Ann M. Ravel
Ellen L. Weintraub
999 E St. NW
Washington, DC 20463

June 8, 2015

Federal Election Commission
Office of General Counsel
999 E St. NW
Washington, DC 20463

Ann M. Ravel and Ellen L. Weintraub hereby petition the Federal Election Commission pursuant to 11 C.F.R. § 200.1 *et seq.* to issue new rules and to amend its current rules implementing the Federal Election Campaign Act of 1971, as amended ("the Act"), in order to respond to and comply with the Supreme Court's decision in *Citizens United v. FEC.*[1]

The *Citizens United* decision and its progeny in the lower courts[2] have transformed the American campaign finance system by opening up substantial new avenues for outside spending. In *Citizens United,* the Supreme Court ruled that corporations and labor organizations could not be prohibited from making communications advocating for the election or defeat of particular candidates, reasoning that, as long as political spending is entirely independent of candidates—in other words, not *coordinated*—it does not raise corruption concerns.[3] Subsequent related court decisions, combined with inaction on the part of the FEC, has led to a proliferation of super PACs[4] and other outside spending groups—many of which appear to be closely associated with

[1] 558 U.S. 310 (2010).

[2] *See SpeechNow.org v. FEC*, 599 F.3d. 686 (2010) ("*SpeechNow*"); *Carey v. FEC,* 791 F.Supp.2d 121 (2011).

[3] *Citizens United.* 558 U.S. *at* 360-362.

[4] Independent expenditure-only political committees, commonly known as super PACs, were created in the wake of the U.S. Court of Appeals for the D.C. Circuit's decision in *SpeechNow v. FEC*. 599 F.3d. 686 (2010)

particular candidates and many of which do not disclose their donors—and has resulted in lingering uncertainty about other important issues concerning corporate and labor organization spending.

The Supreme Court's decision to strike down the ban on corporate and labor independent campaign-related spending has led to record increases in election spending by all of these outside groups. Outside spending in the 2012 election cycle exceeded $1 billion for the first time, triple the amount spent in the 2008 cycle.[5] Similarly, in the 2014 midterm elections, outside spending "was a larger chunk of the total cost of the election than ever before."[6] In many of the most competitive races, outside spending far exceeded spending by the candidates.[7]

While the Supreme Court ruled that corporations and labor organizations have a First Amendment right to engage in independent spending, the Court also resoundingly affirmed disclosure laws requiring political advertisers to provide information to the public about their spending and their funding sources. Contrary to the Court's directive, however, millions of dollars in anonymous spending has surged into federal elections. Nearly a third of 2012 election cycle outside spending—$310 million—came from "dark money" groups that do not disclose

("*SpeechNow*"). There, relying on the reasoning of *Citizens United*, the court held that political committees that make only independent expenditures are not subject to contribution limits. *Id* at 695.

[5] Andrew Mayersohn, *Four Years After Citizens United: The Fallout*, OPENSECRETS BLOG (Jan. 21, 2014), http://www.opensecrets.org/news/2014/01/four-years-after-citizens-united-the-fallout/.

[6] Russ Choma, *Final Tally: 2014's Midterm Was Most Expensive, With Fewer Donors*, OPENSECRETS BLOG (Feb. 18, 2015), https://www.opensecrets.org/news/2015/02/final-tally-2014s-midterm-was-most-expensive-with-fewer-donors/.

[7] *Races in Which Outside Spending Exceeds Candidate Spending, 2014 Election Cycle*, OPENSECRETS.ORG, https://www.opensecrets.org/outsidespending/outvscand.php.

their donors.[8] In the 2014 midterm elections, it is estimated that dark money accounted for over a third of outside spending, upwards of $190 million.[9]

The Commission is statutorily obligated to formulate policy with respect to the Act. The Commission should therefore promulgate new rules ensuring that the public is fully informed about all election-related spending, in accordance with *Citizens United*.[10]

Nearly five years after the *Citizens United* decision, the Commission took limited action to remove regulations that the Court had ruled unconstitutional. While this provided some guidance to the public, the Commission has not yet fulfilled its obligation to address the fact that *Citizens United* was premised on adequate disclosure of these new sources of outside spending. Anonymous campaign spending will continue to diminish public faith in the political process, unless the Commission acts.[11]

The Commission must also address other significant policy issues in order to faithfully implement the Act in light of the Supreme Court's decision. For example, the new rules do not address spending in U.S. federal elections by corporations that are owned or controlled by foreign nationals or foreign governments. Nor do the rules address the increased potential for coercion by labor unions and corporate employers. Moreover, the proliferation of super PACs

[8] Robert Maguire, *How 2014 is Shaping Up to Be the Darkest Money Election to Date*, OPENSECRETS BLOG (Apr. 30, 2014), http://www.opensecrets.org/news/2014/04/how-2014-is-shaping-up-to-be-the-darkest-money-election-to-date/.

[9] *Outside Spending by Disclosure, Excluding Party Committees*, OPENSECRETS.ORG, https://www.opensecrets.org/outsidespending/disclosure.php.

[10] 52 U.S.C. § 30106(b)(1).

[11] *See, e.g.*, *Americans' Views on Money in Politics*, N.Y. TIMES, June 1, 2015, *available at* http://www.nytimes.com/interactive/2015/06/02/us/politics/money-in-politics-poll.html (finding that 84 percent of Americans believe that money has too much influence on politics, and that 58 percent are pessimistic that anything will be done to solve the problem); BRENNAN CENTER FOR JUSTICE, AMERICANS' ATTITUDES ABOUT THE INFLUENCE OF SUPER PAC SPENDING ON GOVERNMENT AND THE IMPLICATIONS FOR OUR DEMOCRACY (Apr. 24, 2012), http://www.brennancenter.org/sites/default/files/legacy/Democracy/CFR/SuperPACs_Corruption_Democracy.pdf (reporting, for example, that nearly two in three Americans say that they trust government less because big donors to super PACs have more influence than regular voters).

and other outside spending groups exposed gaps in the Commission's regulations that must be filled to address organizations whose established relationships with federal candidates facilitate coordination.

We are therefore taking the unprecedented step, as members of the Commission, of petitioning the Commission to revise and amend its rules in order to:

1. Ensure full public disclosure of corporate and labor organization independent spending, consistent with both the *Citizens United* decision and the Act's requirement that outside spending groups disclose their donors.
2. Clarify that the prohibition on foreign national campaign-related spending restricts such spending by U.S. corporations owned or controlled by a foreign national.
3. Clarify that corporations and labor organizations are prohibited from coercing their employees and members into providing financial or other support for the corporation's or labor organization's independent political activities.
4. Ensure that the expenditures made by super PACs and other outside spending groups are truly independent of federal candidates as required by *Citizens United* and its progeny.

Below, we explain why the Commission should, after allowing ample opportunity for public notice and comment, promulgate rules on these critical issues.

I. Ensuring Full Disclosure of Outside Independent Spending

Citizens United upheld the Act's disclosure requirements for electioneering communications—including an obligation to disclose donors—as applied to corporations.[12] The

[12] 558 U.S. at 366-71.

Court reasoned that the disclosure required by the Act "permits citizens and shareholders to react to the speech of corporate entities in a proper way," and "enables the electorate to make informed decisions and give proper weight to different speakers and messages."[13] The public's "interest in knowing who is speaking about a candidate shortly before an election" is a sufficiently significant interest to warrant disclosure and disclaimers on political advertising.[14] The Court ruled that unlimited corporate independent political spending must be accompanied by transparency as to the sources of such spending.

Paradoxically, although eight Justices endorsed the Act's disclosure requirements in *Citizens United*, "dark money" groups that do not disclose their donors have proliferated. With hundreds of millions of dollars coming from anonymous sources, we are very far from the Court's vision of a "campaign finance system that pairs corporate independent expenditures with *effective* disclosure."[15] The Commission has not implemented "effective" disclosure rules addressing these new sources of outside spending. The result has been historically low levels of disclosure, which is contrary to the Act and to the Court's clear direction in *Citizens United*.

It is incumbent upon the Commission to ensure that its disclosure rules applicable to corporations and labor organizations making independent expenditures and electioneering communications give full effect to the Supreme Court's ruling.[16]

II. Preventing Foreign Nationals from Influencing Federal Elections

The Commission should also address how the *Citizens United* decision affects key provisions of the Act that protect the integrity of the campaign finance system. For example, now

[13] *Id.* at 371.

[14] *Id.* at 369.

[15] *Id*. at 370 (emphasis added).

[16] Currently these regulations are at 11 C.F.R. § 104.20(c) and § 11 C.F.R. 109.10(e)(1)(vi).

that *Citizens United* has permitted unlimited U.S. corporate independent spending on elections, the Commission should promulgate rules ensuring that foreign nationals, foreign corporations, and foreign governments do not impermissibly influence federal elections through their U.S. subsidiaries or affiliates. The Act broadly prohibits foreign nationals from "directly or indirectly" making political contributions, expenditures and electioneering communications.[17] Before *Citizens United*, all corporations were prohibited from making these types of disbursements. *Citizens United*, however, permitted U.S. corporations to engage in independent campaign-related spending.

Corporations, by their very nature, are designed to be owned and controlled by others. Now that *Citizens United* has permitted independent corporate spending on elections, the Commission must revisit our implementation of the Act's foreign national prohibition and clarify that, when U.S. companies are owned or controlled by foreign nationals, they are barred from engaging in election-related spending.[18] The public deserves a say in protecting our democracy from foreign money, and U.S. subsidiaries of foreign corporations need to know whether and to what extent they can spend money influencing U.S. elections.

III. Protecting Employees and Union Members From Political Coercion

The Commission should promulgate rules to more clearly protect employees and union members from coercion by corporations and labor organizations engaged in independent political spending. The Act prohibits corporations and labor organizations from obtaining funds they may spend on political purposes by "physical force, job discrimination, financial reprisals, or the threat of force, job discrimination, or financial reprisal."[19] Prior to *Citizens United*, separate

[17] 52 U.S.C. § 30121(a)(1).

[18] The relevant Commission regulations are at 11 C.F.R. § 110.20.

[19] 52 U.S.C. § 30118(b)(3)(A).

segregated funds were the primary vehicles through which corporations and labor organizations could participate in federal elections. Thus, the Act's prohibition on coercion applied to the funds maintained in such separate segregated funds. The Commission, however, has also interpreted the Act to generally prohibit the use of "coercion, such as the threat of a detrimental job action," to induce "any individual to make a contribution…"[20] This approach is wholly consistent with Congress's intent to ensure that corporate employees and union members aid their employers' and unions' political activities only when their support is truly voluntary.

Nothing in *Citizens United* suggests that the Court intended to expand the rights of corporations and labor organizations at the expense of their employees' and members' longstanding rights to be free from coercion and to express or decline to express their own political views. However, the Commission has not issued new rules that specifically prohibit corporate and labor organization coercion of employees and members in order to support independent political spending. The Commission should therefore promulgate new rules[21] confirming that corporations and labor organizations may not coerce employees and union members to support, financially or otherwise, corporate or union independent political spending permitted under *Citizens United*.

IV. Ensuring the Independence of Independent Expenditures.

The creation of super PACs was a direct result of the reasoning of *Citizens United* that truly independent expenditures do not give rise to corruption and therefore may not be limited. In *SpeechNow*, the D.C. Circuit Court of Appeals relied on that reasoning, noting that "[t]he

[20] 11 C.F.R. § 114.2(f)(2)(iv); *see also* Corporate and Labor Organization Activity; Express Advocacy and Coordination with Candidates, Final Rule, 60 Fed. Reg. 64259, 64265 (Dec. 14,1995) (corporate or labor union "employees who are unwilling to [contribute or fundraise in support of a political campaign] as part of their job have a right to refuse to do so").

[21] Current regulations addressing coercion of employees and union members are at 11 C.F.R. §§ 114.2(f)(2)(iv); 114.5(a)(2)-(4).

independence of independent expenditures was a central consideration" in *Citizens United*.[22] In *Carey v. FEC*, the D.C. District Court applied these previous decisions to invalidate contribution limits when the independent expenditure is "wholly separate from federal candidates or parties."[23]

The emergence of super PACs and other outside spending groups that appear to have close ties to particular, individual federal candidates raises the question of whether the Commission's regulations effectively ensure the independence of candidates and these outside groups, as required by the *Citizens United* decision.

The Commission's regulations should be revised to fully and clearly prohibit coordination between candidates and outside spending groups with which they are closely associated. In so doing, the Commission should adopt rules that prohibit candidates from attending super PAC fundraising events. The Commission should also adopt rules that deem all spending by outside groups that effectively operate as "the alter ego of a candidate" as coordinated spending.[24] Finally, the Commission should look to the states for innovative solutions to ensure that spending by outside groups looking to influence elections is truly independent.[25]

* * *

The Commission has a crucial role to play in implementing the *Citizens United* decision and ensuring that the public is informed about who is funding political advertising. We therefore

[22] *SpeechNow*, 599 F.3d at 693.

[23] *See Carey*, 791 F. Supp. 2d at 126.

[24] *See* Richard Briffault, *Coordination Reconsidered*, 113 COLUM. L. REV. SIDEBAR 88, 97-100 (2013).

[25] *See, e.g.*, Chisun Lee, Brent Ferguson, and David Earley, *After Citizens United: The Story In The States*, BRENNAN CENTER FOR JUSTICE, 16-29 (Oct. 29, 2014), https://www.brennancenter.org/sites/default/files/publications/After%20Citizens%20United_Web_Final.pdf.

petition the Commission to act quickly in requiring disclosure of independent political spending, and prohibiting foreign national corporate spending, the coercion of employees and union members, and coordination between candidates and outside spending groups. We welcome public comment on how to craft clear regulations addressing each of the issues raised in this petition.

Respectfully submitted,
Ann M. Ravel
Ellen L. Weintraub