedom Partners also contributed \$32 million to AFP, which ran advertisements opposing Obama's healthcare law.⁵⁴ AFP spent \$36.4 million on behalf of Republicans in 2012.⁵⁵ In addition, Freedom Partners gave \$2.5 million to the National Federation of Independent Business, a trade group representing small businesses⁵⁶ that joined the fight against Obama's healthcare law, unsuccessfully challenging its legality before the Supreme Court.⁵⁷

The increase in outside spending was at the center of the controversy over the IRS's flagging certain groups for extra scrutiny when they applied for Section 501(c)(4) status.⁵⁸ This filing status became coveted by groups that wanted to engage in some political activities while keeping their benefactors hidden from public view. "*Citizens United* opened up everything," said Melanie Sloan, executive director of Citizens for Responsibility

50. *Id.*

51. *Id.*

52. Jonathan D. Salant & Greg Giroux, *Bloomberg News*, *Reynolds, Noble Energy Join Others in Donation Disclosure*, <http://www.bloomberg.com/news/2013-09-25/reynolds-noble-energy-join-others-in-donation-disclosure.html> (Sept. 25, 2013, 1:35 p.m. ET).

53. *Id.*

54. *Id.*

55. Robert Maguire & Viveca Novak, Ctr. for Responsive Pol., *Americans for Prosperity Helped Churn Koch-Linked Money*, <http://www.opensecrets.org/news/2013/11/americans-for-prosperity-helped-churn-koch-linked-money.html> (Nov. 15, 2013, 7:11 p.m.).

56. Salant & Giroux, *supra* n. 52.

57. *Nat'l Fed'n of Indep. Bus. v. Sebelius*, 132 S. Ct. 2566 (2012).

58. Julie Bykowicz & Jonathan D. Salant, *Bloomberg News*, *Bloomberg Politics*, *IRS Sent Same Letter to Democrats That Fed Tea Party Row*, <http://www.bloomberg.com/news/2013-05-15/irs-sent-same-letter-to-democrats-that-fed-tea-party-row.html> (May 14, 2013, 9:42 p.m. ET) [hereinafter *IRS Letter*].

and Ethics in Washington, a watchdog group that has sued the IRS over the issue.⁵⁹ “Suddenly, the IRS is deluged with applications. They were trying to find groups that were political.”⁶⁰ But the IRS singled out groups that had terms such as “tea party” or “patriot” in their names to help decide whether they needed closer examinations.⁶¹ Such names were used by conservative, not liberal, organizations. Even so, some liberal-leaning groups received similar inquiries from the IRS, and one Democratic-leaning nonprofit, Emerge America, lost its tax-exempt status altogether.⁶²

Former FEC Chairman Michael Toner, co-chairman of the election law and government ethics practice at Wiley Rein LLP, said the IRS bureaucrats were given no guidelines to follow.⁶³ “In the aftermath of *Citizens United*, there has been a significant uptick in 501(c)(4) activity with no corresponding improvement in IRS clarity,” Toner said. “It’s the absence of standards that create the conditions for these types of abuses.”⁶⁴

Craig Engle, founder of the political law group at Arent Fox LLP and a former National Republican Senatorial Committee general counsel and FEC staff member, said the IRS should not be in the business of approving nonprofits.⁶⁵ Instead, groups claiming nonprofit status should face IRS examinations to ensure that they are following the law, the same way the FEC audits campaigns, Engle said.⁶⁶ “It would be like the IRS telling you how much income tax you owe before you got a job,” Engle said. “It is up to the American public to voluntarily and faithfully comply with the law. It is not up to the government to make as a prerequisite a promise before engaging in any activity.”⁶⁷

Meanwhile, nonprofit groups continue to spend millions of dollars on political campaigns without identifying their funders.

59. Interview with Melanie Sloan, Exec. Dir., Citizens for Resp. & Ethics in Wash. (2012).

60. *Id.*

61. *IRS Letter*, *supra* n. 58.

62. *Id.*; Debra Cassens Weiss, ABA J., *IRS Official Apologizes for Singling out ‘Tea Party’ and ‘Patriot’ Groups*, http://www.abajournal.com/news/article/irs_official_apologizes_for_singling_out_tea_party_and_patriot_groups/ (May 10, 2013, 11:50 a.m. CST).

63. Interview with Michael Toner, Partner, Wiley Rein LLP (2012).

64. *Id.*

65. Interview with Craig Engle, Partner, Arent Fox LLP (2012).

66. *Id.*

67. *Id.*

Efforts to require disclosure have gone nowhere. Sloan's group has sued the IRS, arguing that federal law prevents nonprofits from spending any money on politics.⁶⁸

In Congress, Senate Republicans have repeatedly filibustered legislation that would require nonprofits funding political advertisements to identify who is paying for the advertisements.⁶⁹ A bipartisan bill requiring disclosure was introduced by Oregon Democrat Ron Wyden and Alaska Republican Lisa Murkowski, but that legislation has yet to receive a vote.⁷⁰

The FEC has also sat on the sidelines. Although the 2002 campaign finance law known as McCain-Feingold—named after its Senate sponsors, Republican John McCain of Arizona and Democrat Russ Feingold of Wisconsin—required disclosure of funders of political advertisements,⁷¹ the FEC in 2007 ruled that only donors who specifically earmarked their contributions for advertisements had to be identified, not those who gave money to a group airing political commercials.⁷² Representative Chris Van Hollen, a Maryland Democrat, has sued the FEC to require full disclosure.⁷³ The case is still pending in the courts.

Even as spending by nonprofits has grown, the six-member FEC has been hamstrung by a partisan divide and unable to muster the four votes needed to take a new look at disclosure in the wake of the *Citizens United* decision.⁷⁴ In fact, the FEC has not even been able to find four votes to rewrite those rules that conflict with *Citizens United* and therefore can no longer be enforced although they remain on the books, such as the ban on corporate and union spending to support or oppose particular

68. Citizens for Resp. & Ethics in Wash. (CREW), *CREW Sues IRS for Failing to Revise Rules Governing 501(c)(4) Groups*, <http://www.citizensforethics.org/legal-filings/entry/crew-sues-irs-for-failing-to-revise-rules-governing-501c4-groups> (May 21, 2013); Pl.'s Compl., *Citizens for Resp. & Ethics in Wash. v. United States Dep't of the Treasury IRS*, 2013 WL 2403471 (D.D.C. May 21, 2013) (No. 1:13CV00732).

69. Jonathan D. Salant, *Bloomberg News*, *Bloomberg Sustainability, Republicans Join Democrats to Back Ending Donor Anonymity*, <http://www.bloomberg.com/news/2013-02-22/republicans-join-democrats-to-back-ending-donor-anonymity.html> (Feb. 22, 2013, 12:01 a.m. ET).

70. *Id.*

71. Jonathan D. Salant, *Bloomberg News*, *Van Hollen Asks Federal Court, FEC to Require Donor Disclosure*, <http://www.bloomberg.com/news/2011-04-21/van-hollen-asks-federal-court-fec-to-require-donor-disclosure.html> (Apr. 21, 2011, 3:24 p.m. ET).

72. 11 C.F.R. § 104.20(c)(9) (2007).

73. *Van Hollen v. Fed. Election Comm'n*, 851 F. Supp. 2d 69 (D.D.C. 2012), *rev'd sub nom. Ctr. for Individual Freedom v. Van Hollen*, 694 F.3d 108 (D.C. Cir. 2012).

74. Crewdson, Fitzgerald, Salant & Babcock, *supra* n. 29.

candidates, known as express advocacy.⁷⁵ In addition, a coalition of organizations has asked the Securities and Exchange Commission to require publicly traded companies to disclose their donations to nonprofits.⁷⁶

Unable to win disclosure by rule or law, advocates have pressured companies directly to reveal the money they give to nonprofits that in turn fund campaigns. An increasing number of companies have come forward voluntarily and agreed to disclose their corporate political spending. A 2013 study by the Center for Political Accountability and the University of Pennsylvania Wharton School's Zicklin Center for Business Ethics Research reported that 84 of the 195 largest corporations in the Standard & Poor's 500 Index agreed to reveal their contributions to trade associations, and 51 said they would disclose donations to other nonprofits.⁷⁷

It is possible that companies believe these disclosures avoid contributions that could anger consumers. For example, Target Corporation faced a boycott by gay-rights groups in 2010 after donating \$150,000 to a business group backing a gubernatorial candidate in Minnesota who opposed same-sex marriage.⁷⁸ "Target was viewed by companies as a reason for them to adopt serious disclosure and accountability policies," said Bruce Freed, president of the Washington-based Center for Political Accountability. "Companies can say, 'we'd like to give but it's going to be disclosed. That's a reason that they're not going to give.'" ⁷⁹

Pro-disclosure efforts, however, are being challenged by large trade associations, which argue that businesses face threats and boycotts if their contributions are made public.⁸⁰ "The idea here is to bring these companies' political spending—which is free

75. *Id.*

76. Jonathan Salant, *Bloomberg News, Bloomberg Politics, Political Disclosure on SEC Agenda*, <http://go.bloomberg.com/political-capital/2013-01-08/political-disclosure-on-sec-agenda/> (Jan. 8, 2013, 11:08 a.m. EST).

77. Salant & Giroux, *supra* n. 52; Ctr. for Political Accountability, *New CPA-Zicklin Index Reveals Surge in Number of Top Companies with Strong Political Disclosure Policies*, <http://www.politicalaccountability.net/index.php?ht=d/sp/i/8051/pid/8051> (accessed Feb. 26, 2014).

78. Salant & Giroux, *supra* n. 52; Brian Montopoli, *CBS News, Target Boycott Movement Grows Following Donation to Support "Antigay" Candidate*, <http://www.cbsnews.com/news/target-boycott-movement-grows-following-donation-to-support-antigay-candidate/> (July 28, 2010, 4:10 p.m.).

79. Salant & Giroux, *supra* n. 52.

80. *Id.*

speech—out into the open so they can be targeted for harassment and boycotts,” United States Chamber of Commerce President Tom Donohue said in a September 10, 2013, speech in Stamford, Connecticut.⁸¹

Toner said that he expected the disclosure question to eventually be decided in the courts. “There will be a test case,” Toner said. “It’s going to be a big fish with hundreds of millions of dollars at stake.”⁸²

The five Republican-appointed justices on the Supreme Court have shown their willingness to overrule decades of precedent and legislation and overturn restrictions on campaign spending on First Amendment grounds. In the coming years, they will be given plenty of other chances to do so, as they are asked to hear cases involving direct corporate donations and perhaps even limits on individual contributions. At risk is the entire book of campaign finance laws that was written after the Watergate scandal, which involved unlimited, secret campaign donations to President Nixon’s reelection effort.

“Americans believe that the current system of campaign finance is corrupt, and that *Citizens United*, thanks to the anonymous spending it unleashed, has made the problem worse,” Senators John McCain and Rhode Island Democrat Sheldon Whitehouse wrote in an amicus brief to the United States Supreme Court, urging it not to strike down a Montana state law banning campaign spending by corporations.⁸³ “The news confirms, daily, that existing campaign finance rules purporting to provide for ‘independence’ and ‘disclosure’ in fact provide neither. Regulatory filings show that much of the funding for independent expenditures comes from shell companies, pass-through entities, and nonprofit organizations that conceal the true source of the individuals and companies supporting them.”⁸⁴

81. *Id.*

82. Interview with Michael Toner, *supra* n. 63.

83. Br. of United States Sens. Sheldon Whitehouse & John McCain as Amicus Curiae in Support of Respts., *Am. Tradition P’ship, Inc. v. Bullock*, 2012 WL 1829058 at *20 (May 18, 2012) (No. 11-1179, 132 S. Ct. 2490 (2012)).

84. *Id.* at **2–3.