STETSON LAW

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Regarding HB 5528

Introduction

Thank you for inviting me to testify today. Despite the fact that roughly half of the states, including Connecticut, banned corporate political expenditures pre-2010,[2] in *Citizens United v. FEC*, the Supreme Court imposed a one-size-fits-all approach, thereby permitting corporate political spending in all elections based on a contested theory that independent spending cannot corrupt.[3]

Connecticut has been an innovator among the states in addressing money in politics with its groundbreaking public financing system. With HB 5528, Connecticut can continue its leadership by protecting shareholders in politically active companies post-*Citizens United*.[4]

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[2] *Life After* Citizens United, NAT'L CONF. OF STATE LEGISLATURES (Jan. 4, 2011), http://www.ncsl.org/default.aspx?tabid=19607.

[3] Even sitting Supreme Court Justices have been concerned about the impact of *Citizens United*. *See* Am. Tradition P'ship, Inc. v. Bullock, No. 11A762 (statement of Ginsburg, J. & Breyer, J.), *available at* http://big.assets.huffingtonpost.com/11A762.pdf ("Montana's experience, and experience elsewhere since this Court's decision in *Citizens United* . . . make it exceedingly difficult to maintain that independent expenditures by corporations 'do not give rise to corruption or the appearance of corruption.' A petition for certiorari will give the Court an opportunity to consider whether, in light of the huge sums currently deployed to buy candidates' allegiance, *Citizens United* should continue to hold sway . . . .") (internal citations omitted).

[4] Citizens United v. Fed. Election Comm'n, 130 S. Ct. 876 (2010).

A Lack of Transparency and a Lack of Consent for Investors

In the *Citizens United* decision, the Supreme Court created at least two nationwide corporate law problems for shareholders: a lack of transparency and a lack of consent.[5] There is a lack of transparency about most corporate political spending for shareholders in the United States since the SEC requires no disclosure on the topic of electioneering.[6] Nor are shareholders offered any ability to consent to corporate political spending either before or after the fact. The problem pre-dated *Citizens United* in the several states that allowed corporations to spend in state elections.[7] In a state like Connecticut which previously banned corporate political expenditures, this case allows a whole new category of political spending.

Furthermore, because the Court ruled on constitutional grounds, instead of more narrow statutory grounds, this leaves Congress and the 50 states with far fewer policy options to address issues raised by corporate political spending.[8] By overruling bans on corporate political expenditures, the court turned its back on long standing legal precedents.[9] However, there are two areas of regulation specifically approved by the Court in *Citizens United*. First is disclosure (which could fix the transparency problem) and the second is corporate

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[5] CIARA TORRES-SPELLISCY, BRENNAN CTR. FOR JUST., CORPORATE CAMPAIGN SPENDING: GIVING SHAREHOLDERS A VOICE 7-15 (2010); Ciara Torres-Spelliscy, *Corporate Political Spending & Shareholders' Rights: Why the U.S. Should Adopt The British Approach*, in RISK MANAGEMENT AND CORPORATE GOVERNANCE (Routledge 2011).

[6] HEIDI WELSH & ROBIN YOUNG, CORPORATE GOVERNANCE OF POLITICAL EXPENDITURES: 2011 BENCHMARK REPORT ON S&P 500 COMPANIES 8 (Nov. 2011) ("106 [of the S&P 500] do not appear to spend, 99 companies in the index both spend and report (in some fashion) and 278 companies spend and do not report on it (two-thirds of the spenders.)").

[7] *Life After* Citizens United, NAT'L CONF. OF STATE LEGISLATURES.

[8] But see Western Tradition P'ship, Inc. v. Attorney Gen., No. DA 11–0081, slip op. at 14–15 (describing the corruption caused by out of state corporate spending in Montana as a reason for upholding Montana corporate expenditure ban). This decision has been stayed pending potential Supreme Court review of a petition for certiorari.

[9] As Justice William Brennan wrote, laws requiring corporations to pay for political expenditures through corporate PACs "[protect] dissenting shareholders of business corporations." *Austin*, 494 U.S. at 673 (Brennan, J. concurring); *see* FEC v. Mass. Citizens for Life, Inc. (*MCFL*), 479 U.S. 238, 258 (1986) ("The resources in the treasury of a business corporation, however, are not an indication of popular support for the corporation's political ideas."); Pipefitters Local Union No. 562 v. United States, 407 U.S. 385, 415 n.28 (1972) ("We are of the opinion that Congress intended to insure against officers proceeding in such matters without obtaining the consent of shareholders by forbidding all such [political] expenditures." (quoting United States v. Lewis Food Co., 366 F.2d 710, 713 (9th Cir. 1966))); United States v. Cong. of Indus. Orgs., 335 U.S. 106, 113 (1948) (explaining that Taft-Hartley's prohibition of corporate independent expenditures was motivated by "the feeling that corporate officials had no moral right to use corporate funds for contribution to political parties without the consent of the stockholders").

democracy (which could fix the consent problem).[10] Thus, there is a congruency between *Citizens United*'s problems and its solutions.

Corporate Political Spending and Corporate Governance Problems

Citizens United opened the door to managers' using corporate resources in politics. Shareholders have few tools to intercede even if they find corporate spending in elections fiscally wasteful or morally objectionable. The corporate governance problem created by *Citizens United* is what economists identify as an agency problem.[11] Shareholders are the principals, while managers who run the company are their agents. It is difficult for principals to monitor agents continually to make sure they are maximizing the value of the company. This creates monitoring costs for shareholders when their interests diverge from managers.[12]

Corporate political spending is an instance where the interests of managers and shareholders diverge. As Professor John Coffee once put it, when it comes to corporate political spending, "managerial and shareholder interests are not well aligned."[13] Because of these agency problems, shareholders cannot monitor how corporate managers are spending corporate assets on political causes.[14] Even when corporations

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[10] *Citizens United*, 130 S. Ct. 876 at 916-917.

[11] Comment of Dr. Susan Holmberg on SEC Petition File No. 4-637 (2011), http://www.sec.gov/comments/4-637/4637-12.pdf.

[12] *See* Lucian A. Bebchuk & Robert L. Jackson, *Corporate Political Speech: Who Decides?*, 124 HARV. L. REV. 83, 89–90 (2010) ("Where the interests of directors and executives diverge from those of shareholders with sufficient regularity and magnitude, [such as in executive compensation,] corporate law rules impose special requirements designed to address this conflict."); Committee on Corporate Political Spending, *Corporate Political Spending: Policies and Practices, Accountability and Disclosure*, CONFERENCE BOARD, 7 (2011), https://www.conference-board.org/retrievefile.cfm?filename=corporate-political-spending-Committee-Report---Advance-Copy.pdf&type=subsite ("[A] corporation's direct or indirect political spending can put its reputation at risk and could adversely affect its business if the company takes a controversial position or supports a candidate who holds positions that are inconsistent with its corporate values or the views of a significant number of its workers, shareholders or customers."); Subcommittee on Money in Politics, *After Citizens United: Improving Accountability in Political Finance*, COMMITTEE FOR ECON. DEV., 5 (2011), http://www.ced.org/images/content/events/moneyinpolitics/2011/38751_citizensunited.pdf ("Political activity also exposes companies to substantial reputational and legal risks that endanger enterprise and shareholder value. These risks are particularly pronounced in the case of contributions made to third party groups where the donor does not exercise control over the ways that funds will be spent.").

[13] John C. Coffee Jr., Testimony Before the Subcommittee on Capital Markets, Insurance, and Government Sponsored Enterprises of the Committee on Financial Services, United States House of Representatives (Mar. 11, 2010).

[14] Comment of Dr. Susan Holmberg on SEC Petition File No. 4-637 at 4 (2011) ("In the CPA [corporate political activity] context, there is considerable potential for personal

are up front about their political spending, as a growing cohort of top companies are, there is no mechanism within the corporate structure for shareholders to consent or object to this spending.[15] Shareholders are left with two unsatisfactory tools to respond to objectionable corporate political activity: selling their stock after the fact or trying in vain to vote out the board.[16]

The Transparency Problem for Investors

Whether wittingly or unwittingly, the Supreme Court created transparency problems for shareholders when it ruled in *Citizens United*[17] that corporations have the right to spend unlimited corporate funds in American elections.[18] This new corporate political spending has been unleashed into a regulatory environment rife with loopholes. In short, the way the tax code, corporate and securities laws, and campaign finance laws interact enables publicly-traded U.S. corporations to legally mask their political spending, thereby thwarting accountability from customers, shareholders, and potential investors.

The 2010 Midterm federal election showed the scale of undisclosed political spending. Studies have shown that between one third and one half of the independent spending in 2010 was from unnamed sources.[19]

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advantages to corporate executives, particularly prestige, a future political career, and star power (Hart 2004) or to help political allies (Aggarwal et al. 2011).").

[15] Donald H. Schepers & Naomi A. Gardberg, *Baruch Index of Corporate Political Disclosure 2010 Results*, BARUCH C., http://www.baruch.cuny.edu/baruchindex/BIResults.pdf (showing that, on average, companies that spend the most on political activities are in reality the ones disclosing the least information about their political activity to outsiders, such as shareholders).

[16] Business Roundtable v. SEC, No. 10-1305, slip op. (D.C. Cir. July 22, 2011), http://www.cadc.uscourts.gov/internet/opinions.nsf/89BE4D084BA5EBDA852578D5004FBBBE/$file/10-1305-1320103.pdf (invalidating the SEC's Dodd-Frank proxy access rule).

[17] For a discussion of the shareholder rights implicated by *Citizens United*, see Lucian Bebchuk & Robert Jackson, *Corporate Political Speech Who Decides?* 124 HARV. L. REV. 83, 84 (Nov. 2010) (arguing for rules that "mandate detailed and robust disclosure to shareholders of the amounts and beneficiaries of a corporation's political spending, whether made directly by the company or indirectly through intermediaries"); Torres-Spelliscy, *Corporate Campaign Spending* (arguing for shareholder disclosure and consent).

[18] Citizens United v. Fed. Election Comm'n, 130 S. Ct. 876 (2010).

[19] Bill De Blasio, Citizens United *and the 2010 Midterm Elections,* 3 (Public Advocate for the City of New York Dec. 2010), http://advocate.nyc.gov/files/12-06-10CitizensUnitedReport.pdf (finding 36% of outside spending in the 2010 federal election was funded by secret sources); Congress Watch, *12 Months After: The Effects of* Citizens United *on Elections and the Integrity of the Legislative Process*, 12 (Public Citizen Jan. 2011), http://www.citizen.org/documents/Citizens-United-20110113.pdf (finding "[g]roups that did not provide any information about their sources of money

This dark spending is only poised to increase in future elections. Money can get from a publicly-traded corporation into federal elections without detection in the following way:

- First, the SEC currently requires no reporting of political spending. This enables a publicly-traded company to gives a donation to a politically active nonprofit (usually organized under the Internal Revenue Code §§ 501(c)(4) or 501(c)(6))[20] without reporting this donation to the Commission.[21]
- Second, the politically active nonprofit, such as a § 501(c)(6) trade association, purchases a political ad supporting a federal candidate. This nonprofit will report these corporate donations to the Internal Revenue Service ("IRS"), but not to the public.[22]
- And third, the nonprofit reports to the Federal Election Commission ("FEC") that it has purchased a political ad. The FEC only requires the nonprofit to report earmarked donations.[23] If the publicly-traded corporation did not

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collectively spent $135.6 million, 46.1 percent of the total spent by outside groups during the election cycle.").

[20] 26 U.S.C. § 501(c)(4); § 501(c)(6).

[21] The SEC requires no disclosure of corporate political spending. Bebchuk et al, Committee on Disclosure of Corporate Political Spending Petition for Rulemaking at Securities and Exchange Commission (Aug. 3, 2011), http://www.sec.gov/rules/petitions/2011/petn4-637.pdf ("Because the Commission's current rules do not require public companies to give shareholders detailed information on corporate spending on politics, shareholders cannot play the role the Court described.").

[22] L. PAIGE WHITAKER, ERIKA K. LUNDER, KATE M. MANUEL, JACK MASKELL, & MICHAEL V. SEITZINGER, CONG. RESEARCH SERV., R41096, LEGISLATIVE OPTIONS AFTER *CITIZENS UNITED V.* FEC: CONSTITUTIONAL AND LEGAL ISSUES 6 n.41 (2010), http://www.fas.org/sgp/crs/misc/R41096.pdf ("Under the Internal Revenue Code, § 501(c) organizations that file an annual information return (Form 990) are generally required to disclose significant donors (typically those who give at least $5000 during the year) to the Internal Revenue Service (IRS). 26 C.F.R. § 1.6033-2(a)(2)(ii)(f). No identifying information of donors to § 501(c) organizations is subject to public disclosure under the tax laws except in the case of private foundations (which are a type of § 501(c)(3) organization). IRC § 6104(b), (d).").

[23] According to the instructions for FEC Form 9, "[i]f you are a corporation, labor organization or Qualified Nonprofit Corporation making communications permissible under [11 C.F.R.] 114.15 and you received no donations made specifically for the purpose of funding electioneering communications, enter '0' (zero)." Fed. Election Comm'n, Instructions for Preparing FEC Form 9 (24 Hour Notice of Disbursements for Electioneering Communications) 4 (undated), http://www.fec.gov/pdf/forms/fecfrm9i.pdf; *see also* Fed. Election Comm'n, FEC Form 5 Report of Independent Expenditures Made and Contributions Received to be Used by Persons (Other than Political Committees) including Qualified Nonprofit Corporations (2009) http://www.fec.gov/pdf/forms/fecfrm5.pdf.

> "earmark" the donation, which nearly no sophisticated donor would, then the role of the corporation will never be revealed to the public.

The investing public can see that the nonprofit bought a political ad, but they cannot discern the role of the publicly-traded company in underwriting the purchase. As Peter Stone at the Center for Public Integrity reported on the eve of the 2010 Midterm election, "[m]any corporations seem inclined to give to groups that are allowed by tax laws to keep their donations anonymous."[24]

This transparency problem can be repeated in each of the 50 states if state level campaign finance disclosure laws fail to capture underlying donors to political spenders. Fortunately, Connecticut has already taken steps to ensure better transparency than what exists at the federal level through its enhanced disclaimer requirements.[25] But the problem of secretive nonprofits spending in state elections is only likely to rise in the coming years as spenders try to obfuscate their role in politics. Maryland has been the first state to act to require disclosure to shareholders when corporations spend in its elections.[26]

Transparency for Corporate Political Spending in the U.K.

Unlike their American cousins, the United Kingdom has rules in place to ensure both transparency and accountability for corporate political spending. We, in the United States, are at least forty years behind our peers in the United Kingdom, which has required disclosure of corporate political spending directly to shareholders since the 1960s.[27] The U.K.'s Companies Act of 1967 imposed a duty on companies to declare political donations in the company's annual report over £50, which was subsequently increased to £200 in 1980.[28] However, this

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[24] Peter Stone, *Campaign Cash: The Independent Fundraising Gold Rush Since 'Citizens United' Ruling* (Ctr. for Public Integrity Oct. 4, 2010), http://www.publicintegrity.org/articles/entry/2462/.

[25] Connecticut Public Act No. 10-187, "An Act Concerning Independent Expenditures" (2010) ("[S]uch communication shall also bear upon its face the words 'Top Five Contributors' followed by a list of the five persons or entities making the largest contributions to such organization during the twelve-month period before the date of such communication.).

[26] Md. Election Law Code Ann. § 13-306 ("if the entity submits regular, periodic reports to its shareholders, members, or donors, include in each report, in a clear and conspicuous manner, the information …[about] each independent expenditure made…").

[27] Ciara Torres-Spelliscy & Kathy Fogel, *Shareholder-Authorized Corporate Political Spending in the United Kingdom*, 46 U. OF SAN FRANCISCO L. REV. 479 (Forthcoming Spring 2012), http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1853706.

[28] Committee on Standards in Public Life, Fifth Report § 6.24 (vol. 1 1998), http://www.public-standards.org.uk/Library/OurWork/5thInquiry_FullReport.pdf.

information was not systematically reported or aggregated.[29] In the 1990s, the lack of readily accessible data across companies and within political parties led the U.K. press to complain about the lack of transparency around party financing, including reports of millions of pounds from unnamed sources.[30]

In 2000, under the Political Parties, Elections and Referendums Act, the U.K. adopted amendments to its Companies Act, which improved reporting requirements for corporate political contributions.[31] The Act covers political advertisements in addition to direct donations to candidates or parties.[32] Under the Companies Act, if a publicly-traded company made a political donation of over £2,000, then the directors' annual report to the shareholders must include the donation's recipient and amount.[33] The Companies Act covers political spending by a U.K. company in elections for public office in the U.K. and in any European Union (EU) member state.[34] After the 2000 amendments, companies have given detailed accounts of how they spent political money in their

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[29] *Id.* at § 6.25 ("there is no central record of the companies that give political donations. That information is held in the reports of over one million registered UK companies.").

[30] Rosie Waterhouse, *Source of Pounds 15m in Donations to Tory Party Not Disclosed*, THE INDEPENDENT, (June 16, 1993) (reporting "The source of more than [ ] 15 [million pounds] in donations to the Conservative Party made before the 1992 general election remains a mystery despite an exhaustive search of the accounts of 5,000 companies to see if they declared political donations last year.").

[31] Political Parties, Elections and Referendums Act at §§ 139–140, & sched. 19, http://www.legislation.gov.uk/ukpga/2000/41/pdfs/ukpga_20000041_en.pdf; *see also* Explanatory Notes to Political Parties, Elections and Referendums Act (2000), c. 41, http://www.opsi.gov.uk/ACTS/acts2000/en/ukpgaen_20000041_en_1. The Companies Act was amended again in 2006. Companies Act at c. 46, *see also* Companies Act 2006 Regulatory Assessment (2007), http://www.berr.gov.uk/files/file29937.pdf. In addition, directors are jointly and severally liable for any unauthorized political expenditures plus interest. *Id.* at § 369.

[32] Companies House, *Companies Act* (Oct. 1 2008), http://www.companieshouse.gov.uk/companiesAct/implementations/oct2008.shtml ("A company must also be authorised by its members before it incurs expenditure in respect of political activities such as advertising, promotion or otherwise supporting a political party, political organisation [o]r an independent candidate in an election.").

[33] Political Parties, Elections and Referendums Act, *supra* note 31, at § 140; *see also* ELECTORAL COMMISSION, GUIDANCE TO COMPANIES: POLITICAL DONATIONS AND LENDING (2007), http://www.electoralcommission.org.uk/__data/assets/electoral_commission_pdf_file/0014/13703/Companies-Guidance-Final1_27776-20443__E__N__S__W__.pdf.

[34] Freshfields Bruckhaus Deringer LLP, *The 2011 AGM Hot Topics*, 21 (Dec. 2010), http://www.freshfields.com/publications/pdfs/2010/dec10/29290.pdf (British law firm Freshfields reports, "From 1 October 2008, the scope of statutory control was extended to donations to, and expenditure on, independent candidates at any election to public office in the UK or any EU member state—previous rules applied only to support for political parties and organizations.").

annual reports to investors down to the pound.[35] In the U.K., the directors' report is equivalent to a company's annual report on SEC Form 10-K in the United States, and £2,000 is roughly equal to $3,000 at current exchange rates.[36] We can learn from the U.K.'s example, including their reasonable disclosure thresholds.[37]

Constitutionality of Disclosure Requirements in the U.S.

In the United States, campaign finance reforms typically come on the heels of political scandals, and many of the biggest U.S. political scandals have at their heart a corporate scandal.[38] Recognizing the state's interest in preventing corruption and fraud, the constitutionality of disclosure of money in politics has been repeatedly upheld by the Supreme Court.

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[35] *See* for example, British American Tobacco, *Annual Report*, 64 (2010).

[36] The original reporting threshold in the 2000 law was £200. Political Parties, Elections and Referendums Act 2000, *supra* note 31 at § 140. The amount was later raised to £2,000 in 2007 under secondary legislation, the British equivalent of American implementing regulations. *See* DEPARTMENT FOR BUSINESS ENTERPRISE & REGULATORY REFORM, GOVERNMENT RESPONSE TO CONSULTATION ON THE COMPANIES ACT 2006 – ACCOUNTING AND REPORTING REGULATIONS (2007), http://www.berr.gov.uk/files/file40480.doc.

[37] I caution Connecticut against adopting disclosure thresholds that are too low. Courts across the country have routinely invalidated disclosure laws that capture tiny expenditures. *See* Vote Choice, Inc. v. DiStefano, 4 F.3d 26, 29 (1st Cir. 1993) (striking down a Rhode Island law that required PACs to disclose the identity of every contributor, even when the contribution was as small as $1, a practice known as "first dollar disclosure"); *see also* Canyon Ferry Rd. Baptist Church v. Unsworth, 556 F.3d 1021, 1033 (9th Cir. 2009) (holding disclosure statute unconstitutional as applied to a one-time in-kind *de minimis* expenditure in a ballot measure context and stating "the value of this financial information to the voters declines drastically as the value of the expenditure or contribution sinks to a negligible level.").

[38] The 1907 Tillman Act followed after the public discovered in 1905 that insurance companies had given vast sums of money to the Republican Party using policy holder money, including for the 1904 re-election of Theodore Roosevelt. *See* Adam Winkler, *'Other People's Money': Corporations, Agency Costs, and Campaign Finance Law*, 92 GEORGETOWN L. J. 871, 893–94 (June 2004); *see also id.* at 914–15 (one insurance executive involved in the 1905 scandal was charged with grand larceny, but the New York courts threw out the criminal charges). Following the Teapot Dome scandal, a pay-to-play scheme where oil companies gave payoffs to federal officials in exchange for oil leases, the Federal Corrupt Practices Act of 1925 expanded the federal disclosure requirements. 43 Stat. 1070. The Watergate investigations revealed that oil companies, among others, were giving large, illegal and secretive contributions to Nixon's Committee to Re-Elect the President (CREEP). LAWRENCE M. SALINGER, ENCYCLOPEDIA OF WHITE-COLLAR AND CORPORATE CRIME, Vol. 2, 584 (2005); MARSHALL BARRON CLINARD & PETER C. YEAGER, CORPORATE CRIME 158–159 (2006) (listing secret political contributions from oil companies including over $1 million from Gulf Oil); MICHAEL A. GENOVESE, THE WATERGATE CRISIS 23 (1999) (listing illegal corporate campaign donors); George Lardner Jr., *Watergate Tapes Online: A Listener's Guide* (2010) (dairy industry as illegal donors).

Starting with *Burroughs v. United States* in 1934, the Supreme Court upheld the reporting requirements imposed by the Federal Corrupt Practices Act of 1925—a response to the Teapot Dome scandal.[39] In upholding this law, the Court emphasized that disclosure of campaign spending serves crucial anti-corruption interests: the U.S. government "undoubtedly …possesses every other power essential to preserve the departments and institutions of the general government from impairment or destruction, whether threatened by force or by corruption."[40]

Over the past four decades, the Supreme Court has recognized a number of state interests in disclosure of money in politics including *Buckley v. Valeo*'s voter information interest, anti-corruption interest, and anti-circumvention interest, *Caperton v. Massey*'s due process interest in judicial elections, as well as *Doe v. Reed*'s interest in ballot measure integrity.[41]

Post-*Citizens United*, lower courts have also embraced the constitutionality of disclosure of money in politics. For example, one federal district court noted that after *Citizens United* "[i]n essence, corporations are free to speak, but should do so openly."[42] The Eighth Circuit upheld Minnesota's disclosure for corporate political expenditures.[43] And First Circuit upheld both Maine's and Rhode Island's disclosure laws.[44]

Meanwhile, in *SpeechNow*, the D.C. Circuit held there were strong governmental interests in requiring disclosure of who had made

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[39] 3 Stat. 1070.

[40] Burroughs v. United States, 290 U.S. 534, 545 (1934).

[41] Buckley v. Valeo, 424 U.S. 1 (1976); Caperton v. A.T. Massey Coal Co., 129 S.Ct. 2252 (2009); Doe v. Reed, 130 S. Ct. 2811 (2010). On remand, the district court in *Doe* reaffirmed the state's interest in disclosure in an as-applied challenge based on alleged risk of harassment. *See* Doe v. Reed, No. C09-5456BHS, slip op. at 33 (D. W. Washington Oct. 17, 2011), http://electionlawblog.org/wp-content/uploads/doevreed-summary-judgment.pdf.

[42] Yamada v. Kuramoto, 2010 WL 4603936, at *1 (D. Haw. Oct. 29, 2010).

[43] Minnesota Citizens Concerned for Life, Inc. v. Swanson, No. 10-3126, slip op. at 13 n.4 (8th Cir. May 16, 2011) ("The burden on corporations appears light, and the reporting requirement greatly facilitates the government's informational interest in monitoring corporate independent expenditures."). This decision has been vacated pending en banc review by the Eighth Circuit.

[44] National Organization for Marriage v. Deluz, No. 10-2304 slip op. (1st Cir. Aug. 11, 2011) ("As with Maine's law, the disclosures required by the [Rhode Island] provision here impose no great burden on the exercise of election-related speech. All that is required is the completion of a one-page form, which can be filled out and submitted to the Board online. This relatively small imposition serves [a] recognizedly important government interest…").

contributions to independent expenditure political committees, including corporate donors. As the D.C. Circuit wrote:

> [T]he public has an interest in knowing who is speaking about a candidate and who is funding that speech, no matter whether the contributions were made towards administrative expenses or independent expenditures. Further, requiring disclosure of such information deters and helps expose violations of other campaign finance restrictions, such as those barring contributions from foreign corporations or individuals.[45]

The Supreme Court denied SpeechNow's petition for certiorari, thereby leaving the D.C. Circuit's endorsement of disclosure intact.[46]

The Shareholder Consent Problem

But just as troubling as the transparency problem is, the inability of shareholders to voice their assent to political spending manifests an equally troubling issue. Presently, there is no corporate mechanism in the United States for shareholders to consent or object to a company's political spending. Even though the Supreme Court majority in *Citizens United* conceptualized corporations as collections of individuals with joint First Amendment rights,[47] it is unclear how shareholders can voice their opinions collectively without a consent process.[48] Without an opportunity for shareholders to express their heterogeneous interests

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[45] SpeechNow.org v. Fed. Election Comm'n, 599 F.3d 686, 698 (D.C. Cir. 2010).

[46] Keating v. Fed. Election Comm'n, 131 S. Ct. 553 (2010).

[47] Citizens United v. FEC, 130 S. Ct. 876, 928 n.7 (2010) (Scalia, J., concurring) ("The authorized spokesman of a corporation is a human being, who speaks on behalf of the human beings who have formed that association—just as the spokesman of an unincorporated association speaks on behalf of its members.").

[48] Ronald Gilson & Michael Klausner, Op-Ed., *Corporations Can Now Fund Politicians. What Should Investors Do*?, FORBES, Mar. 29, 2010, at 28 ("The answer is to mandate that corporations let stockholders vote annually on whether they want the company to exercise the rights that *Citizens United* gave them to get into political races."); *see also* Steven Rosenfeld, *The Uphill Battle Against Citizens United: Tricky Legal Terrain and No Easy Fixes*, ALTERNET, Jan. 19, 2012 ("Beyond passing more disclosure laws that report political spending, states could require shareholders to approve corporate political expenditures. 'These kinds of laws have been adopted for unions. It's time to do it with regard to corporations,' he said.") (quoting Professor Erwin Chemerinsky).

and opinions,[49] managers could misrepresent all or some subset of shareholders' voices and political inclinations.[50]

Furthermore, investors have reasons to worry about future political spending because initial evidence from one published and two working papers indicates that corporate political spending has hurt shareholder value.[51] Meanwhile, courts historically have denied relief to shareholders who have sued companies to protest corporate political spending after the fact.[52] This lack of post-hoc legal redress makes prophylactic rules to protect shareholders all the more necessary.

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[49] Thomas W. Joo, *The Modern Corporation and Campaign Finance: Incorporating Corporate Governance Analysis into First Amendment Jurisprudence*, 79 WASH. U. L.Q. 1, 57–58 (2001); *see* Jill E. Fisch, *The "Bad Man" Goes to Washington: The Effect of Political Influence on Corporate Duty*, 75 FORDHAM L. REV. 1593, 1613 (2006) ("Political contributions are generally not disclosed to the board or shareholders, nor are political expenditures generally subject to oversight as part of a corporation's internal controls. The lack of oversight makes it difficult for corporate decision makers and stakeholders to evaluate the costs and benefits of political activity.").

[50] Supplemental Brief of Amici Curiae Sen. John McCain et al. in Support of Appellee at 2, Citizens United v. FEC, 130 S. Ct. 876 (2010) (No. 08-205), 2009 WL 2365214 at *2 ("The tremendous resources business corporations and unions can bring to bear on elections, and the greater magnitude of the resulting apparent corruption, amply justify treating corporate and union expenditures differently from those by individuals and ideological nonprofit groups. So, too, does the countervailing free-speech interest of the many shareholders who may not wish to support corporate electioneering but have no effective means of controlling what corporations do with what is ultimately the shareholders' money.").

[51] Michael Hadani, *Institutional Ownership Monitoring and Corporate Political Activity: Governance Implications*, J. BUS. RES. (forthcoming 2011) (manuscript at 1), *available at* http://www.sciencedirect.com/science?_ob=MiamiImageURL&_cid=271680&_user=5085880&_pii=S0148296311001378&_check=y&_origin=search&_coverDate=31-May-2011&view=c&wchp=dGLzVlt-zSkzS&md5=013a7212e805d8bf2431318ec04a22b4/1-s2.0-S0148296311001378-main.pdf ("[R]esearch indicates that [corporate political activity] is uncertain and increases information asymmetries between owners and managers."); John C. Coates IV, *Corporate Governance and Corporate Political Activity: What Effect Will* Citizens United *Have on Shareholder Wealth?* 1 (Harv. L. & Econ., Discussion Paper No. 684, 2010), *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1680861 ("The paper finds that in the period 1998–2004 shareholder-friendly governance was consistently and strongly negatively related to observable political activity before and after controlling for established correlates of that activity, even in a firm fixed effects model."); Rajesh K. Aggarwal et al., Corporate Political Donations: Investment or Agency?, at Abstract (Nov. 2011) (unpublished manuscript), *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=972670 ("Firms that donate have operating characteristics consistent with the existence of a free cash flow problem, and donations are negatively correlated with returns. A $10,000 increase in donations is associated with a reduction in annual excess returns of 13.9 basis points."); s*ee* Letter of Michael Hadani, Assistant Professor of Mgmt., Long Island Univ., to Elizabeth M. Murphy, Sec'y, S.E.C. (Oct. 13, 2011), http://www.sec.gov/comments/4-637/4637-8.pdf (After analyzing an eleven-year sample of 1110 small-, mid-, and large-cap Standard & Poor firms, economist Michael Hadani, Ph.D., reported to the SEC: "[T]he regression analysis reveals that [corporate] PAC expenditures and cumulative PAC expenditures have a statistically significant negative affect [sic] on firms' market value, both when examining their year to year PAC expenditures and also when examining their cumulative, 11 years, PAC expenditures.").

[52] *See, e.g.*, Stern v. Gen. Elec. Co., 837 F. Supp. 72, 77 (S.D.N.Y. 1993) (upholding political expenditure under business judgment rule because corporation properly

If voting on executive compensation is "say on pay," then think of this approach as "say on politics." States could adopt this requirement through legislation. A state could change its laws to give shareholders improved transparency and consent regarding corporate political spending. In the past two years, bills to this effect have been introduced in Maryland,[53] New York,[54] California,[55] Pennsylvania,[56] and Maine.[57]

U.K. Companies Act Requires Shareholder Votes

States have largely model their shareholder consent bills on the federal Shareholder Protection Act, which is based on the U.K. Companies Act. In addition to requiring disclosure for shareholders, the U.K. Companies Act requires publicly traded companies to obtain shareholder consent for corporate political spending over £5000 (approximately $8000 at current exchange rates) before the money is spent.[58] If shareholders do not approve a given political donation resolution, that company cannot spend during the relevant period.[59]

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sought "election of candidates open to [its] position on various issues"); Marsili v. Pac. Gas & Elec. Co., 124 Cal. Rptr. 313, 324 (1975) ("[T]he judgment of the board of directors cannot be disturbed . . . unless . . . the [political] contribution could not be construed as incidental or expedient for the attainment of corporate purposes."); *see also* Theodora Holding Corp. v. Henderson, 257 A.2d 398, 405 (Del. Ch. 1969) (holding that charitable contribution falling within the threshold of tax deductibility will tend to be valid business judgment); Kahn v. Sullivan, 594 A.2d 48, 61, 63 (Del. 1991) ("[N]ot every charitable gift constitutes a valid corporate action[,] . . . [but] given . . . the tax benefits[,] . . . the gift . . . was within the range of reasonableness . . . .").

[53] Maryland S.B. 570 (2010), http://mlis.state.md.us/2010rs/bills/sb/sb0570f.pdf.

[54] New York S. 101-2011, "Corporate Political Activity Accountability to Shareholders Act," http://open.nysenate.gov/legislation/bill/S101-2011.

[55] California A.B. 919, "Shareholder Protection Act" (2009), http://corporatereformcoalition.org/wp-content/uploads/2011/03/California-Shareholders_last-years-bill.pdf.

[56] Pennsylvania H.B. 1002, "Corporate Political Accountability Act (2011), http://www.legis.state.pa.us/CFDOCS/Legis/PN/Public/btCheck.cfm?txtType=PDF&sessYr=2011&sessInd=0&billBody=H&billTyp=B&billNbr=1002&pn=1082.

[57] Maine H.P. 1120 (2011), http://www.mainelegislature.org/legis/bills/getPDF.asp?paper=HP1120&item=1&snum=125.

[58] U.K. companies can spend less than £5000 without shareholder authorization. Companies Act § 378 ("Authorisation under this Part is not needed for a donation except to the extent that the total amount of—(a) that donation, and (b) other relevant donations made in the period of 12 months ending with the date on which that donation is made, exceeds £5,000."); *see also* Explanatory Notes to Companies Act, 2006, c. 46, ¶ 612, http://www.opsi.gov.uk/acts/acts2006/en/ukpgaen_20060046_en.pdf ("[A] company need not seek prior shareholder consent for a donation to a political party or organisation unless the aggregate amount of the donation . . . in the previous 12 months exceeds £5,000."). Because shareholder vote was not legally required for small amounts, corporate political donations below £5000 have no accompanying shareholder authorization.

[59] Companies Act § 366(1)–(2).

Shareholder approval for political spending originally required an annual vote; however, in 2006 the U.K. law changed to allow for votes to cover up to four years at a time.[60] Finally, directors who make unauthorized political donations are personally liable to the company for the amount spent, plus interest, and they must compensate the company for any loss or damage resulting from the unauthorized donation or expenditure.[61] Shareholders nearly always pre-authorized corporate political donations of £5000 or more in the period of 2000–2010.[62]

The following is a snapshot of how the British system works. At the annual general meeting when the shareholders vote on reelecting the board or choosing auditors, in many firms, shareholders also vote on future corporate political spending.[63] In other words, a resolution to authorize future political spending is often among a dozen resolutions on a British proxy statement. British shareholders do not typically approve each and every individual political donation, nor do they typically get an opportunity to specify which political party should be supported.[64] Instead, the managers request a generic political budget for one year to four years of £100,000, for example, and the shareholders give an up or

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[60] *Compare* Political Parties, Elections and Referendums Act, *supra* note 31, at c. 41, sched. 19 (requiring yearly authorization), *with* Companies Act § 368(1) (allowing authorizations for up to four years).

[61] Companies Act § 369; *see also Corporate Briefing, The Companies Act 2006: Political Donation*, TRAVERS SMITH, (Nov. 2007), http://www.traverssmith.com/assets/pdf/Legal_Briefings/companies_act_2006_-_political_donations_-_nov_2007.pdf ("[D]irectors in default of the requirement for authorisation are jointly and severally liable to pay to the company the amount of the unauthorised donation or expenditure, with interest, and also to compensate the company for any loss or damage sustained by it as a result of the unauthorised donation or expenditure having been made."). The interest rate charged on unauthorized political expenditures is 8% per annum. Companies (Interest Rate for Unauthorised Political Donation or Expenditure) Regulations, 2007, S.I. No. 2007/2242, art. 2 (U.K.).

[62] *See* Torres-Spelliscy & Fogel, *Shareholder-Authorized Corporate Political Spending in the United Kingdom*, 46 U. OF SAN FRANCISCO L. REV. 479, Exhibit 4.

[63] *See, e.g.*, *Notice of BP Annual General Meeting 2011*, BP, 3 (Feb. 25, 2011), http://www.bp.com/liveassets/bp_internet/globalbp/globalbp_uk_english/set_branch/set_investors/STAGING/local_assets/downloads/pdf/BP_notice_of_meeting_2011.pdf (introducing Resolution 21 to seek authority from shareholders to spend £400,000 on political donations).

[64] However, one firm, Caledonia Investments PLC, indicated for several consecutive years which political party it intended to benefit, and the company sought and received shareholder authorization to give £75,000 to the Conservative Party for two years. *Caledonia Investments PLC: Letter from the Chairman and Notice of 2008 Annual General Meeting*, CALEDONIA INVESTMENTS, 9 (June 12, 2008), http://www.caledonia.com/docs/AGM08.pdf ("Authority is . . . being requested to make donations of up to £75,000 . . . to enable the Company to assist the Conservative Party . . . in the approach to the next general election."); *see also Caledonia Investments plc: Results of Annual General Meeting*, CALEDONIA INVESTMENTS, 1 (July 29, 2008), http://www.caledonia.com/docs/Result%20of%20AGM%202008.pdf; Richard Wachman, *Caledonia Set for Revolt on Plan to Donate to the Tories*, OBSERVER (U.K.), July 19, 2009, Business, at 3 ("Caledonia Investments has been heavily criticised by Pirc, the shareholder lobby group, for proposing to donate £ 75,000 to the Conservative party.").

down vote.[65] Shareholders may also abstain.[66] Directors cannot spend the money if they lose the vote and are liable to the corporation for the cost of the unauthorized expenditures and for any resulting damages.[67]

Before the 2000 amendments, corporate governance experts raised concerns about corporate political expenditures in the United Kingdom. For example, Anne Simpson from Pensions and Investment Research Consultants ("PIRC"), stated in her testimony before a Parliamentary Committee in 1998, that corporate political spending raised classic corporate agency problems between beneficial owners and day-to-day managers:

> Our other main point is accountability. When the directors decide to make a corporate donation, that is made from shareholder funds . . . . In other words, the majority of shareholders in British companies are institutions such as pension funds and insurance companies who are investing on behalf of others – [sic] they are investing the public's money by and large. We therefore think it is absolutely essential that the directors seek approval from shareholders for donations that they wish to make from shareholders' funds.[68]

In 1999, the U.K. Secretary of State for Trade and Industry, Stephen Byers echoed this concern about directors using investors' funds without accountability: "In recent years there has been growing concern about directors' accountability to shareholders in relation to political donations by companies. This concern is due in part to the scope for conflict between a director's personal wishes or interests and his duty to the company."[69] The main objective of the Companies Act's 2000 amendments concerning corporate political spending was to address these agency problems among managers who had the power to spend corporate money on politics and the heterogeneous, dispersed shareholders underwriting the expenditures.

Legal Analysis of Shareholder Consent

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[65] Companies Act, 2006, c. 46, § 366(2)(a) (U.K.) ("[The donation or expenditure must be authorized] by a resolution of the members of the company."); *id.* § 367(5) ("The resolution must be expressed in general terms . . . and must not purport to authorise particular donations or expenditure.").

[66] *See, e.g.*, *Mitchells & Butlers PLC*: *Result of AGM*, *supra* note 89 (reporting percentage of votes made for, against, or abstaining resolutions during Mitchells & Butlers' Annual General Meeting held on January 28, 2010).

[67] Companies Act §§ 366, 369.

[68] COMMITTEE ON STANDARDS IN PUBLIC LIFE, FIFTH REPORT, STANDARDS IN PUBLIC LIFE, THE FUNDING OF POLITICAL PARTIES IN THE UNITED KINGDOM, 1998, Cm. 4057-II, ¶ 3750 (U.K.), *available at* http://www.archive.official-documents.co.uk/document/cm40/4057/volume-2/volume-2.pdf [hereinafter COMMITTEE ON STANDARDS IN PUBLIC LIFE 2] (statement of Anne Simpson, Joint Managing Dir., Pensions & Inv. Research Consultants Ltd.).

[69] POLITICAL DONATIONS BY COMPANIES, *supra* note 107, ¶ 1.2.

Since states have yet to adopt shareholder votes on corporate political spending, no court has had the opportunity to rule on its legality. However, there is language in the *Citizens United* opinion itself, which gives the government the ability to protect shareholders. As Justice Kennedy wrote for the *Citizens United* eight-person majority:[70]

> Shareholder objections raised through the procedures of corporate democracy . . . can be more effective today because modern technology makes disclosures rapid and informative. . . . With the advent of the Internet, prompt disclosure of expenditures can provide shareholders and citizens with the information needed to hold corporations and elected officials accountable for their positions and supporters. Shareholders can determine whether their corporation's political speech advances the corporation's interest in making profits. . . .[D]isclosure permits citizens and shareholders to react to the speech of corporate entities in a proper way.[71]

The language of the *Citizens United* opinion is clear that shareholders have the right to hold corporations accountable for their political spending. Accountability may include a U.K.-style shareholder authorization through an annual vote. But such accountability is impossible unless shareholders know in the first instance which companies are spending in politics and which are not.

In a pre-*Citizens United* case, *Davenport v. Washington Education Association*, Justice Scalia upheld a state requirement that public sector labor unions must receive affirmative authorization from a nonmember before spending that nonmember's agency-shop fees for election-related purposes.[72] His opinion argued that shareholder protection, on the other hand, would regulate money that is voluntarily in the hands of the corporation and that can be withdrawn at any time by a dissatisfied shareholder. Corporate political spending, according to Justice Scalia, does not raise the same First Amendment issues implicated by unions' mandatory agency-shop fees.[73] In their concurrence, however, Justices Breyer, Roberts, and Alito stated that they did not agree with this particular part of the lead opinion because the shareholder protection argument was raised for the first time in briefs before the Supreme Court.[74] Thus, the fate of shareholder rights in the Roberts Court is

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[70] Eight Justices voted in favor of disclosure and disclaimers in both 2010's *Citizens United* and in 2003's *McConnell*.

[71] Citizens United v. Fed. Election Comm'n, 130 S. Ct. 876 (2010).

[72] Davenport v. Wash. Educ. Ass'n, 551 U.S. 177, 187 (2007).

[73] *Id.*

[74] *Id.* at 191.

unclear. Since *Davenport*, Justices Sotomayor and Kagan have joined the Court, both of whom likely hold opposing views to Justice Scalia.

Popular Support for Shareholder Consent

Recognizing post-*Citizens United* corporate agency problems, an influential portion of the popular press in the United States has written in favor of adopting shareholder consent mechanisms.[75] The general public has also expressed dismay with *Citizens United* and support for corporate governance solutions in national polls.[76] Meanwhile, polling of business leaders indicates they would welcome increased transparency,[77]

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[75] *E.g.*, Editorial, *A Supreme Court Stretch*, L.A. TIMES, Jan. 22, 2010, at A28 ("Congress also could consider regulations that would require unions and public companies to ensure that their political activities are supported by the rank-and-file or shareholders."); Editorial, *A Vote for Disclosure*, WASH. POST, July 27, 2010, at A16 ("Corporations now can funnel money to a trade association to target Representative Y or Senator X. The trade association must report its spending to the Federal Election Commission, but it doesn't have to say where the money comes from."); Editorial, *Corporate Blunder*, PHILA. INQUIRER, Jan. 25, 2010, at A10 ("Congress must immediately blunt the impact of the Supreme Court's disastrous decision allowing unlimited corporate spending on elections. . . . They could require stronger rules against campaigns' coordinating with outside groups, or require publicly-traded firms to get approval from shareholders before spending on elections."); Editorial, *Corporations Aren't People, Don't Merit Special Protections*, BOS. GLOBE, Jan. 23, 2010, at 10 ("Congress should require corporations to seek shareholders' permission before spending money in political campaigns, coupled with a similar restriction on unions."); Editorial, *The Court's Blow to Democracy*, N.Y. TIMES, Jan. 21, 2010, at A30 ("Congress . . . should also enact a law requiring publicly-traded corporations to get the approval of their shareholders before spending on political campaigns.").

[76] *E.g.*, Dan Eggen, *Corporate Sponsorship is Campaign Issue on Which Both Parties Can Agree*, WASH. POST, Feb. 17, 2010, at A15 (finding that 72% of respondents to a Washington Post poll supported an effort by Congress to reinstate limits on corporate and union spending on election campaigns); Memorandum from Stan Greenberg et al., Greenberg Quinlan Rosner Research, to the Common Cause, Change Congress, Public Campaign Action Fund 2 (Feb. 8, 2010), *available at* http://www.greenbergresearch.com/articles/2425/5613_Campaign%20Finance%20Memo_Final.pdf (finding "[b]y a stark 64 to 27 percent margin, voters oppose this decision, with 47 percent strongly opposed" and "[a] majority of voters strongly favor both requiring corporations to get shareholder approval for political spending (56 percent strongly favor, 80 percent total favor)"); *New Poll Shows Broad Support for "Fixing" Citizens United*, PEOPLE FOR AM. WAY (Feb. 18, 2010), http://www.pfaw.org/press-releases/2010/02/new-poll-shows-broad-support-for-fixing-citizens-united ("75% [of respondents to a survey] believe that a publicly traded company should get shareholder approval before spending money in an election."); *see also* Chad S. Novak & Andrew E. Smith, *Granite State Poll for Americans for Campaign Reform and Committee for Economic Development* 1 (Oct. 2011) http://www.ced.org/images/content/events/moneyinpolitics/2011/acr_october_survey_final.pdf (finding "[a]lmost Two-thirds (61%) of likely New Hampshire Republican Primary voters strongly disagree with the Supreme Court decision that political spending by corporations and unions is a form of free speech protected under the First Amendment" and "[j]ust under three-quarters of likely GOP New Hampshire Primary voters (73%) strongly support a law that would require corporations, unions, and non-profits to disclose their sources of spending when they participate in elections").

[77] Press Release, Comm. for Econ. Dev., New Business Poll Shows Discontent with Undisclosed Campaign Expenditures Following *Citizens United* Decision (Oct. 28, 2010), *available at* http://www.ced.org/news-events/campaign-finance-reform/561-press release (indicating that 77% of business leaders believe corporations should disclose all of their political spending, including that funneled through third parties, and 66% agreed that the lack of transparency and oversight in corporate political spending puts

and certain corporate governance leaders have also embraced the need for a shareholder vote.[78]

In Comments filed with the SEC on a petition for a new post-*Citizens United* Commission Rule, commentators have asked not just for transparency, but also shareholder consent. For example, John Bogle, the founder of Vanguard wrote:

> the Petition for Rulemaking by the Committee on Disclosure is a start. Transparency in corporate political spending is in the best interests of investors, companies, and the general public, so I urge the SEC to take favorable action on this petition. However, such a rule doesn't go far enough. Concerned investors should have an explicit right to submit a resolution [requiring a supermajority of shareholders to approve future corporate political spending].[79]

Sharing many of Mr. Bogle's concerns, Congressman Capuano urged the SEC to also go further than mere disclosure. He wrote, "I believe shareholders have the right to decide if their money is spent for political purposes and to be notified of its specific use. … I urge you to act to protect shareholders by requiring a shareholder 'say' on political spending and ensuring proper public disclosure."[80]

Board Approval

Another approach to address corporate political spending is to require boards of directors to approve future political spending by managers. This is required in three states: (1) Missouri, (2) Louisiana

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corporations at legal and reputational risk).

[78] John C. Bogle, *The Supreme Court Had Its Say. Now Let Shareholders Decide*, N.Y. TIMES, May 15, 2011, at WK9 (suggesting that "[i]nstitutional investors should insist that the proxy statement of each company in which they invest contain the following: 'Resolved: That the corporation shall make no political contributions without the approval of the holders of at least 75 percent of its shares outstanding,'" and calling on institutional investors to "stand up to the Supreme Court's misguided decision and bring democracy to corporate governance . . . and take that first step along the road to reducing the dominant role that big money plays in our political system."); Nell Minow, *Shareholders United: SEC Rules That Political-Spending Proposal Must Go to a Vote*, BNET (Apr. 6, 2011), http://www.bnet.com/blog/corporate-governance/shareholders-united-sec-rules-that-political-spending-proposal-must-go-to-a-vote/366 ("Companies that want to avoid more new rules should begin to reach out to their shareholders to explain their procedures and criteria for political campaign and lobbying contributions and be able to show how they support both the brand and long-term shareholder returns.").

[79] John Bogle, Comment on SEC Petition 4-637, Jan. 17, 2012, http://www.sec.gov/comments/4-637/4637-22.pdf.

[80] Rep. Michael Capuano, Comment on SEC Petition 4-637, Jan. 18, 2012, http://www.sec.gov/comments/4-637/4637-23.pdf.

and (3) Iowa.[81] Last year, Massachusetts introduced a bill which would require board approval before a company could engage in political expenditures.[82] This type of internal control has been requested repeatedly in shareholder sponsored resolutions at public companies.[83] And voluntary board oversight has increased in recent years.[84] There is little case law on mandatory board approval of corporate political spending. In the one case to review Iowa's board approval law, the court failed to reach the merits of the law because the plaintiff in the case lacked standing to challenge the board approval measure.[85] The board approval section of H.B. 5528 would embrace the best practices of internal controls over corporate political spending.

Conclusion

In the two years since *Citizens United* was decided, the federal government has been slow to respond, because the decision raises a host of problems across federal agencies like the IRS, the FEC, the FCC and the SEC. We do not know which may be first to act to protect the public. While SEC Commissioner Aguilar has indicated his public support for a new disclosure rule on corporate political spending, the SEC has yet to take up a post-*Citizens United* rule making.[86] This leaves shareholders in the dark about which corporation is abstaining and which corporation is spending in the 2012 election cycle. In the meantime, States should act to require thoughtful disclosure and consent mechanisms to protect shareholders. I encourage Connecticut to move forward with H.B. 5528 to protect shareholders. Thank you again for the opportunity to address

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[81] CIARA TORRES-SPELLISCY, BRENNAN CTR. FOR JUSTICE, TRANSPARENT ELECTIONS AFTER *CITIZENS UNITED* (2011), *available at* http://www.brennancenter.org/content/resource/transparent_elections_after_citizens_united/.

[82] Massachusetts Bill S. 305, "An Act relative to accountability for corporate political spending" (2011), http://www.malegislature.gov/Bills/187/Senate/S00305.

[83] HEIDI WELSH & ROBIN YOUNG, CORPORATE GOVERNANCE OF POLITICAL EXPENDITURES: 2011 BENCHMARK REPORT ON S&P 500 COMPANIES 4 (Nov. 2011)("Social investment firms, public pension funds, religious groups and labor unions have pursued their goals of more board oversight and spending disclosure by filing shareholder resolutions that investors consider at corporate annual meetings.").

[84] *Id.* at 1 ("Thirty-one percent of S&P 500 company boards now are explicitly charged with oversight, an increase from 23 percent at the same time in 2010.").

[85] Iowa Right to Life v. Smithson, 2010 WL 4277715 (S.D. Iowa Oct. 20, 2010); Iowa Right to Life v. Tooker, 795 F.Supp.2d 852 (S.D. Iowa 2011).

[86] Commissioner Luis A. Aguilar, *Shining a Light on Expenditures of Shareholder Money*, at 5, Practising Law Institute's SEC Speaks in 2012 Program, Feb. 24, 2012, http://electionlawblog.org/wp-content/uploads/aguilar.pdf ("Unfortunately, there is no comprehensive system of disclosure related to corporate political expenditures – and that failure results in investors being deprived of uniform, reliable, and consistent disclosure regarding the political expenditures of the companies they own.").

this key issue for our democracy. Attached is a report that I authored at the Brennan Center for Justice at NYU School of Law which highlights these issues.