

# I Went Down to the Crossroads: Lifting the Blindfold About the Origin of 501(c)(4) Political Advertisements

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## Introduction

ON JANUARY 21, 2010, the Supreme Court dropped a bomb on American politics. Coinciding with a powerful backlash in corporate boardrooms and among the conservative establishment against President Obama and the Democratic Party-controlled Congress, and bolstered by the media-beloved “tea party” movement, the Court’s decision in *Citizens United v. Federal Election Commission*<sup>1</sup> transformed the American political landscape. The decision helped Republicans retake both houses of Congress in the 2010 elections and signals a change in the locus of electoral influence from parties and candidates, whose donors are disclosed, toward third party organizations, many with undisclosed contributors.<sup>2</sup>

The expenditure of large amounts of money to impact American elections did not begin with *Citizens United*.<sup>3</sup> Nonetheless, since the

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1. *Citizens United v. FEC*, 130 S. Ct. 876 (2010).

2. *Id.* at 940 (Stevens, J., concurring in part and dissenting in part) (arguing that the ruling distorts BCRA’s regulatory scheme in favor of corporations/unions as opposed to parties); R. SAM GARRETT, CONG. RESEARCH SERV., R41542, THE STATE OF CAMPAIGN FINANCE POLICY: RECENT DEVELOPMENTS AND ISSUES FOR CONGRESS 13 (2010) (“Following *Citizens United* and *SpeechNow*, it is also possible that tax-exempt organizations, corporations, or unions will rival or overshadow the parties’ financial prowess in the long term.”).

3. See, e.g., Press Release, FEC, 2008 Presidential Campaign Financial Activity Summarized: Receipts Nearly Double 2004 Total (June 8, 2009), available at <http://www.fec.gov/press/press2009/20090608PresStat.shtml>. In 2008, total presidential campaign spending topped \$1.8 billion. *Id.* The Obama for President campaign alone spent \$729.3 million. Press Release, FEC, Presidential Pre-Nomination Campaign Disbursements December 31,

enactment of the Bipartisan Campaign Reform Act (“BCRA”)<sup>4</sup> of 2002, election dollars came primarily from a large number of comparatively smaller donations to candidates and parties from individuals,<sup>5</sup> Political Action Committees (“PACs”),<sup>6</sup> and independent expenditures typically funded by wealthy individuals.<sup>7</sup> BCRA banned “soft money” donations to parties,<sup>8</sup> and the law long prohibited using corporate and labor union treasury funds to campaign for or against a candidate or pay for advertisements designed to impact a race close to the election.<sup>9</sup> These prohibitions provided a bulwark against both the reality and the perception of a campaign finance free-for-all where any person or organization, if creative or well-lawyered enough, could spend unlimited funds to affect the outcome of a particular election.

*Citizens United* has changed that perception. The Supreme Court empowered corporations, both for-profit and non-profit, to use unlimited general treasury funds to make independent expenditures (“IEs”)<sup>10</sup> or electioneering communications (“ECs”)<sup>11</sup> expressly for or

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2008 (June 8, 2009), available at [http://www.fec.gov/press/press2009/20090608Pres/3\\_2008PresPrimaryCmpgnDis.pdf](http://www.fec.gov/press/press2009/20090608Pres/3_2008PresPrimaryCmpgnDis.pdf).

4. Bipartisan Campaign Reform Act of 2002, Pub. L. 107-155, 116 Stat. 81 (codified in scattered sections of 2 and 47 U.S.C.).

5. See Press Release, FEC, Presidential Campaign Receipts (June 8, 2009), available at [http://www.fec.gov/press/press2009/20090608Pres/1\\_OverviewPresFinActivity1996-2008.pdf](http://www.fec.gov/press/press2009/20090608Pres/1_OverviewPresFinActivity1996-2008.pdf); Press Release, FEC, 2008 Presidential Campaign Financial Activity Summarized: Receipts Nearly Double 2004 Total (June 8, 2009), available at <http://www.fec.gov/press/press2009/20090608PresStat.shtml>.

6. In 2008, individual contributions to federal candidates were limited to \$2300 per election (i.e., each of the primary and general elections), with a maximum \$115,500 to all federal candidates, parties, and committees. 11 C.F.R. § 110.1(b) (2011); Price Index Increases for Expenditure and Contribution Limitations, 72 Fed. Reg. 5294 (Feb. 5, 2007). Only U.S. citizens and permanent residents may contribute. See 11 C.F.R. § 110.20. Political action committees may accept contributions of up to \$5000. 11 C.F.R. § 110.1(d).

7. See, e.g., Chris Fitzsimon, *Anti-Obama Ads with Tar Heel Ties*, NEWS & OBSERVER, Oct. 15, 2008, at A11 (canvassing advocacy groups participating in 2008, including “Freedom’s Watch, Alliance for a Better Tomorrow, Patriot Majority, Americans Majority, and dozens more, all running ads across the country against a candidate they don’t like, usually with money from a few wealthy individuals.”); Paul Kane, *Liberal 527s Find Shortfall*, ROLL CALL, Sept. 25, 2006 (finding that the five largest individual contributors to “liberal” 527 groups in 2004 gave more than \$86 million, including George Soros’ contributions of \$27 million).

8. See 2 U.S.C. § 441i (2006). “Soft money” refers to contributions that are not subject to the limitations and requirements of BCRA. *Id.*

9. 2 U.S.C. §§ 441b, 434(f)(3).

10. 11 C.F.R. § 100.16(a). An “independent expenditure” is an expenditure for a communication “expressly advocating the election or defeat of a clearly identified candidate that is not made in cooperation, consultation, or concert with, or at the request or suggestion of, a candidate, a candidate’s authorized committee, or their agents, or a political party or its agents.” *Id.*

against a candidate. *Citizens United's* progeny have extended this right to support IEs and ECs sponsored by another entity, such as a political committee organized under section 527 of the tax code, a 501(c)(4) social welfare organization, or a 501(c)(6) trade association.<sup>12</sup> While contributions and contributors to political committees must be timely disclosed to the public,<sup>13</sup> contributions to 501(c)(4) organizations that are utilized for IEs or ECs are, for the most part, not being disclosed.<sup>14</sup>

Emboldened by *Citizens United*, 2010 campaign spending by outside groups increased more than 400% from the 2006 mid-term election to nearly \$300 million, roughly 60% of the combined spending of federal parties and outside groups—the first time ever that outside spending eclipsed party spending.<sup>15</sup> Groups maintaining the anonymity of their contributors dominated the landscape.<sup>16</sup> Two allied organizations with ties to the highest levels of the Republican Party—Crossroads Grassroots Policy Strategies (“Crossroads GPS”), a 501(c)(4) that does not disclose contributors, and American Crossroads, a 527 “super PAC” that must disclose its donors<sup>17</sup>—had a particularly profound impact on elections, especially in the Third and Twentieth Congressional Districts in California. With the Presidency and control of Congress in the balance, 501(c)(4) organizations on both sides of the political aisle are already mobilizing and fundraising

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11. 2 U.S.C. § 434(f)(3). An “electioneering communication” is a broadcast, cable, or satellite communication which refers to a clearly identified candidate for Federal office; is made within sixty days before a general election or thirty days before a primary; and, in the case of a communication which refers to a candidate for an office other than President or Vice President, is targeted to the relevant electorate. *Id.*

12. See *SpeechNow.org v. FEC*, 599 F.3d 686, 689 (D.C. Cir. 2010) (holding that limitations on contributions to political committees did not apply to contributions to an IE-only 527 committee).

13. 11 C.F.R. §§ 103.3, 104.1(a).

14. See Jim Rutenberg et al., *Offering Donors Secrecy, and Going on Attack*, N.Y. TIMES, Oct. 12, 2010, at A1.

15. *12 Months After: The Effects of Citizens United on Elections and the Integrity of the Legislative Process*, PUB. CITIZEN, 9 (Jan. 2011), <http://www.citizen.org/documents/Citizens-United-20110113.pdf> [hereinafter PUBLIC CITIZEN]; Spencer MacColl, *Citizens United Decision Profoundly Affects Political Landscape*, OPENSECRETS.ORG (CENTER RESPONSIVE POL.) (May 5, 2011, 11:16 AM), <http://www.opensecrets.org/news/2011/05/citizens-united-decision-profoundly-affects-political-landscape.html>.

16. PUBLIC CITIZEN, *supra* note 15, at 9.

17. See Dan Eggen & T.W. Farnam, *‘Super PACs’ Alter Campaign*, WASH. POST, Sept. 28, 2010, at A1. “Super PACs” are also known as “independent expenditure-only committees” and are, therefore, not bound by the limits on contributions required of PACs that fund candidates and parties. *Id.*

from donors, who expect to remain anonymous, to impact the 2012 elections.<sup>18</sup>

Numerous proposals have been proffered to increase transparency of contributions through disclosure, including fairly modest contributions that could pay for only a small fraction of any IE or EC.<sup>19</sup> The proposal outlined in this Article balances (1) the need for greater transparency of those attempting to have a major impact on American elections; (2) the organizational burden and potential disincentive for participation imposed by disclosure; and (3) the interests of contributors that have already contributed to these organizations under the present disclosure regime. Specifically, we call for disclosure of all contributors who make contributions totaling \$100,000 to any person or organization that makes an IE or EC by the end of the day following the IE or expenditure for the EC. These disclosure obligations would begin on the first day of the next odd-numbered year following enactment.

This Article proceeds in several parts. We begin by discussing how *Citizens United* upended decades of precedent restricting corporate spending on elections. We then describe how regulatory changes have limited disclosure requirements and galvanized anonymous political spending even where *Citizens United* acknowledged the importance of prompt disclosure. To ground these abstract principles in the trenches where elections are actually decided, we then describe how American Crossroads' and Crossroads GPS' involvement in two heavily contested California congressional contests profoundly affected those races. Finally, we conclude with a description of our proposal, which balances the public's interest in prompt disclosure against the political reality that a bipartisan consensus around more fundamental structural reform is unlikely.

## I. The Supreme Court in *Citizens United Invited Unlimited Corporate Independent Expenditures to Impact Elections*

*Citizens United* was not the most likely case to end the prohibition on corporate spending on elections. *Citizens United*, a 501(c)(4),

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18. Brody Mullins, *2012 Election Spending Race Heats Up*, WALL ST. J., Mar. 1, 2011, at A5; Alex Leary, *Influence of Super PACs to Grow with 2012 Election*, MIAMI HERALD (July 31, 2011), <http://www.miamiherald.com/2011/07/31/2332319/influence-of-super-pacs-to-grow.html>.

19. See, e.g., DISCLOSE Act, H.R. 5175, 111th Cong. (2010); S. 3628, 111th Cong. (2010).

produced and released *Hillary*, a documentary critical of then-Senator (and then-presumptive Democratic Party presidential nominee) Hillary Clinton.<sup>20</sup> Citizens United hoped to make the film available through video-on-demand on cable television and to promote the showings through cable and broadcast television advertisements.<sup>21</sup>

Citizens United brought a suit for declaratory and injunctive relief that (1) BCRA's prohibition on corporations using general treasury funds for ECs in section 441b was unconstitutional as applied to *Hillary*; and (2) BCRA's disclaimer, disclosure, and reporting requirements in sections 201 and 311 were unconstitutional as applied both to *Hillary* and the ads.<sup>22</sup> Citizens United did not challenge these regulations on their face, let alone the overall ban on corporate spending on elections.<sup>23</sup> After determining that Citizens United's as applied challenge did not adequately address their constitutional infirmities, the Court struck down section 441b's prohibition on corporate IEs and ECs.<sup>24</sup>

#### A. The Fight over Regulation in the Electoral Marketplace of Ideas

Mirroring the battle lines over the propriety, constitutionality, and impact of regulation in other contexts,<sup>25</sup> the majority and dissent parried over the role of regulation in the electoral marketplace of ideas. Underpinning the Court's ruling was the conviction that the First Amendment could neither permit the government to prohibit political speech by certain "disfavored" speakers, regardless of whether the speakers were natural persons or organizations, nor attempt to engineer or impact the range of participants in political discussion.<sup>26</sup>

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20. Citizens United v. FEC, 130 S. Ct. 876, 887 (2010).

21. *Id.*

22. *Id.* at 888.

23. *See id.* at 931–36 (Stevens, J., concurring in part and dissenting in part).

24. *Id.* at 913 (majority opinion).

25. *See, e.g.,* McDonald v. City of Chi., 130 S. Ct. 3020 (2010) (striking down Chicago's gun registration law); Free Enter. Fund v. Pub. Co. Accounting Oversight Bd., 130 S. Ct. 3138 (2010) (striking down Sarbanes-Oxley's removal restrictions for members of the corporate accounting oversight board and allowing the SEC to remove board members at will); District of Columbia v. Heller, 554 U.S. 570 (2008) (striking down the District of Columbia's gun regulations); Leegin Creative Leather Prods., Inc. v. PSKS, Inc., 551 U.S. 877 (2007) (striking down a prohibition on manufacturer-imposed minimum resale prices).

26. *Citizens United*, 130 S. Ct. at 899 ("We find no basis for the proposition that, in the context of political speech, the Government may impose restrictions on certain disfavored speakers."); *id.* ("The Government may not . . . deprive the public of the right and privilege to determine for itself what speech and speakers are worthy of consideration.").

The Court directed its ire most pointedly at *Austin v. Michigan Chamber of Commerce*,<sup>27</sup> in which the *Austin* majority had relied on Michigan's interest in avoiding "the corrosive and distorting effects of immense aggregations of wealth that are accumulated with the help of the corporate form and that have little or no correlation to the public's support for the corporation's political ideas" to uphold a ban on corporate IEs in that state.<sup>28</sup> Framing *Austin's* "anti-distortion" rationale as an inexplicable "aberration" from precedent,<sup>29</sup> the Court overruled *Austin*, skirting around the possibility that corporate participation might in fact distort the political conversation as the *Austin* court feared.<sup>30</sup>

By contrast, the dissent echoed *Austin's* concern that regulation could facilitate, rather than impede, the marketplace of ideas and enable the listener to exercise her First Amendment rights.<sup>31</sup> University of Baltimore Law School Professor Christopher Peters has endorsed this idea, criticizing as "stunningly anachronistic" the majority's insistence that a free marketplace of ideas mandates unfettered corporate participation.<sup>32</sup>

## B. The Exaltation of Corporate Political Speech

The *Citizens United* Court not only ruled that corporations *could* "speak" by making IEs for the first time in sixty-three years,<sup>33</sup> it called upon corporations to do so. As the Court recognized, there are undoubtedly certain political issues regarding corporations (or, more accurately, those who run or are affiliated with the corporations) that may have unique insights or views.<sup>34</sup>

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27. *Austin v. Mich. Chamber of Commerce*, 494 U.S. 652 (1990), *overruled by Citizens United*, 130 S. Ct. 876.

28. *Id.* at 660.

29. *Citizens United*, 130 S. Ct. at 903 ("[T]he *Austin* Court identified a new governmental interest in limiting political speech: an antidistortion interest."); *id.* at 907.

30. *Id.* at 913.

31. *Id.* at 976 (Stevens, J., concurring in part and dissenting in part).

32. Christopher J. Peters, *Misusing 'Marketplace of Ideas'*, NAT'L L.J. (Feb. 22, 2010), <http://www.law.com/jsp/nlj/PubArticleNLJ.jsp?id=1202443880161&slreturn=1>.

33. See *Citizens United*, 130 S. Ct. at 900 (citing Labor Management Relations Act of 1947, Pub. L. No. 80-101, § 313, 61 Stat. 136, 159 (prohibiting corporate IEs for the first time)); see also *id.* at 930 (Stevens, J., concurring in part and dissenting in part) (citing Tillman Act, Pub. L. No. 59-36, ch. 420, 34 Stat. 864 (1907) (banning corporate contributions to candidates)).

34. See *id.* at 906-07 (majority opinion) (stating that section 441b "permits the Government to ban the political speech of millions of associations of citizens[,] . . . [m]ost of [which] are small corporations without large amounts of wealth"); *id.* at 907 ("The Government has 'muffle[d] the voices that best represent the most significant segments of the

Going a step further, the Court's aggressive condemnation of section 441b and suggestion that its ruling released corporations from the oppression the BCRA had wrought encouraged them to take advantage of this new freedom of speech.<sup>35</sup> The Court's use of such hyperbolic language, at least by effect if not by design, provided political, as well as legal cover for the substantially increased corporate participation in elections that has ensued.<sup>36</sup>

## II. Prompt and Thorough Disclosure of Political Contributors Is Essential for an Informed and Empowered Electorate

The Court, long before *Citizens United*, has emphasized the importance of timely disclosure of contributions and contributors as a necessary component of a transparent, robust electoral system. As the number and influence of contributors to political organizations like 501(c)(4)s increases, disclosure is even more critical.

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economy' . . . [and has] 'deprived [the electorate] of information, knowledge and opinion vital to its function.'" (citations omitted); *id.* ("By suppressing the speech of manifold corporations, both for-profit and nonprofit, the Government prevents their voices and viewpoints from reaching the public and advising voters on which persons or entities are hostile to their interests."); *id.* at 912 ("On certain topics corporations may possess valuable expertise, leaving them the best equipped to point out errors or fallacies in speech of all sorts, including the speech of candidates and elected officials.").

35. See *id.* at 897 ("The law before us is an outright ban [on speech], backed by criminal sanctions."); *id.* ("These prohibitions are classic examples of censorship."); *id.* at 898 ("Were the Court to uphold these restrictions, the Government could repress speech by silencing certain voices at any of the various points in the speech process."); *id.* ("[P]olitical speech must prevail against laws that would suppress it, whether by design or inadvertence."); *id.* at 907 ("The censorship we now confront is vast in its reach."); *id.* at 908 ("When Government seeks to use its full power, including the criminal law, to command where a person may get his or her information or what distrusted source he or she may not hear, it uses censorship to control thought. This is unlawful. The First Amendment confirms the freedom to think for ourselves."); see also *id.* at 942 (Stevens, J., concurring in part and dissenting in part) ("[T]he majority invokes the specter of a 'ban' [on corporate speech] on nearly every page of its opinion."); *id.* at 944 n.39 (Stevens, J., concurring in part and dissenting in part) (criticizing the majority for "suggest[ing] that the FEC's 'business is to censor'").

36. See Michael Crowley, *The New GOP Money Stampede*, TIME, Sept. 27, 2010, at 30. For example, as Democracy 21 President Fred Wertheimer posited, because of *Citizens United*, "a corporate CEO may see such spending as 'an exercise of your First Amendment rights rather than a potentially questionable circumvention of campaign-finance laws.'" *Id.* at 35.

**A. Disclosure of Contributors Who Make Possible Electoral Activities Serves the Consistently Recognized Interest in Knowing the Identity of Political Speakers**

Having overruled *Austin*, the Court took a decidedly less controversial path in considering Citizens United's as applied challenge to BCRA's requirement that a person spending over \$10,000 on ECs file a disclosure statement with the Federal Election Commission ("FEC") identifying, *inter alia*, the names of certain contributors.<sup>37</sup> The Court found a substantial interest in the public's knowing who is speaking—and who is funding the speech.<sup>38</sup>

Specifically, the Court recognized the disclosure of the sponsor and contributors to an EC (and IEs more generally) affords the following benefits:

- allows voters to “make informed decisions and give proper weight to different speakers and messages[.]”<sup>39</sup>
- allows citizens and voters to “hold . . . elected officials accountable for their positions and supporters[.]”<sup>40</sup> and to determine whether they are “‘in the pocket’ of so-called moneyed interests[.]”<sup>41</sup> and
- allows shareholders to hold corporations accountable for their political positions.<sup>42</sup>

Knowing who is spending hundreds of thousands, if not millions, of dollars to support or oppose a candidate will almost certainly provide insight into the interests to which a candidate is likely to serve. Even if the candidate is unmoved by a deluge of dollars spent on her behalf, those funding IEs and ECs would not do so without a high level of confidence, supported by the candidates' positions, that the candidate is going to vote “the right way.”<sup>43</sup>

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37. 2 U.S.C. § 434(f)(1)–(2) (2006) (mandating that unless the person or entity paying for the EC has set up a segregated fund, it must disclose contributions of \$1000 or more since January 1 of the prior year); *see also Citizens United*, 130 S. Ct. at 913–14.

38. *Citizens United*, 130 S. Ct. at 915 (“The disclaimers required by § 311 ‘provid[e] the electorate with information,’ and ‘insure that the voters are fully informed’ about the person or group who is speaking.” (alteration in original) (citations omitted)); *see also* Speech-Now.org v. FEC, 599 F.3d 686, 698 (D.C. Cir. 2010) (“[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.”).

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

40. *Id.*

41. *Id.* (quoting *McConnell v. FEC*, 540 U.S. 93, 259 (2003) (Scalia, J., dissenting)).

42. *Id.*

43. *See id.* at 965–66 (Stevens, J., concurring in part and dissenting in part) (citing *McConnell*, 540 U.S. at 129); *see* *McConnell v. FEC*, 251 F. Supp. 2d 176, 622–23 (D.D.C. 2003) (canvassing indicia of corporate influence in Washington and concluding “[t]he



Central to the resistance to disclosure is the assertion that making contributors and contributions public will discourage this type of political speech. There can be little doubt that certain individuals will donate for IEs or ECs only if they can do so anonymously.<sup>44</sup> Similarly, corporations, which cannot give to candidates and therefore will not be subject to the liberal disclosure regime for candidate contributions, may be deterred by disclosure. The Court acknowledged as much.<sup>45</sup>

The fact that disclosure may discourage certain contributions and, therefore, some political speech must be weighed against the interest of an informed electorate in knowing who is speaking—and who is paying for that person’s speech. Accordingly, the Court found that BCRA’s EC disclosure regime was permissible as “a less restrictive alternative to more comprehensive regulations of speech.”<sup>46</sup> Indeed, the Court has consistently upheld requirements that political contributors and contributions be publicly disclosed.<sup>47</sup>

Citizens United and its allied *amici* also raised the specter of retaliation, even violence, against contributors whose identities are made public.<sup>48</sup> The realization that someone, whether an individual or cor-

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record powerfully demonstrates that electioneering communications paid for with the general treasury funds of labor unions and corporations endears those entities to elected officials in a way that could be perceived by the public as corrupting”); *id.* at 623–24 (reporting on poll showing that 80% of American public believes those engaged in ECs received special consideration from the elected officials they had supported).

44. See *Citizens United*, 130 S. Ct. at 916 (noting Citizens United’s argument to this effect and citing *amicus curiae* briefs of the Institute for Justice and the Alliance Defense Fund); see, e.g., *Buckley v. Valeo*, 424 U.S. 1, 66 (1976) (“[C]ompelled disclosure has the potential for substantially infringing the exercise of First Amendment rights.”); DICK M. CARPENTER II, INST. FOR JUSTICE, *Disclosure Costs: Unintended Consequences of Campaign Finance Reform* (2007), available at [http://www.ij.org/images/pdf\\_folder/other\\_pubs/DisclosureCosts.pdf](http://www.ij.org/images/pdf_folder/other_pubs/DisclosureCosts.pdf).

45. *Citizens United*, 130 S. Ct. at 914 (“Disclaimer and disclosure requirements may burden the ability to speak, but they ‘impose no ceiling on campaign-related activities,’ and ‘do not prevent anyone from speaking.’” (citations omitted)).

46. *Id.* at 915 (citing, *inter alia*, *FEC v. Mass. Citizens for Life, Inc.*, 479 U.S. 238, 262 (1986); *Buckley*, 424 U.S. at 75–76; *McConnell*, 540 U.S. at 321 (Kennedy, J., dissenting)).

47. See, e.g., *McConnell*, 540 U.S. at 230–31; *Mass. Citizens for Life, Inc. (MCFL)*, 479 U.S. at 262; *Buckley*, 424 U.S. at 75–76.

48. *Citizens United*, 130 S. Ct. at 916; see, e.g., Brief of Amicus Curiae Chamber of Commerce of the United States of America in Support of Appellant at 13 n.8, *Citizens United v. FEC*, 130 S. Ct. 876 (2010) (No. 08-205), available at [http://www.abanet.org/publiced/preview/briefs/pdfs/07-08/08-205\\_AppellantAmCuUSCoC.pdf](http://www.abanet.org/publiced/preview/briefs/pdfs/07-08/08-205_AppellantAmCuUSCoC.pdf) (“The use of donor information for retaliation purposes is part of the daily news.”); Brief of Amicus Curiae Center for Competitive Politics in Support of Appellant at 9–15, *Citizens United v. FEC*, 130 S. Ct. 876 (2010) (No. 08-205), available at [http://www.abanet.org/publiced/preview/briefs/pdfs/07-08/08-205\\_AppellantAmCuCtrforCompetitivePolitics.pdf](http://www.abanet.org/publiced/preview/briefs/pdfs/07-08/08-205_AppellantAmCuCtrforCompetitivePolitics.pdf); Crowley, *supra* note 36, at 35 (noting contention that non-disclosure is necessary to protect contributors who “are

poration, has made a political contribution may indeed prompt speech or actions in response. Consumer-facing companies, in particular, risk alienating customers by taking a position on a major candidate who, almost by definition, has legions of supporters and opponents. For example, Target Corporation was subjected to protests and a boycott threat after contributing to a pro-business Minnesota political group linked to an anti-gay 2010 gubernatorial candidate.<sup>49</sup>

The *Citizens United* Court properly rejected these retaliation concerns in light of the information interest in disclosure. While acknowledging *amici*'s examples of retaliation that had occurred as a result of disclosure, *Citizens United* had identified "no instance of harassment or retaliation" in its long history.<sup>50</sup> Borrowing the logic of the *Citizens United* Court, if it is not the government's job to influence the electoral marketplace of ideas, it is certainly not the government's job to protect a speaker preemptively from the consequences of that speech where the response is itself First Amendment-protected activities.

## B. Only Prompt Disclosure Provides Voters Adequate Information

To make fully informed decisions, the voting public must know the identity of the contributors prior to the election *and* shortly after the IE or EC is made. Of course, voters cannot be aided in evaluating the candidates prior to voting if disclosure of contributions does not occur until after the election.<sup>51</sup> Further, the increased prevalence of voting by mail in many jurisdictions has extended the voting period to encompass one month before election day.<sup>52</sup> Therefore, certain voters

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concerned about intimidation."); Bradley A. Smith, *In Defense of Political Anonymity*, CITY J., Winter 2010, at 74, available at [http://www.city-journal.org/2010/20\\_1\\_political-anonymity.html](http://www.city-journal.org/2010/20_1_political-anonymity.html).

49. Brody Mullins & Ann Zimmerman, *Target Discovers Downside to Political Contributions*, WALL ST. J., Aug. 7, 2010, at A2.

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

51. See *id.* at 915 ("[T]he public has an interest in knowing who is speaking about a candidate shortly before an election."); *McConnell*, 540 U.S. at 200 ("Given the relatively short timeframes in which electioneering communications are made, the interest in assuring that disclosures are made promptly and in time to provide relevant information to voters is unquestionably significant.")

52. Cathy Locke, *California's County Election Officials Send Out Ballots by Mail*, SACRAMENTO BEE, Oct. 5, 2010, at B1. Ballots are automatically sent to "permanent" vote by mail ("PVBm") voters, typically as early as one month before election day. *Id.* In the 2010 general election in California, for example, 48.44% of voters voted by mail. CAL. SEC'Y OF STATE, STATEMENT OF VOTE: NOVEMBER 2, 2010 GENERAL ELECTION 3 (2010), available at <http://www.sos.ca.gov/elections/sov/2010-general/complete-sov.pdf> [hereinafter STATEMENT OF VOTE 2010]. As of the 2010 general election, over 37.5% of California voters are

will likely be voting on the day of or shortly after an EC is broadcast, and only immediate disclosure can have any impact on their vote.

Similarly, attention to the disclosure of a contribution and its ability to impact the political process, even on a prospective basis, will be substantially less if disclosure is made post-election. Not only does campaign coverage rapidly wane after a winner has been declared, the media and the electorate have demonstrated little appetite for a continuing discussion of campaign tactics and potential irregularities even where the outcome of the election could be in doubt.<sup>53</sup> This desire to “move on,” enthusiastically encouraged by the campaign leading in the preliminary vote count, means that indicia of potentially corrupting contributions are unlikely to receive much attention.

The most effective disclosure will occur almost immediately after the IE or EC is made so that a voter can incorporate the identity of the contributor(s) in her evaluation of the advertisement and the candidates. The current requirement that ECs and IEs made between twenty days and twenty-four hours before an election must be disclosed to the FEC by the end of the day after the EC or IE is publicly distributed serves this aim.<sup>54</sup>

### C. Disclosure of the Sponsor of IEs and ECs May Cloak Rather Than Illuminate Who Is Speaking

Even if the disclosure is timely, what (and who) is disclosed is critical for voters to evaluate the IE or EC and the candidate it supports or opposes. In the present proliferation of organizations taking advantage of *Citizens United*, the public and the media may not have heard of the group or be familiar with its views until they see its first advertisement. At best, only those who followed political news closely throughout 2010 would likely have heard about even the largest organizations, such as the Crossroads organizations, before seeing their ads. Moreover, the name of the organization is rarely informative. Often, the name suggests concern about an important public issue on

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registered as PVB. CAL. SEC'Y OF STATE, CAL. REGISTERED PERMANENT VOTE-BY-MAIL STATISTICS (1992–2010), [www.sos.ca.gov/elections/vote-by-mail/pvmb-voter-survey-1992-2010.xls](http://www.sos.ca.gov/elections/vote-by-mail/pvmb-voter-survey-1992-2010.xls).

53. See, e.g., Donna Britt, *Worst Voter Error Is Apathy Toward Irregularities*, WASH. POST, Nov. 12, 2004, at B1 (noting scant media coverage of alleged voting irregularities after the 2004 presidential election).

54. See also *Citizens United*, 130 S. Ct. at 916 (“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.”).

which the organization is unquestionably on the correct side, unwavering patriotism, or both.<sup>55</sup> Other names, like American Crossroads and Crossroads GPS, which were formed in 2010, provide no insight whatsoever into the organization's origins or motivations.

Further, neither the identity of the sponsor of the IE or EC nor the advertisement itself may be particularly informative of the interests and motivations of contributors. For example, a contributor desiring increased domestic oil exploration might choose to target an oil industry-hostile Congressman by contributing to a 501(c)(4) running ads chastising her for her record on health care. Without disclosure of the underlying contributors to the sponsor of an IE or EC, it is too easy for a wealthy donor to obscure not only its identity, but also its true goal, which may have far less public support than the issue position taken in the IE or EC. Therefore, unless the underlying contributors are mentioned in the ad's disclaimer as required of the largest contributors in some states and certain reform proposals,<sup>56</sup> to obtain useful information about who is behind the ad and not simply the organization sponsoring the IE utilizing others' money, the voters must rely on disclosure to the FEC of the underlying contributors.

### III. Current Federal Law Permits Contributors to 501(c)(4)s to Evade Disclosure

Much of the response to *Citizens United* has focused on its empowering for-profit corporations to make IEs.<sup>57</sup> *Citizens United* itself, however, is a 501(c)(4) corporation (albeit a large one with for-profit corporate donors, among others).<sup>58</sup> The Court's analysis concerning the importance of disclosure did not distinguish among types of cor-

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55. See *McConnell*, 540 U.S. at 128 ("Because FECA's disclosure requirements did not apply to so-called issue ads, sponsors of such ads often used misleading names to conceal their identity. 'Citizens for Better Medicare,' for instance, was not a grassroots organization of citizens, as its name might suggest, but was instead a platform for an association of drug manufacturers. And 'Republicans for Clean Air,' which ran ads in the 2000 Republican Presidential primary, was actually an organization consisting of just two individuals—brothers who together spent \$25 million on ads supporting their favored candidate.").

56. See, e.g., DISCLOSE Act, H.R. 5175, 111th Cong. § 214(b)(2) (2010); CAL. CODE REGS. tit. 2, § 18450.4 (2011).

57. See, e.g., Editorial, *Corporations, Wealthy Dominating Politics*, SAN JOSE MERCURY NEWS, Nov. 3, 2010 ("Following the Supreme Court's radical decision in the *Citizens United* case, corporations now have the same rights to make political donations as individuals, drowning the voices of those who don't earn billions or employ armies of lobbyists. And anyone who thinks campaign spending only influences elections is delusional; it's directly related to what laws are made or blocked.").

58. See *Citizens United*, 130 S. Ct. at 886–87.

porations. Since the government has an interest in the public knowing who is speaking politically, it should not matter whether the corporation is a 501(c)(4). Nonetheless, amidst a complex array of relevant tax and election regulations, 501(c)(4)s sponsoring IEs and ECs have routinely avoided disclosing contributions and contributors.

#### **A. 501(c)(4)s Are Social Welfare Organizations Whose Primary Purpose Cannot Be Electoral Politics**

Section 501(c)(4) organizations, which include both “social welfare” organizations and local associations of employees, must be “primarily engaged in promoting in some way the common good and general welfare of the people of the community.”<sup>59</sup> Promoting social welfare does not include participation in political campaigns on behalf of or in opposition to any candidate.<sup>60</sup> Accordingly, while one must review all of the “facts and circumstances” to determine whether an organization is “primarily” engaged in promoting social welfare,<sup>61</sup> the consensus among practitioners is that a 501(c)(4) may not spend a majority of its time or money on electoral politics.<sup>62</sup>

#### **B. Federal Regulations Require Public Disclosure of Contributions to 501(c)(4)s for IEs or ECs Only in Rare and Easily Circumvented Circumstances**

Section 501(c)(4) organizations must report to the IRS all of their political activities, which are publicly disclosed.<sup>63</sup> They must also report donors who contribute \$5000 or more during a year.<sup>64</sup> Infor-

59. Treas. Reg. § 1.501(c)(4)-1(a)(1)-(2), (b) (as amended in 1990).

60. Treas. Reg. § 1.501(c)(4)-1(a)(2)(ii).

61. Raymond Chick & Amy Henchey, *Political Organizations and IRC 501(c)(4)*, INTERNAL REVENUE SERV. (1995), <http://www.irs.gov/pub/irs-tege/eotopicm95.pdf>.

62. See ERIKA K. LUNDER & L. PAIGE WHITAKER, CONG. RESEARCH SERV., R40183, 501(C)(4) ORGANIZATIONS AND CAMPAIGN ACTIVITY: ANALYSIS UNDER TAX AND CAMPAIGN FINANCE LAWS 2-3 (2010) (noting that to maintain a 501(c)(4)'s tax-exempt status, (1) campaign activity—along with any other activities that do not further an exempt purpose—cannot be the organization's primary activity; and (2) the organization must primarily benefit public interests). In the wake of increasing 501(c)(4) activity in the 2010 elections, there have been numerous requests to the IRS to investigate organizations that have engaged in highly visible political activity. See, e.g., Letter from Max Baucus, U.S. Senator, to Hon. Douglas H. Shulman, Comm'r, Internal Revenue Serv. (Sept. 28, 2010) [hereinafter Letter from Baucus to Shulman], *available at* <http://www.scribd.com/doc/53692379/Sen-Max-Baucus-Letter-to-IRS-regarding-abuses-of-tax-exempt-status>.

63. I.R.C. § 6033 (2006) (disclosed on Schedule C to Form 990).

64. *Id.* (disclosed on Schedule B to Form 990). In addition, contributions to 501(c)(4)s are subject to the gift tax although, until recently, the IRS did very little to

mation identifying these donors, however, is not subject to public disclosure under tax law.<sup>65</sup>

The FEC’s regime underlying IEs and ECs requires disclosure if there is a nexus between the contribution and a particular advertisement or expenditure. This is an easily-evaded nexus that essentially permits organizations that do not need to publicly disclose contributors as a matter of tax law to withhold identifying information under federal election law as well.

**Table 1: Current Law Governing Disclosure of Contributors to IEs and ECs**

Type of Expenditure	Statute	Regulation
Independent Expenditures	disclose “each person who made a contribution in excess of \$200 to the person filing such statement which was made <i>for the purpose of furthering an independent expenditure.</i> ” <sup>66</sup>	disclose “each person who made a contribution in excess of \$200 to the person filing such report, which contribution was made <i>for the purpose of furthering the reported independent expenditure.</i> ” <sup>67</sup>
Electioneering Communications	disclose “the names and addresses of all contributors who contributed an aggregate amount of \$1,000 or more to the person making the disbursement during the period beginning on the first day of the preceding calendar year and ending on the disclosure date.” <sup>68</sup>	disclose “the name and address of each person who made a donation aggregating \$1,000 or more to the corporation or labor organization, aggregating since the first day of the preceding calendar year, which was made <i>for the purpose of furthering electioneering communications.</i> ” <sup>69</sup>

With regard to ECs, there is both a distinction between the statute and the regulation and between the regulation and the FEC’s prevailing interpretation of it. Unlike 2 U.S.C. § 434(c)(2)(C) concerning IEs, the statutory language of 2 U.S.C. § 434(f)(2)(F) con-

collect the tax or seek penalties for non-payment. See Stephanie Strom, *I.R.S. Sets Sights on Donors’ Gifts That Push Policy*, N.Y. TIMES, May 13, 2011, at A1.

65. I.R.C. § 6104(b), (d)(3)(A).

66. 2 U.S.C. § 434(c)(2)(C) (2006) (emphasis added).

67. 11 C.F.R. § 109.10(e)(1)(vi) (2011) (emphasis added).

68. 2 U.S.C. § 434(f)(2)(F). Where funds are received into and paid out of a segregated bank account, the statement need only disclose contributors who contributed \$1000 or more to that account during the period beginning on the first day of the preceding calendar year and ending on the disclosure date. *Id.* § 434(f)(2)(E).

69. 11 C.F.R. § 104.20(c)(9) (emphasis added).

cerning ECs does not require any inquiry into the purpose of the contribution and requires disclosure of “all contributors.”<sup>70</sup>

The regulations concerning ECs were revised in late 2007 following *Federal Election Commission v. Wisconsin Right to Life*.<sup>71</sup> The Court’s ruling permitted corporations to use general treasury funds to finance ECs that were not the functional equivalent of express advocacy and only required disclosure of contributions “made for the purpose of furthering electioneering communications.”<sup>72</sup> These general treasury funds include “funds received in response to solicitations specifically requesting funds to pay for ECs as well as funds specifically designated for ECs by the donor.”<sup>73</sup> The FEC explained its rationale for the revision by emphasizing that investors, customers, and donors to a corporation’s general treasury funds do not necessarily support its ECs and that disclosure of all those providing \$1000 or more to a corporation would be costly and burdensome.<sup>74</sup>

Notably, although the FEC stated that the “for the purpose of furthering standard” was drawn from the disclosure requirements for IEs,<sup>75</sup> its justification for the regulatory change never limited disclosure to only a donation to further a specific reported EC, as provided for in 11 C.F.R. § 109.10(e)(1)(vi).<sup>76</sup> Instead, in its explanation, the FEC consistently referred to donations to pay for “ECs,” i.e., one or more ECs generally but not necessarily a particular EC.<sup>77</sup>

Nonetheless, shortly before the 2010 election, three Republican FEC commissioners imported the narrow IE disclosure standard in 11 C.F.R. § 109.10(e)(1)(vi) into the regulation governing ECs to dismiss a complaint.<sup>78</sup> The complaint concerned a 501(c)(4) that had run an EC against a Democratic congressional candidate without disclosing any contributions made to further that communication.<sup>79</sup> The commissioners concluded that, because the complaint did not provide facts tying alleged contributions to the precise advertisement at issue, the FEC had no reason to find that the 501(c)(4) had violated its dis-

70. 2 U.S.C. § 434(f)(2)(F).

71. *FEC v. Wis. Right to Life, Inc.*, 551 U.S. 449 (2007).

72. *Id.* at 480–81; 11 C.F.R. § 104.20(c)(9).

73. *Electioneering Communications*, 72 Fed. Reg. 72,899, 72,911 (Dec 26, 2007) (to be codified at 11 C.F.R. pts. 104, 114).

74. *Id.*

75. *Id.* at 72,911 n.22.

76. *Id.* at 72,910–12.

77. *Id.*

78. *Freedom’s Watch, Inc.*, MUR 6002 at 5–7 (F.E.C. Aug. 13, 2010) (statement of reasons), available at <http://eqs.sdrdc.com/eqsdocsMUR/10044274536.pdf>.

79. *Id.* at 2.

closure obligations.<sup>80</sup> With little threat of the FEC's marshaling the four votes needed to go beyond the organization's filings to investigate and punish potential violators,<sup>81</sup> few 501(c)(4) groups funding ECs in the 2010 election disclosed their contributors.<sup>82</sup>

In the wake of *Citizens United* and subsequent regulatory changes, many commentators predicted a material increase in non-party spending in the 2010 midterm election.<sup>83</sup> As any voter who lived near a hotly contested election witnessed, those predictions were fully borne out.<sup>84</sup> The 2010 election saw an unprecedented surge in outside spending and a sea change in the types of groups through which corporations, unions, and wealthy individuals chose to channel their contributions.<sup>85</sup>

#### IV. *Citizens United* Led to Higher Outside Spending in 2010

By all accounts, the *Citizens United* decision precipitated a gusher of election-related spending by outside groups. One study found that spending by outside groups (excluding party committees) soared to \$294 million in 2010, more than a 400% increase from the approxi-

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80. *Id.* at 6–7; *see also* PUB. CITIZEN, FADING DISCLOSURE: INCREASING NUMBER OF ELECTIONEERING GROUPS KEEP DONORS' IDENTITIES SECRET 5 (2010), *available at* <http://www.citizen.org/documents/Disclosure-report-final.pdf> (“[T]he Republican bloc of FEC commissioners . . . announced a new, even higher bar for requiring disclosure: Not only must funds be earmarked for electioneering communications; they must be earmarked for a *specific campaign ad.*” (emphasis in original)); *id.* at 3 (“A growing number of groups now claim that they are required to disclose their funders only when donations are specifically earmarked for a campaign ad.”).

81. There are six FEC commissioners, of which there can be no more than three Democrats and three Republicans, and a bipartisan group of four is required at every step of the enforcement process, even to find a “reason to believe” that the Federal Election Campaign Act has been violated. 2 U.S.C. § 437c(a) (2006); 11 C.F.R. § 111.9 (2011). Reformers have called for hearings on what they allege is a concerted effort by the three Republican members to stymie the FEC's enforcement of the Act. Letter from Ams. for Campaign Reform et al. to Barack Obama, U.S. President (Mar. 15, 2011), *available at* <http://www.democracy21.org/vertical/Sites/%7B3D66FAFE-2697-446F-BB39-85FBBA57812%7D/uploads/%7BCC360C8B-46D2-41AB-9EB4-96650403DF68%7D.pdf>.

82. *See 2010 Outside Spending, by Groups*, OPENSECRETS.ORG (CENTER RESPONSIVE POL.), <http://www.opensecrets.org/outsidespending/summ.php?cycle=2010&disp=O&type=E&chrt=D> (last visited Nov. 17, 2011). Of the thirty-three 501(c) groups that made ECs in 2010 (ranging from just over \$5000 to almost \$33 million), just twelve (36%) of them made partial or full disclosures of their donors. *Id.* Of those 501(c) groups that made substantial ECs of \$100,000 or more, only three of twenty groups (15%) made at least partial disclosures. *Id.*

83. *See, e.g.*, Adam Liptak, *Justices, 5-4, Reject Corporate Campaign Spending Limit*, N.Y. TIMES, Jan. 22, 2010, at A1.

84. *See, e.g.*, Crowley, *supra* note 36.

85. *See* Rutenberg, *supra* note 14.



mately \$70 million spent in the last mid-term election of 2006.<sup>86</sup> Indeed, the total from 2010 nearly matched the \$300 million spent by outside groups during the presidential year of 2008.<sup>87</sup> Just under half (46%) of this outside spending was by groups that do not disclose their contributors.<sup>88</sup>

As the table below shows, the vast majority of so-called super PAC and 501(c) activity in 2010 involved conservative-oriented groups. Of the ten outside groups (excluding political party committees) that spent the most in 2010, eight of them generally support conservative issues and candidates.

**Table 2: Outside Groups With the Most Spending (2010)**<sup>89</sup>

Group	Ideological Orientation	Approx. Spend (\$M)	Discloses Donors
U.S. Chamber of Commerce	Conservative	\$31	No
American Crossroads	Conservative	\$21.5	Yes
American Action Network Inc.	Conservative	\$21	No
Crossroads Grassroots Policy Strategies	Conservative	\$16.6	No
American Future Fund	Conservative	\$9.6	No
Americans for Job Security	Conservative	\$9	No
SEIU COPE	Liberal	\$8.3	Yes
AFSCME	Liberal	\$7.4	Yes <sup>90</sup>
60 Plus Association	Conservative	\$7.1	No
NRA of America Political Victory Fund	Conservative	\$6.7	Yes

These conservative groups, often advised by the same circle of longtime party operatives and officials, comprised a “new kind of unofficial but totally coordinated national Republican campaign ma-

86. PUBLIC CITIZEN, *supra* note 15, at 9.

87. *Id.*

88. *Id.* at 10.

89. *Id.* Public Citizen reported that it analyzed FEC filings to compile these statistics. *Id.* Ideological orientation for each of the groups can be found at *2010 Outside Spending, by Groups*, *supra* note 82.

90. Federal regulations require AFSCME and other labor organizations with more than \$250,000 in annual receipts to file a LM-2 form with the Department of Labor each year, in which the organization must disclose its itemized receipts and expenditures. U.S. DEP’T OF LABOR, INSTRUCTIONS FOR FORM LM-2 LABOR ORGANIZATION ANNUAL REPORT 1 (2003), available at <http://www.dol.gov/olms/regs/compliance/Form%20LM-2%20Instructions12-03-03.pdf>. A searchable database of those reports is available at *Organization Query Page (Disclosure)*, U.S. DEP’T OF LABOR, <http://kcerds.dol-esa.gov/query/getOrgQry.do> (last visited May 31, 2011).

chine.”<sup>91</sup> Press reports suggested the impetus for many of these groups might have been the internal turmoil and weak fundraising at the Republican National Committee.<sup>92</sup> The law prohibits these organizations from coordinating their expenditures with a candidate campaign or party committee, but they could—and did—coordinate with other like-minded organizations. American Crossroads reportedly coordinated its efforts with a network of at least two dozen other independent groups.<sup>93</sup> Top officials from these groups regularly gathered at Karl Rove’s home to discuss strategy and dubbed themselves the “Weaver Terrace” group, after the Washington street on which Rove lives.<sup>94</sup> These allied groups coordinated both their political activities, by divvying up which organization would invest in which races and when, and also their fundraising outreach.<sup>95</sup>

Liberal-leaning groups notably lagged in developing a similar network. While traditional sources of Democratic support, including organized labor, spent significant sums in 2010, these organizations and groups were slower to adapt to the post-*Citizens United* landscape than their conservative counterparts.<sup>96</sup> Multiple explanations for this have emerged. First, President Obama, famously critical of *Citizens United*, had urged Democrats to avoid forming Crossroads-like groups.<sup>97</sup> Second, reports suggested some wealthy Democratic-leaning financiers, feeling alienated by a perceived anti-Wall Street bias at the White

91. Crowley, *supra* note 36, at 31.

92. Jim Rutenberg, *The Gloves Come Off Early for Midterm Elections: Rove Returns, with Team, Planning G.O.P. Push*, N.Y. TIMES, Sept. 26, 2010, at A1.

93. *Id.*

94. Rutenberg, *supra* note 92. Some of the major conservative groups, including American Crossroads and former Senator Norm Coleman’s American Action Network, even share office space. Crowley, *supra* note 36, at 31.

95. Peter H. Stone, *Campaign Cash: The Independent Fundraising Gold Rush Since ‘Citizens United’ Ruling*, CENTER PUB. INTEGRITY (Oct. 4, 2010), <http://www.iwatchnews.org/2010/10/04/2470/campaign-cash-independent-fundraising-gold-rush-citizens-united-ruling>.

96. See Alison Fitzgerald, *Democratic Groups Pool Money Efforts to Take on Rove, Republicans in 2012*, BLOOMBERG (May 19, 2011), <http://www.bloomberg.com/news/2011-05-19/democrat-groups-pool-money-efforts-to-take-on-rove-republicans.html>. It is also worth noting that the two liberal-leaning groups that made 2010’s “top ten” (SEIU and AFSCME) are also two of the most politically active public sector unions, which may help explain Republican efforts in 2011 to eliminate collective bargaining and other rights of public employees and their unions. See Brody Mullins & John D. McKinnon, *Campaign’s Big Spender*, WALL ST. J., Oct. 22, 2010, at A1. One labor strategist, noting that labor unions have pledged \$30 million in 2011 alone to oppose those Republican efforts, observed that “[e]very dollar [Republicans] force unions to spend protecting collective bargaining is a dollar that can’t be spent on politics, representing workers, or organizing new workers.” Mullins, *supra* note 18 (second alteration in original).

97. Eggen & Farnam, *supra* note 17.

House, sat out the midterm election to send a pointed message.<sup>98</sup> Finally, with most indicators pointing to a nearly inevitable Republican wave in 2010, some regular Democratic contributors were reluctant to “throw good money after bad.”<sup>99</sup>

The substantial influx of money on the right gave the Republican Party and conservative-oriented groups a great deal of flexibility to choose which candidates to back financially. Republicans had the luxury of directing resources to races that would have been marginal in other years, either because the Republican candidate was weak or the Democratic incumbent well established.<sup>100</sup> Some press reports suggested Republicans spent money in some districts they did not necessarily expect to win—essentially bluffing to draw precious Democratic money away from embattled incumbents that likely needed the reinforcement more.<sup>101</sup>

This Republican strategy was largely successful. Seventy-five House seats changed partisanship in 2010, giving Republicans control of that chamber, and spending by outside groups favored the winner in sixty of those races.<sup>102</sup> As a rougher measure of success, in early September—before outside spending substantially increased—the influential (and well regarded) FiveThirtyEight blog predicted Republicans had a one-in-three chance of winning at least fifty-four House seats and a nearly one-in-four chance of winning at least sixty seats.<sup>103</sup> Boosted by a wave of outside spending in the intervening weeks, the Republicans handily beat those early odds, claiming sixty-three seats in November. While it is impossible to determine if outside spending was dispositive in any single race and a strong anti-incumbent mood likely bolstered many Republican candidates regardless of outside spending, the improbable breadth of the Republican wave speaks to these groups’ influence in 2010.

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98. See Crowley, *supra* note 36, at 35.

99. *Id.*

100. T.W. Farnam & Dan Eggen, *Outside Spending Upsharply for Midterms*, WASH. POST, Oct. 4, 2010, at A1.

101. See David Weigel, *Nobody Is Safe*, SLATE (Oct. 20, 2010), [http://www.slate.com/articles/news\\_and\\_politics/politics/2010/10/nobody\\_is\\_safe.html](http://www.slate.com/articles/news_and_politics/politics/2010/10/nobody_is_safe.html).

102. PUBLIC CITIZEN, *supra* note 15, at 12.

103. See Nate Silver, *G.O.P. Has 2-in-3 Chance of Taking House, Model Forecasts*, N.Y. TIMES FIVETHIRTYEIGHT BLOG (Sept. 10, 2010, 4:00 PM), <http://fivethirtyeight.blogs.nytimes.com/2010/09/10/g-o-p-has-2-in-3-chance-of-taking-house-model-forecasts/>. The FiveThirtyEight prediction model incorporates data from a variety of sources, including public polling and the predictions of expert election handicappers. *Id.*

## V. The Emergence of American Crossroads and Crossroads GPS

In the 2010 election, American Crossroads and its sister organization, Crossroads GPS, emerged as lightning rods for both supporters and advocates of the *Citizens United* decision. Certainly the vast spending these two groups directed at targeted races played a role in their stature, but the sterling Republican pedigree behind them also commanded notice. Below, we briefly examine the origin, structure, and activity of each group.

### A. American Crossroads

American Crossroads is a “super PAC” organized under section 527 of the Internal Revenue Code and must periodically disclose its receipts and expenditures. The group was founded in March 2010 under the auspices of Karl Rove and Ed Gillespie.<sup>104</sup> Rove was a senior advisor to former President George W. Bush and Ed Gillespie was a former chairman of the Republican National Committee (“RNC”) and also an advisor to former President Bush.<sup>105</sup> While Rove and Gillespie remain “informal advisors,” the current president and CEO of the group is Steven Law, the former General Counsel of the U.S. Chamber of Commerce.<sup>106</sup> The organization describes its goals as “rescuing our economy from the Obama agenda, restoring health to our financial balance sheet and making America the strong, vigilant world leader we once were and must always be.”<sup>107</sup>

American Crossroads purports to reflect a grassroots oriented approach to political mobilization. It credits itself with having given Americans the “tools” in 2010—“information, facts, voter turnout support”—to “take ownership of their government, throw out tax-and-spend incumbents in droves, break the Obama-Pelosi-Reid power monopoly, and move America in a positive conservative direction.”<sup>108</sup> But the group certainly leverages substantial resources to connect with its target voters, including expenditures on television ads, direct mail,

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104. Crowley, *supra* note 36, at 31; Stone, *supra* note 95.

105. Crowley, *supra* note 36, at 31; Stone, *supra* note 95. For a detailed narrative about Rove’s involvement in the origin of both groups, see Joe Hagan, *Goddangit, Baby, We’re Making Good Time*, N.Y. MAG., Mar. 7, 2011, available at <http://nymag.com/news/politics/karl-rove-2011-3/>.

106. Crowley, *supra* note 36, at 31; Stone, *supra* note 95.

107. *About—Who We Are*, AMERICANCROSSROADS.COM, <http://www.americancrossroads.org/about/> (last visited Nov. 29, 2011).

108. *Id.*

and get-out-the-vote phone banking and mobilization efforts. American Crossroads spent approximately \$21.5 million on independent expenditures in 2010, second only to the U.S. Chamber of Commerce (a 501(c)(6) group).<sup>109</sup> Including Crossroads GPS' spending, the Crossroads organizations together handily outspent the Chamber of Commerce.<sup>110</sup> Compared solely against other section 527 super PACs, American Crossroads accounted for nearly one-third of *all* super PAC spending in 2010 and spent nearly three-quarters of what all liberal-aligned super PACs spent, combined.<sup>111</sup>

A substantial amount of that spending was directed towards political ads (over 30,000 ads total, according to one report) and direct mail targeted to the most contested Senate races, and (to a lesser degree) House races.<sup>112</sup> According to the Center for Responsive Politics, American Crossroads spent over \$1 million—and sometimes much more—to attack the Democratic candidate in the Colorado (\$5.1 million), Missouri (\$2.3 million), Kentucky (\$1.4 million), Nevada (\$1.2 million), and Illinois (\$1.1 million) Senate races, and to support Republican Marco Rubio's (\$1.6 million) ultimately successful bid for the Senate in Florida.<sup>113</sup> While these represented the group's most significant expenditures, American Crossroads also directed resources to over thirty other contested House and Senate races.<sup>114</sup> In the nineteen Senate races in which the organization made an expenditure of \$10,000 or more, its preferred candidate prevailed 63% of the time, winning twelve races.<sup>115</sup> American Crossroads made similarly substantial expenditures in nineteen House races, in which its preferred candidate prevailed 53% of the time, winning ten races.<sup>116</sup>

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109. GARRETT, *supra* note 2, at 13–14; PUBLIC CITIZEN, *supra* note 15, at 9.

110. See PUBLIC CITIZEN, *supra* note 15, at 9.

111. Michael Beckel, *Led by Karl Rove-Linked Groups, 'Super PACs' and Nonprofits Significantly Aid GOP in Election 2010*, OPENSECRETS BLOG (Nov. 5, 2010, 2:50 PM), <http://www.opensecrets.org/news/2010/11/led-by-karl-rove-linked-groups-nonp.html>.

112. Hagan, *supra* note 105.

113. *American Crossroads Recipients, 2010*, OPENSECRETS.ORG (CENTER RESPONSIVE POL.), <http://www.opensecrets.org/outsidespending/recips.php?cmte=C00487363&cycle=2010> (last visited Apr. 28, 2011). Florida's was the only Senate contest in which American Crossroads spent over \$1 million to support the Republican candidate (as opposed to attacking the Democratic candidate)—but that race featured a unique three-way dynamic in that former Republican Governor Charlie Crist was also running for the seat, albeit as an independent. *Id.*; John Whitesides, *Crist Leads 3-Way Senate Race in Florida*, REUTERS (July 13, 2010), <http://www.reuters.com/article/2010/07/13/us-usa-election-florida-idUSTRE66C4I320100713>.

114. *American Crossroads Recipients, 2010*, *supra* note 113.

115. *Id.*

116. *Id.*

Because American Crossroads is a section 527 organization, its contributors are a matter of public record. Overall, one-third of American Crossroads' contributions were from corporate sources in 2010—contributions that were illegal prior to *Citizens United*.<sup>117</sup> The chart below shows the top ten contributors, many of whom were solicited by Karl Rove.<sup>118</sup> The chart also represents, according to the New York Times, an “old coalition of millionaires and billionaires who supported Mr. Bush and have huge financial stakes in regulatory and tax policy.”<sup>119</sup> Four individuals from this coalition accounted for 44% of American Crossroads' contributions.<sup>120</sup> Bob Perry is a Texas real estate investor and was a major supporter of the Swift Boat Veterans for Truth.<sup>121</sup> The three other individuals in this elite circle also have Texas roots: Harold Simmons, Trevor Ree-Jones, and Robert Rowling live or work in Texas.<sup>122</sup>

American Crossroads has made little effort to downplay these substantial contributions. One operative close to Karl Rove has suggested that the publicity around the large-dollar donations were meant to incentivize other, presumably more publicity-adverse individuals, to give large amounts anonymously to Crossroads GPS—a strategy that “worked like a charm.”<sup>123</sup>

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117. Beckel, *supra* note 111.

118. Rutenberg, *supra* note 92; *Top Organizations Donating to American Crossroads, 2010*, OPENSECRETS.ORG (CENTER RESPONSIVE POL.), <http://www.opensecrets.org/outsidespending/contrib.php?cmte=CO0487363&cycle=2010> (last visited May 30, 2011) [hereinafter *Top Organizations*].

119. Rutenberg, *supra* note 92.

120. See *Top Organizations*, *supra* note 118 (listing the total contribution amounts of Perry Homes (Bob Perry), TRT Holdings (Robert Rowling), Harold C. Simmons Family Trust, and Chief Oil & Gas (Trevor Ree-Jones), which totaled \$14 million); *Donors to American Crossroads, 2010*, OPENSECRETS.ORG (CENTER RESPONSIVE POL.), <http://www.opensecrets.org/outsidespending/contrib.php?cmte=CO0487363&type=A&cycle=2010> (last visited Nov. 29, 2011) (listing the amounts that American Crossroads received from donors in 2010, which totaled \$31.9 million).

121. See *Republican-Funded Group Attacks Kerry's War Record*, FACTCHECK.ORG (Aug. 6, 2004), [http://www.factcheck.org/republican-funded\\_group\\_attacks\\_kerrys\\_war\\_record.html](http://www.factcheck.org/republican-funded_group_attacks_kerrys_war_record.html). The Swift Boat Veterans for Truth was a 527 political group that rose to prominence (and attracted a great deal of controversy) during the 2004 presidential campaign. The group attacked Democratic candidate John Kerry's service in the Vietnam War and questioned the legitimacy of the medals Kerry was later awarded. *Id.*

122. Stone, *supra* note 95.

123. Rutenberg, *supra* note 14.

**Table 3: Top 10 Contributions to American Crossroads (2010)**<sup>124</sup>

Rank	Employer (Individual)	Contribution
1	Perry Homes (Bob Perry)	\$7,000,000
2	TRT Holdings (Robert Rowling)	\$4,000,000
3	Public Storage, Inc. (Bradley Wayne Hughes)	\$3,250,750
4	Alliance Resources Partners	\$2,425,000
5	Harold C. Simmons Family Trust	\$2,000,000
6	Chief Oil & Gas (Trevor Ree-Jones)	\$1,000,000
6	Jerry Perenchio Living Trust	\$1,000,000
8	American Finance Group	\$400,000
9	Weaver Popcorn	\$330,000
10	Aragon Global Management	\$250,000
10	Citadel Investment Group	\$250,000
10	Cumberland Resources	\$250,000
10	First Virtual Group	\$250,000

**B. Crossroads GPS**

Crossroads GPS is organized as a section 501(c)(4) “social welfare” organization. Like its sister organization, Crossroads GPS was founded in 2010 and shares Steven Law as its president. Crossroads GPS also purports to focus on grassroots mobilization and describes itself as a “policy and grassroots advocacy organization that is committed to educating, equipping[,] and mobilizing millions of American citizens” to effect political change.<sup>125</sup> Because 501(c) groups cannot have the “primary purpose” of influencing elections, but may engage in issue and legislative advocacy, Law has explained that Crossroads GPS is “focused over the longer term on advocating on ‘a suite of issues that are likely to see some sort of legislative response.’”<sup>126</sup> “American Crossroads’ efforts,” in contrast, “are geared towards results in this year’s elections.”<sup>127</sup> In 2010 and 2011, some critics complained that, notwithstanding Law’s protests, Crossroads GPS often engaged in thinly veiled electioneering in violation of the Internal

124. *Top Organizations*, *supra* note 118.

125. *About*, CROSSROADSGPS.ORG, <http://www.crossroadsgps.org/about/> (last visited Nov. 29, 2011).

126. Michael Luo & Stephanie Strom, *Donor Names Remain Secret as Rules Shift*, N.Y. TIMES, Sept. 21, 2010, at A1.

127. *Id.*

Revenue Code.<sup>128</sup> However, to date neither the IRS nor FEC have fined or otherwise sanctioned the group.

In 2010, Crossroads GPS made approximately \$16 million in IEs and \$1.1 million in ECs.<sup>129</sup> Most of the group's top targets overlapped with American Crossroads' spending, with Crossroads GPS spending heavily to oppose Democratic Senate candidates in Illinois (\$4.5 million), Washington (\$3.6 million), Nevada (\$2.3 million), and Ken-

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128. See, e.g., Letter from Gerald Herbert, Exec. Dir., Campaign Legal Ctr., & Fred Wertheimer, President, Democracy 21, to Hon. Douglas H. Shulman, Comm'r, Internal Revenue Serv., & Lois Lerner, Dir. of the Exempt Orgs. Division, Internal Revenue Serv. (Oct. 5, 2010), available at <http://www.democracy21.org/vertical/Sites/%7B3D66FAFE-2697-446F-BB39-85FBBBA57812%7D/uploads/%7B02CFCA78-5618-44A8-97F6-056444A48BA1%7D.pdf>. In October 2010, Democracy 21 sent a letter to the IRS, requesting an investigation of Crossroads GPS, alleging that the group was "operating in violation of its tax status because it has a primary purpose of participating in political campaigns in support of, or in opposition to, candidates for public office." *Id.* The group's founder later complained that Crossroads GPS' tax status "is a complete joke," because "Karl Rove and Gillespie did not create this organization to influence issues in America. The organization was created to elect Republicans and defeat Democrats." Crowley, *supra* note 36, at 35. In December 2011, Democracy 21 raised these concerns again in another letter to the IRS, this time complaining not just about Crossroads GPS but also several of its peer organizations. See Amanda Becker, *Reform Groups Ask IRS to Investigate Crossroads GPS*, ROLL CALL, Dec. 14, 2011. Democratic Senator and Finance Committee Chairman Max Baucus has also asked the IRS to investigate the tax-exempt status of 501(c) organizations that may engage in political advocacy. See Letter from Baucus to Shulman, *supra* note 62. It seems very unlikely the IRS has opened a (confidential) investigation of Crossroads GPS' tax status, however, given that, at least as of October 2011, the agency had not yet even approved the group's application to operate as a non-profit. (Crossroads GPS filed that application in September 2010, and could lawfully operate as such pending IRS approval.) See T.W. Farnam & Dan Eggen, *Lenient IRS Rules May Help Groups Shield Campaign Donors' Identities*, WASH. POST, Mar. 10, 2011, at A21; *Search for Charities*, IRS, <http://www.irs.gov/charities/article/0,,id=96136,00.html> (last updated Oct. 5, 2011) (a search of the IRS database using the terms "Crossroads GPS," "Crossroads," or "Grassroots" does not return a result for Crossroads GPS or Crossroads Grassroots Policy Strategies). In any event, the IRS' "incentive to police" political groups is reportedly small because of the marginal revenue-collection potential and the deviation such investigations represent from the agency's core competency. See Luo, *supra* note 126.

Similarly, the Public Citizen campaign finance organization has lodged a complaint about Crossroads GPS with the FEC, alleging the group had violated the Federal Election Campaign Act by raising and spending significant sums to influence the 2010 elections without registering as a political committee. See Complaint, Pub. Citizen v. Crossroads Grassroots Political Strategies, (F.E.C. Oct. 12, 2010), available at <http://www.citizen.org/documents/FEC-Complaint-AmericanxroadsGPS101310.pdf>. The current status of the FEC investigation, if any, is confidential. Citing to campaign finance experts, lawyers, and federal officials, however, the *New York Times* has reported that neither the FEC nor the IRS is likely to examine 501(c) organizations closely, as they fall into a "regulatory netherworld." See Luo, *supra* note 126.

129. GARRETT, *supra* note 2, at 14.



tucky (\$1.1 million).<sup>130</sup> The organization made smaller expenditures in thirteen additional races, most of which were for the House.<sup>131</sup> Crossroads GPS amassed an even better record than its sister, as its preferred candidate won in 65% of the races in which the organization made expenditures.<sup>132</sup>

As a 501(c)(4) organization, at least half of Crossroads GPS' contributions must be used for non-political purposes.<sup>133</sup> Therefore, Crossroads GPS' contributors who are focused on electoral politics are paying what Politico has characterized as a "secrecy premium"—essentially contributing twice the amount to "keep their names out of the paper."<sup>134</sup> Law has argued that this type of non-disclosure is necessary to protect contributors who "are concerned about intimidation."<sup>135</sup>

Sporadic press reports have shed light on the sources of Crossroad GPS' funding. Citing GOP fundraising sources, for example, NBC News reported in November 2010 that a "substantial portion of Crossroads GPS' money came from a small circle of extremely wealthy Wall Street hedge fund and private equity moguls."<sup>136</sup> These contributors were reportedly motivated by these contributors' "bitter" opposition to a Democratic proposal to "increase the tax rates on compensation that hedge funds pay their partners."<sup>137</sup>

## VI. Crossroads' Activities: Two Case Studies

In 2010, American Crossroads and Crossroads GPS emerged as the most visible of a new breed of post-*Citizens United* super PAC and 501(c) organizations. Their unmatched financial resources allowed both groups to spend broadly and deeply, targeting races to reinforce vulnerable Republican incumbents and bolster untested Republican

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130. *Crossroads Grassroots Policy Strategies Recipients, 2010*, OPENSECRETS.ORG (CENTER RESPONSIVE POL.), <http://www.opensecrets.org/outsidespending/recips.php?cmte=C90011719&cycle=2010> (last visited May 30, 2011).

131. *Id.*

132. *See id.* (showing that Crossroad GPS' preferred candidate won in eleven of seventeen races).

133. *See* LUNDER & WHITAKER, *supra* note 62, at 2.

134. *See* Ben Smith, *The Secrecy Premium*, POLITICO (Oct. 5, 2010, 9:45 AM), [http://www.politico.com/blogs/bensmith/1010/The\\_secrecy\\_premium.html](http://www.politico.com/blogs/bensmith/1010/The_secrecy_premium.html).

135. Crowley, *supra* note 36, at 35. Critics have rejected this claim, noting that "disclosure has been a central part of campaign-finance law since Watergate, with few examples of political harassment." *Id.*

136. Michael Isikoff & Rich Gardella, *Spending Blitz by Outside Groups Helped Secure Big GOP Wins*, MSNBC.COM (Nov. 4, 2010), [http://www.msnbc.msn.com/id/39995283/ns/politics-decision\\_2010](http://www.msnbc.msn.com/id/39995283/ns/politics-decision_2010).

137. *Id.*

challengers. Furthermore, given the anti-incumbent mood that year, the landscape of potential races in which the organizations could play was vast. The November results made clear that the Crossroads organizations had at least *some* effect: Republican candidates won nine of the twelve Senate races and fourteen of twenty-two House races where American Crossroads and Crossroads GPS made expenditures.<sup>138</sup> As the *New York Times* explained, these groups were “widely credited with helping the party to take control of the House and diminish the Democrats’ edge in the Senate last fall.”<sup>139</sup>

But what these aggregate statistics and anecdotal press reports cannot show is how the Crossroads money made a difference on the ground—specifically, how the Democrats they targeted reacted to the influx of outside money, and whether it made a difference if that spending came from American Crossroads or from Crossroads GPS. To answer these questions, we analyze two California congressional races that were hotly contested in 2010. In California’s Third District, American Crossroads made a substantial expenditure to help suppress a well-funded, well-organized Democratic challenger to a vulnerable Republican incumbent. In the Twentieth District, Crossroads GPS invested resources to help lift a neophyte Republican challenger who very nearly defeated a Democratic “heavyweight”—a challenger who, in almost any other year, would have been written off well before Labor Day.

#### A. California’s Third Congressional District

American Crossroads made one of its first significant forays in the 2010 campaign for the House of Representatives in California’s Third Congressional District, which featured a match-up between Democrat Ami Bera and incumbent Republican Dan Lungren. California’s Third District includes much of suburban (and Republican-leaning) Sacramento, including Rancho Cordova and Elk Grove, and stretches to the east through Amador and Alpine counties to the Nevada border.<sup>140</sup> Neither major party dominates this district; in 2008, 38% of registered voters were Democrat and 40% were Republican, and in 2010 that composition had changed marginally (37% Democrat and

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138. *Id.*

139. Jim Rutenberg, *Now, Liberals Offer Donors a Cash Cloak*, N.Y. TIMES, April 30, 2011, at A1.

140. See MICHAEL BARONE & RICHARD COHEN, THE ALMANAC OF AMERICAN POLITICS, 2008, at 170 (Charles Mahtesian ed., 2008).

41% Republican).<sup>141</sup> Further reflecting the district's moderate orientation, President Obama and John McCain split this district in 2008 (winning 49% of the vote each), and Lungren garnered a relatively small six point margin of victory over his Democratic challenger that year (49.5% to 44%).<sup>142</sup> Lungren's six point victory in an otherwise Democratic year suggests some consolidation of his seat, to which he was first elected in 2004.

Lungren is a Georgetown-educated lawyer with a lengthy history of holding elected office.<sup>143</sup> First elected to Congress in 1978, representing California's Thirty-Fourth District, Lungren held that position for ten years before moving to state government.<sup>144</sup> He served as California Attorney General and then unsuccessfully challenged Gray Davis for Governor in 1998.<sup>145</sup> After a brief stint in private practice, Lungren returned to Congress in 2004 and quickly landed on the House Judiciary and Homeland Security Committees, among others.<sup>146</sup> His 2010 opponent, Ami Bera, is a physician who formerly served as Chief Medical Officer for Sacramento County.<sup>147</sup> Bera's parents emigrated to the United States from India in the 1950s before he was born, and Bera considers himself "as part of a wave of new Indian-American leaders," which includes Governor Bobby Jindal of Louisiana.<sup>148</sup>

As the 2010 campaign opened, Bera's early fund-raising prowess attracted the attention of the national Democratic Party, which

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141. See CAL. SEC'Y OF STATE, REPORT OF REGISTRATION AS OF OCTOBER 20, 2008, at 11, <http://www.sos.ca.gov/elections/ro/ro-pages/15day-presgen-08/congressional.pdf> (last visited May 30, 2011); CAL. SEC'Y OF STATE, REPORT OF REGISTRATION AS OF OCTOBER 18, 2010, at 15, <http://www.sos.ca.gov/elections/ro/ro-pages/15day-gen-10/congressional.pdf> (last visited May 30, 2011).

142. CAL. SEC'Y OF STATE, SUPPLEMENT TO THE STATEMENT OF VOTE: NOVEMBER 4, 2008, GENERAL ELECTION 31, [http://www.sos.ca.gov/elections/sov/2008\\_general/ssov/ssov-complete.pdf](http://www.sos.ca.gov/elections/sov/2008_general/ssov/ssov-complete.pdf) (last visited May 30, 2011) [hereinafter SUPPLEMENT TO THE STATEMENT OF VOTE 2008]; CAL. SEC'Y OF STATE, STATEMENT OF VOTE: NOVEMBER 4, 2008, GENERAL ELECTION 23, [http://www.sos.ca.gov/elections/sov/2008\\_general/sov\\_complete.pdf](http://www.sos.ca.gov/elections/sov/2008_general/sov_complete.pdf) (last visited May 30, 2011) [hereinafter STATEMENT OF VOTE 2008].

143. See *Congressman Dan Lungren: Biography*, CONGRESSMAN DAN LUNGREN, <http://lungren.house.gov/index.cfm?sectionid=9&sectiontree=2,9> (last visited May 30, 2011).

144. *Id.*; BARONE & COHEN, *supra* note 140, at 170.

145. *Congressman Dan Lungren: Biography*, *supra* note 143; BARONE & COHEN, *supra* note 140, at 170–71.

146. *Congressman Dan Lungren: Biography*, *supra* note 143; BARONE & COHEN, *supra* note 140, at 171.

147. *About Dr. Ami Bera*, BERAFORCONGRESS.COM, <http://www.beraforcongress.com/pages/about/> (last visited May 30, 2011).

148. Jesse McKinley, *3 Districts Where G.O.P. May Be Losing Its Hold: Newcomer's Money and Ads Grab Attention in California*, N.Y. TIMES, Oct. 19, 2010, at A14.

quickly identified this race as one of the very few pick-up opportunities in an otherwise bleak year. According to FEC reports, Bera out-raised Lungren for much of 2009 and 2010 and, in July of 2010, reported over \$1 million cash-on-hand—outpacing Lungren’s total of approximately \$800,000.<sup>149</sup> At least one early poll of likely voters (commissioned by the liberal Daily Kos blog) reinforced Democrats’ optimism, showing Bera within single-digit striking distance of Lungren, trailing by 39% to 46%.<sup>150</sup>

The major themes of the campaign were established early. Perhaps sensing an anti-incumbent wave, the Bera campaign portrayed Lungren as a career politician.<sup>151</sup> Conversely, the Lungren campaign suggested that Bera was former Speaker of the House Nancy Pelosi’s candidate of choice, well-funded by Democratic donors, and the true insider in the race.<sup>152</sup> These themes crystallized as each candidate launched his media campaign. In mid-September, Bera aired the first television ad of the campaign, attacking Lungren as a “Washington insider” who was “plagued by ethics issues” including alleged pension “double dipping.”<sup>153</sup> Bera later followed with a second ad mocking Lungren for finding ethics loopholes to attend a lobbyist-funded event in Hawaii.<sup>154</sup> On October 11, Lungren launched his own media campaign with an ad, appropriately titled “Pelosi,” which labeled Bera as “basically a [Nancy] Pelosi clone” and suggested he favored a “nanny state” government that told voters “what you can do when you can do it.”<sup>155</sup> In mid-October, Lungren launched a second, similar ad

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149. Kasie Hunt, *Bera Beats Lungren in Money Chase*, POLITICO (July 20, 2010, 2:22 PM), <http://www.politico.com/news/stories/0710/39963.html>; *Klein’s in an Old West Battle*, NAT’L J. HOUSE RACE HOTLINE, July 16, 2010. Lungren later suggested, and Bera acknowledged, that at least some of that fundraising strength was attributable to support in the Indian-American community. See Hunt, *supra*.

150. See Steve Singiser, *CA-03: Lungren Weak, Leads Little Known Bera by Single Digits*, DAILY KOS (Sept. 22, 2010, 8:46 AM), <http://www.dailykos.com/story/2010/09/22/903727/-CA-03:-Lungren-weak,-leads-little-known-Bera-by-single-digits>.

151. *Id.*

152. See Drew Joseph, *Lungren Facing Strong Challenge*, S.F. CHRON., Aug. 14, 2010, at C1; Lungren2010, *Lungren for Congress TV Ad – Who is Ami Bera?*, YOUTUBE (Oct. 17, 2010), <http://www.youtube.com/watch?v=r-vKvQ9BUvI> [hereinafter Lungren2010, *Who is Ami Bera*].

153. See Joseph, *supra* note 152; *The Big Dipper?*, NAT’L J. HOUSE RACE HOTLINE, Sept. 14, 2010; BeraForCongress, “*More*,” YOUTUBE (Oct. 26, 2010), <http://www.youtube.com/watch?v=R3cLLWIEyiE>.

154. *For Shirts and Giggles*, NAT’L J. HOUSE RACE HOTLINE, Oct. 5, 2010; BeraForCongress, *Shirts*, YOUTUBE (Oct. 1, 2010), <http://www.youtube.com/watch?v=AtCTbnKvbmG>.

155. *A Giants Problem*, NAT’L J. HOUSE RACE HOTLINE, Oct. 12, 2010; Lungren2010, *Dan Lungren for Congress TV Ad – Pelosi*, YOUTUBE (Oct. 10, 2010), [http://www.youtube.com/watch?v=ivI4\\_-RaVU](http://www.youtube.com/watch?v=ivI4_-RaVU).

that claimed Bera was “Nancy Pelosi’s hand-picked candidate” and “Nancy Pelosi’s choice for more spending and more taxes.”<sup>156</sup> Lungren’s emphasis on Pelosi was not lost on the Bera campaign, which suggested that “Dan Lungren should move to San Francisco if he wants to run against Nancy Pelosi.”<sup>157</sup>

It was at this pivotal moment, less than three weeks before Election Day, that American Crossroads made its dramatic entry into the race. Explaining that “Lungren has been the recipient for [sic] a lot of negative advertising exposure, and our efforts seek to go in and level the playing field a bit,” on October 14 the organization spent approximately \$680,000 to begin airing a commercial attacking Bera.<sup>158</sup> This was the single largest expenditure American Crossroads made in a House race in 2010 and the eighth largest expenditure it made altogether.<sup>159</sup> The American Crossroads buy dwarfed any other IE in this race by at least a factor of ten.<sup>160</sup> The ad, titled “Far,” tied Bera to “ObamaCare,” which the ad asserted involved “\$525 billion in job-killing taxes” that lead to higher premiums, cut \$500 billion from Medicare, and reduce benefits for 1.5 million California seniors.<sup>161</sup> The ad nicely dovetailed with the overall “Pelosi’s choice” narrative the Lungren campaign was asserting by tying Bera to another prominent Democrat, while simultaneously putting Bera on the defensive about health care, a subject area that had previously not been a focus of the race and one that Bera might have used to his advantage given his background. The American Crossroads ad seemingly neutralized that opportunity.

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156. *Can You Bera Any More Taxes?*, NAT’L J. HOUSE RACE HOTLINE, Oct. 19, 2010; Lungren2010, *Who is Ami Bera*, *supra* note 152.

157. Torey Van Oot, *Lungren Calls Bera a ‘Pelosi Clone’ in New Television Spot*, SACRAMENTO BEE CAPITOLALERT BLOG (Oct. 11, 2010, 10:08 AM), <http://blogs.sacbee.com/capitolalertlatest/2010/10/lungren-releases-tv-ad.html>.

158. Torey Van Oot, *Karl Rove-Linked Group to Air TV Ads Helping Lungren in CD 3*, SACRAMENTO BEE CAPITOLALERT BLOG (Oct. 13, 2010, 1:47 PM), <http://blogs.sacbee.com/capitolalertlatest/2010/10/rove-linked-group-to-air-ads-t.html>.

159. *American Crossroads Recipients, 2010*, *supra* note 113.

160. *See California District 03 Race: 2010 Cycle Outside Spending*, OPENSECRETS.ORG (CENTER RESPONSIVE POL.), <http://www.opensecrets.org/races/index.php?cycle=2010&id=CA03> (last visited May 30, 2011). The second most sizable outside spend was attributed to the American Society of Anesthesiologists, which spent \$50,000 to air two radio ads backing Bera. *Id.*; Torey Van Oot, *Candy Makers, Anesthesiologists Drop Cash into CD 3 Race*, SACRAMENTO BEE CAPITOLALERT BLOG (Oct. 22, 2010, 4:07 PM), <http://blogs.sacbee.com/capitolalertlatest/2010/10/jelly-belly-concerned-about-na.html>.

161. AmericanCrossroads, “Far,” YOUTUBE (Oct. 13, 2010), <http://www.youtube.com/watch?v=aq4XCE1DYDM>.

The Bera campaign reacted aggressively to these developments, focusing on the group paying for the ad (and its contributors) as opposed to the substance of their attack. The campaign released four different press releases between October 15 and October 20 that decried the influence of “special interests” in the race.<sup>162</sup> The first, issued on October 15, claimed “Big Oil joined with Wall Street to rescue” Lungren, “one of their staunchest allies.”<sup>163</sup> The release characterized American Crossroads as “funded and operated almost exclusively by Wall Street special interests, corporate lobbyists, and Big Oil executives—including a former Enron lobbyist, the owner of the financial investment giant AIG, and the manager of one of the world’s largest hedge funds.”<sup>164</sup> A fact sheet released with the press release purported to detail Lungren’s connections with American Crossroads.<sup>165</sup> Subsequent releases and opinion pieces echoed these themes, attacking Lungren for “refus[ing] to denounce the misleading ads being aired by Karl Rove and his shadowy front group, American Crossroads.”<sup>166</sup>

The Bera campaign’s initial pushback on American Crossroads’ expenditure focused almost entirely on the nature of the group and the contributors behind it—attacks made possible by the organization’s 527 status and obligation to disclose donors. However, by October 19, Bera was attempting to correct alleged substantive misrepresentations in the ad and clarify his own position on the health care legislation.<sup>167</sup>

Because public polling is not available for this period, the effects of the American Crossroads investment are difficult to measure quantitatively. The ferocity of the Bera response might suggest the cam-

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162. See *Press Releases*, BERAFORCONGRESS.COM, [http://www.beraforcongress.com/press\\_releases/](http://www.beraforcongress.com/press_releases/) (last visited May 30, 2011).

163. Press Release, Dr. Ami Bera for Congress, What Karl Rove and Dan Lungren Don’t Want You to Know (Oct. 15, 2010), available at [http://www.beraforcongress.com/press\\_releases/entry/what-karl-rove-and-dan-lungren-dont-want-you-to-know/](http://www.beraforcongress.com/press_releases/entry/what-karl-rove-and-dan-lungren-dont-want-you-to-know/).

164. *Id.*

165. *The Facts: Dan Lungren and American Crossroads*, BERAFORCONGRESS.COM, <http://www.beraforcongress.com/pages/the-facts-dan-lungren-and-american-crossroads> (last visited Nov. 12, 2011).

166. Press Release, Dr. Ami Bera for Congress, Dan Lungren Stays Silent While Karl Rove and His Shadowy Allies Mislead Voters (Oct. 18, 2010), available at [http://www.beraforcongress.com/press\\_releases/entry/dan-lungren-stays-silent-while-karl-rove-and-his-shadowy-allies-mislead-vot/](http://www.beraforcongress.com/press_releases/entry/dan-lungren-stays-silent-while-karl-rove-and-his-shadowy-allies-mislead-vot/); see Ami Bera, *Karl Rove and Dan Lungren*, CALITICS (Oct. 21, 2010, 12:03 PM), <http://www.calitics.com/diary/12729/karl-rove-and-dan-lungren>.

167. See, e.g., Press Release, Dr. Ami Bera for Congress, The Facts About Karl Rove’s Misleading Ad (Oct. 19, 2010), available at [http://www.beraforcongress.com/press\\_releases/entry/the-facts-about-karl-roves-misleading-ad/](http://www.beraforcongress.com/press_releases/entry/the-facts-about-karl-roves-misleading-ad/).

paigned was seeing some damage in its internal polling or (if there was no such polling) at least suspected the ad was having an effect. At the very least, the ad forced the campaign to spend valuable time discussing and attempting to discredit American Crossroads and its “Obama-Care” attack, at a moment when the campaign probably would have preferred to concentrate on Lungren and the career politician narrative they had been driving.<sup>168</sup> Indeed, the local press appeared to have focused on American Crossroads and its entry into the race during this period.<sup>169</sup> Even where that news coverage had a negative tone, it surely represented a distraction for the Bera campaign.<sup>170</sup> But it could also be that the sheer size of the Crossroads buy had unintended consequences. Anecdotal reports suggest Crossroads’ activity in the race may have legitimized Bera’s challenge to Lungren and catalyzed contributions from Democratic donors who were otherwise sitting on the sideline. This speculation aside, it is abundantly clear the Crossroads ad succeeded in changing the narrative and dynamics of this race at a crucial pre-election moment.

On Election Day, Lungren won 50.1% of the vote to Bera’s 43.2%, even though Bera had outspent Lungren by nearly three-to-two (approximately \$3 million for Bera to Lungren’s \$2 million).<sup>171</sup> Bera had even underperformed the 2008 Democratic challenger, Bill Durston, who spent approximately \$700,000 on his race and won 44% of the vote.<sup>172</sup> Of course, 2008 and 2010 featured fundamentally different political environments, and it is difficult to conclude that Bera would not have performed at least marginally better but for the Republican mood that year. But it also seems likely the American Crossroads investment—a single buy costing as much as Durston’s entire 2008 campaign—also depressed Bera’s result and helped save a Republican seat under substantial threat.

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168. *See id.*

169. *See, e.g.,* Van Oot, *supra* note 158.

170. *See* Dan Morain, *Lungren at Center of Campaign Cash Debate*, SACRAMENTO BEE, Oct. 21, 2010, at A17. Shortly after American Crossroads entered the race, for example, the *Sacramento Bee* published a senior editor’s editorial, which noted that American Crossroads had turned “its bilious attention” to the Bera-Lungren race and criticized the “Far” advertisement as featuring “hideous photos of President Barack Obama, juxtaposed against a sinister-looking Bera.” *Id.*

171. STATEMENT OF VOTE 2010, *supra* note 52, at 58; *California District 03 Race: 2010 Cycle Total Raised and Spent*, OPENSECRETS.ORG (CENTER RESPONSIVE POL.), <http://www.opensecrets.org/races/summary.php?cycle=2010&id=CA03> (last visited May 30, 2011).

172. STATEMENT OF VOTE 2008, *supra* note 142, at 44; *California District 03 Race: 2008 Cycle Total Raised and Spent*, OPENSECRETS.ORG (CENTER RESPONSIVE POL.), <http://www.opensecrets.org/races/summary.php?cycle=2008&id=CA03> (last visited May 30, 2011).

American Crossroads may have the occasion to intervene a second time in this district. In early 2011, Bera announced he would again run for Congress in 2012, setting up a rematch in a year in which the political environment may be more favorable for Democrats.<sup>173</sup> As in 2010, the candidate appears determined to begin this new race from a position of strength, and he reported raising almost \$860,000 through the third quarter of 2011, outpacing Lungren.<sup>174</sup>

## B. California's Twentieth Congressional District

Crossroads GPS made a significant expenditure in California's Twentieth Congressional District to help bolster virtually unknown Republican Andy Vidak in his challenge to incumbent Democrat Jim Costa. The Twentieth District captures much of the Central Valley along Interstate 5 and includes parts of Fresno to the east and a slice of Bakersfield at its southern tip.<sup>175</sup> The district is heavily agricultural. The Twentieth District is, as one leading treatise puts it, "the most Democratic Valley seat between Sacramento and Los Angeles," and over half (51%) of the voters here are registered Democrats; just under a third (31%) are registered Republicans.<sup>176</sup> Recent elections speak to this Democratic advantage; former President George W. Bush did relatively well with 49% of the vote here in 2004, but President Obama dominated with 60% of the vote in 2008.<sup>177</sup>

Democrat Jim Costa, one of the Central Valley's "legislative heavyweights," was first elected to Congress in 2004, narrowly defeating his Republican opponent by a margin of 53% to 47% in a tough and negative campaign.<sup>178</sup> Until 2010, however, 2004 was the last time Costa

173. Torey Van Oot, *Democrat Ami Bera Plans 2012 Rematch Against Dan Lungren*, SACRAMENTO BEE CAPITOLALERT BLOG (Mar. 16, 2011, 4:33 PM), <http://blogs.sacbee.com/capitolalert/latest/2011/03/ami-bera-plans-2012-rematch-with-dan-lungren.html>.

174. Press Release, Dr. Ami Bera for Congress, Bera Announces Overwhelming Support in California's New 7th Congressional District (Oct. 12, 2011), *available at* [http://www.beraforcongress.com/press\\_releases/entry/overwhelmingsupportin2011/](http://www.beraforcongress.com/press_releases/entry/overwhelmingsupportin2011/).

175. See BARONE & COHEN, *supra* note 140, at 216.

176. *Id.*; CAL. SEC'Y OF STATE, REPORT OF REGISTRATION AS OF FEBRUARY 10, 2011, at 23, <http://www.sos.ca.gov/elections/ror/ror-pages/ror-odd-year-11/congressional.pdf> (last visited May 30, 2011).

177. See CAL. SEC'Y OF STATE, SUPPLEMENT TO THE STATEMENT OF VOTE: NOVEMBER 2, 2004, GENERAL ELECTION 32, [http://www.sos.ca.gov/elections/sov/2004\\_general/ssov/pres\\_general\\_ssov\\_congressional.pdf](http://www.sos.ca.gov/elections/sov/2004_general/ssov/pres_general_ssov_congressional.pdf) (last visited May 30, 2011); SUPPLEMENT TO THE STATEMENT OF VOTE 2008, *supra* note 142, at 33.

178. BARONE & COHEN, *supra* note 140, at 216–17; John Ellis, *Costa Battles for Political Life*, FRESNO BEE, Nov. 3, 2010, at A5. For example, in the closing days of the campaign, Costa's opponent ran an advertisement mentioning Costa's arrest, in 1986, for soliciting a prostitute, and an incident in 1994 where police found drug paraphernalia in his home. *Id.*



had to fight for his seat; he ran unopposed in 2006 and won 74% of the vote in 2008.<sup>179</sup> Costa, who was born in Fresno and worked on his family's dairy farm, spent over twenty years in the California State Assembly before running for Congress.<sup>180</sup> In the Assembly, he developed a reputation as a moderate Democrat who strongly represented agricultural interests—an issue background that served him well in the House, where he serves on the Agriculture and Natural Resources committees.<sup>181</sup>

Costa's opponent, Andy Vidak, was a political neophyte who, like Costa, was born and raised in the Central Valley.<sup>182</sup> Vidak worked in agriculture for many years before starting his own cherry farm in 1997.<sup>183</sup> With no encouragement or solicitation from his party, Vidak announced his challenge to Costa in 2009, promising to “‘fix the mess’ that had been created by career politicians” in Washington and support agriculture through “tax relief, regulation reform, and sound environmental and water management planning.”<sup>184</sup> But Vidak was considered a “sacrificial lamb” to a “well-funded incumbent,” and his quixotic quest attracted relatively little attention.<sup>185</sup> Pundits considered Costa a shoo-in given his strong support from the district's agricultural community and the “built-in advantages of being an incumbent in a district with a strong Democratic Party lean.”<sup>186</sup> Vidak's fundraising reflected the conventional wisdom about his slim chances; by the second quarter of 2010 (ending in June), Vidak had raised approximately \$120,000 and had less than \$50,000 cash-on-hand.<sup>187</sup> In the same period, Costa had raised twice that amount (\$254,000) and had approximately \$330,000 cash-on-hand.<sup>188</sup>

However, in late summer signs began to emerge that the national anti-incumbent wave could bolster Vidak's challenge. A mid-September poll of likely voters, conducted for a local television station, found

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179. CAL. SEC'Y OF STATE, STATEMENT OF VOTE: NOVEMBER 7, 2006, GENERAL ELECTION 34, [http://www.sos.ca.gov/elections/sov/2006\\_general/complete\\_sov.pdf](http://www.sos.ca.gov/elections/sov/2006_general/complete_sov.pdf) (last visited May 30, 2011); STATEMENT OF VOTE 2008, *supra* note 142, at 27.

180. *See* BARONE & COHEN, *supra* note 140, at 216–17.

181. *Id.*

182. *See* *Andy Vidak for Congress: Biography*, VIDAKFORCONGRESS.COM, <http://www.vidakforcongress.com/?pg=bio> (last visited Apr. 25, 2011).

183. *Id.*

184. *Id.*; John Ellis, *Valley Congressional Dems Stay Hopeful*, FRESNO BEE, Oct. 28, 2010.

185. *Id.*

186. Ellis, *supra* note 178.

187. *Klein's in an Old West Battle*, *supra* note 149.

188. *Id.*

Costa leading Vidak by just two points, 48% to 46%.<sup>189</sup> Vidak's fundraising in the third quarter (July to September) also increased considerably, as the challenger reportedly raising \$332,000 in the quarter, nearly matching Costa's \$445,000.<sup>190</sup> Vidak, who spent far less in the quarter, now had a cash-on-hand advantage with \$206,000 compared to Costa's \$164,000.<sup>191</sup> At the same time, surging Republicans in other districts required less support, freeing up outside money for Vidak and other long-shot candidates.<sup>192</sup>

With favorable poll numbers and stronger fundraising, outside groups began to take significant interest in the Costa-Vidak race—a race that had been “on nobody's radar.”<sup>193</sup> In mid-October, outside groups decisively entered the race. One conservative 501(c)(4) group, the Center for Individual Freedom (“CIF”), spent \$314,000 in mid-October to air a commercial attacking Costa.<sup>194</sup> Just a few weeks later, on October 26, Crossroads GPS spent approximately \$340,000 to launch an attack ad against Costa.<sup>195</sup> (The fortuitous timing of the CIF and Crossroad GPS ads, with no overlap between them, was probably not a coincidence, given the close coordination between conservative-leaning outside groups.) Crossroads GPS' investment in the Costa-Vidak race was surpassed by their spending in only one other House race.<sup>196</sup> The Crossroads GPS ad, entitled “Boondoggle,” echoed themes from the CIF ad and accused Costa of supporting “Nancy Pelosi and her failed agenda,” including reckless spending and a “stimulus boondoggle filled with sweetheart deals and handouts to special interests.”<sup>197</sup> By attempting to nationalize the race and tie

189. *Vidak Attack*, NAT'L J. HOUSE RACE HOTLINE, Sept. 15, 2010.

190. *On St. Cloud Nine*, NAT'L J. HOUSE RACE HOTLINE, Oct. 18, 2010.

191. *Id.*

192. Ellis, *supra* note 178.

193. John Ellis, *Outside Money Keeps Pouring into Costa-Vidak Congressional Battle*, FRESNOBEE.COM NEWS BLOG (Oct. 26, 2010, 9:40PM), [http://fresnobeehive.com/news/2010/10/outside\\_money\\_keeps\\_pouring\\_in.html](http://fresnobeehive.com/news/2010/10/outside_money_keeps_pouring_in.html).

194. John Ellis, *Hopes Rise for Costa Rival*, FRESNO BEE, October 23, 2010, at A1; T.W. Farnam & Nathaniel Vaughn Kelso, *Campaign Cash: California's 20th Congressional District*, WASH. POST, <http://www.washingtonpost.com/wp-srv/politics/campaign/2010/spending/CA-20.html> (last visited Nov. 27, 2011). The CIF ad, entitled “Costa Debt,” attacked Costa for voting to increase the national debt and tied him to Nancy Pelosi and President Obama. See TheCFIF, *CFIF “Costa Debt,”* YOUTUBE (Oct. 19, 2010), <http://www.youtube.com/watch?v=y2Jfv9Vy6M8>.

195. Ellis, *supra* note 193.

196. See *Crossroads Grassroots Policy Strategies Recipients, 2010*, *supra* note 130. Crossroads GPS spent \$447,125 to oppose Democrat freshman John Bocchieri's ultimately failed campaign to retain his seat in Ohio's 16th District. *Id.*

197. CrossroadsGPSChannel, *Jim Costa Boondoggle*, YOUTUBE (Oct. 25, 2010), <http://www.youtube.com/watch?v=FQGshcp3dSM>.

Costa to a controversial national Democrat and Democratic policy initiative, the Crossroads GPS ad shared clear themes with American Crossroads' "Far" ad in California's Third District. In a striking reflection of how quickly the dynamics of the race changed, immediately after Crossroads GPS launched its ad, the FiveThirtyEight blog revised its odds that Costa would win reelection from 94% to 55%.<sup>198</sup>

Unlike Bera's campaign in the Third District, there is little evidence the Costa campaign pushed back against Crossroads GPS' late entry into the race. However, as Crossroads GPS was airing its attacks against Costa, the Democratic Congressional Campaign Committee was ramping up its own spending on ads attacking Vidak—spending that ultimately totaled over \$560,000.<sup>199</sup> In fact, press coverage of the Costa-Vidak race during these last days of October generally focused on the flood of outside spending and not the content of any particular ad or attack.<sup>200</sup> As such, any number of explanations for Costa's muted response to the Crossroads GPS' ad seem credible. It could have been that the campaign determined the ad was not breaking through, given the clutter on the airwaves and the press's focus on the mere fact of the ads and not their content. Alternatively, given the late date, perhaps the Costa campaign had neither the time nor the resources to effectively push back. Finally, the lack of information about Crossroads GPS' contributors deprived the Costa campaign of at least one line of counterattack—a theme the Bera campaign, in contrast, had quickly adopted after American Crossroads entered its race.

What *is* clear, however, is that the surge in outside spending helped produce a remarkably tight result on election day. Initial returns on election night suggested Vidak had won the race.<sup>201</sup> It was only after all the outstanding ballots were counted three weeks later, that Costa was declared the winner.<sup>202</sup> In the end, the incumbent Costa barely edged out Vidak, winning 51.7% to 48.2%, representing a margin of approximately 3000 votes. Vidak's result was particularly remarkable given that the candidate "ran a largely invisible campaign"

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198. Ellis, *supra* note 193.

199. Jean Merl & Patrick McGreevy, *Incumbents in State Locked in Tight Races*, L.A. TIMES, Nov. 3, 2010, at A21; Farnam & Kelso, *supra* note 194; *see, e.g.*, DCCC2010, *Andy Vidak Is the One Thing We Can Do Without*, YOUTUBE (Oct. 26, 2010), <http://www.youtube.com/watch?v=hbQPkbfxp-Y>.

200. *See, e.g.*, Michael Doyle, *Vidak Raking in GOP Dough*, FRESNO BEE, Oct. 30, 2010, at A3.

201. Ellis, *supra* note 178.

202. Alex Isenstadt, *Jim Costa Defeats Andy Vidak in California Race*, POLITICO (Nov. 23, 2010, 5:42 PM), <http://www.politico.com/news/stories/1110/45549.html>.

and never debated Costa.<sup>203</sup> The *New York Times* later cited Vidak's campaign as one in which conservative-oriented groups, including Crossroads GPS, unleashed a "deluge of spending" to help bolster Republican challengers who otherwise faced fundraising deficits and long odds in their campaign.<sup>204</sup> The credible (and often successful) challenges these candidates were able to mount against relatively enscorced Democratic incumbents represented "arguably the most clear-cut examples of the impact that these Republican-oriented outside groups had on the midterm elections, spending record sums on dozens of races" in the wake of *Citizens United*.<sup>205</sup> In other words, the Twentieth District "political battle was waged via third-party outside interest groups."<sup>206</sup> Vidak was simply "in the right place at the right time" to ride the wave and very nearly rode it to Washington.<sup>207</sup>

## VII. Looking to 2012 & Beyond

The 2012 campaign will make the 2010 campaign look like the calm before the campaign finance storm. Supporters of individual candidates and both parties are poised to rely heavily on 501(c)(4)s and other organizations which the *Citizens United* Court empowered, raising the stakes and the need for a workable mutually acceptable disclosure regime.

### A. The Battle Lines

The Crossroads groups' 2010 spending in these two California districts specifically, and across the entire country, was likely just a preview of super PAC and 501(c) activity to come, especially given a fractious Republican presidential nominating contest and the likelihood of a hotly contested presidential race in the 2012 general election. Motivated by the perceived success of conservative-affiliated groups in 2010, a variety of both Republican and Democratic groups have mobilized for the "blockbuster" election ahead. Indeed, by all accounts, the 2012 elections will be "awash in cash from undisclosed corporate and labor sources with huge stakes in Washington policy making"—and, given intensely partisan disagreement about the necessity of campaign

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203. Ellis, *supra* note 178.

204. Michael Luo & Griff Palmer, *Outside Groups on the Right Flexed Muscles in House Races*, N.Y. TIMES, Nov. 4, 2010, at P6.

205. *Id.*

206. Ellis, *supra* note 178.

207. *Id.*

finance reform, we have little expectation legislation will rein in that spending.<sup>208</sup>

The Crossroads groups are well positioned to maintain their influence moving forward and may emerge as the “possibly largest force in the 2012 campaign, aside from the presidential candidates themselves and the political parties.”<sup>209</sup> Steven Law and Karl Rove have explained that the two Crossroads groups were designed to “remain in place beyond November [2010],” and voter lists and other assets the organizations began developing in 2010 will be a valuable resource in 2012.<sup>210</sup> In March 2011, the groups announced a combined fundraising target of \$120 million for the 2012 election—a feasible target, Law concluded, after checking in with his 2010 contributors, many of whom reportedly planned “to come in at a significantly higher level.”<sup>211</sup> In September 2011, bolstered by greater-than-anticipated fundraising, the groups doubled that fundraising target to \$240 million and announced that Mississippi Governor Haley Barbour would assist their efforts.<sup>212</sup> Crossroads GPS made smaller (but still substantial) expenditures in early 2011 on targeted advertisements attacking incumbent Democrats—including Jim Costa.<sup>213</sup> By late 2011, Crossroads GPS had committed upwards of one million dollars in competitive races, including the Massachusetts, Nebraska, Montana, and Missouri Senate races.<sup>214</sup> American Crossroads also remains active, having spent \$690,000 in an ultimately unsuccessful effort to elect Republican Jane Corwin in a May 2011 congressional special election in upstate New York.<sup>215</sup> Three months later, the group spent \$255,360 to support Republican Mark Amodei’s successful campaign for an open congressional seat in Nevada.<sup>216</sup> The Crossroads groups have also signaled their continued commitment to coordinating fundraising and expenditures with other conservative-oriented groups.

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208. See Rutenberg, *supra* note 139.

209. Mullins, *supra* note 18.

210. Crowley, *supra* note 36, at 35; Rutenberg, *supra* note 92.

211. Mullins, *supra* note 18.

212. Jonathan D. Salant, *Rove’s Crossroads Doubles Fundraising Goal*, BLOOMBERG (Sept. 9, 2011), <http://www.bloomberg.com/news/2011-09-09/rove-s-crossroads-seeks-to-raise-more-than-240-million-for-2012-elections.html>.

213. Steve Peoples, *Crossroads GPS Launches \$450,000 Radio Ad Buy*, ROLL CALL, Feb. 23, 2011.

214. Joshua Miller, *Crossroads GPS Buys Ads in Montana, Missouri, Massachusetts and Nebraska*, ROLL CALL, Dec. 8, 2011.

215. Carl Hulse, *Surprise Victory in New York Invigorates Democrats Looking to 2012*, N.Y. TIMES, May 31, 2011, at A12.

216. Salant, *supra* note 212.

After largely watching from the sidelines during 2010 and experiencing the detrimental effect of their passivity, Democrats have begun to organize. As one commenter succinctly put it, the “Democrats simply could not allow Republicans to have exclusive possession of these fundraising groups.”<sup>217</sup> In early 2011, several Democratic activists launched the “Priorities USA Action” group, registered as a 527, and “Priorities USA,” its 501(c)(4) sister organization, with a goal of supporting President Obama’s reelection.<sup>218</sup> Press reports state that the Priorities organizations intend to coordinate their efforts with other like-minded groups, including the House Majority PAC and Majority PAC groups (which will concentrate on House and Senate races, respectively).<sup>219</sup> A fourth group, American Bridge 21st Century, will reportedly conduct targeted research on key races and candidates.<sup>220</sup>

Late 2011 and 2012 also saw substantial super PAC activity in an intra-party contest, as organizations nominally affiliated with the major Republican presidential candidates poured money into that fractured race. By early 2012, with just the Iowa caucuses and New Hampshire primary decided, super PACs supporting the major candidates had already spent over \$19 million in the nomination race.<sup>221</sup> In the lead-up to the South Carolina primary, the third nomination event on the calendar, super PAC spending on that contest accounted for 60% of *all* broadcast advertising spending in that state—the first time in the 2012 Republican nomination race that super PAC spending exceeded candidate spending on broadcast television.<sup>222</sup> Indeed, the breadth of super PAC spending was so substantial that it emerged as a topic of discussion at a South Carolina debate.<sup>223</sup>

This burst of organizing on both the left and the right, and rush to organize by supporters of individual candidates, reflects a rare consensus that substantial changes to current campaign finance rules are unlikely in the short term. Democrats and Republicans remain intensely divided on what reforms are needed to those rules, and little

217. Fitzgerald, *supra* note 96.

218. *Id.*

219. *Id.*

220. *Id.*

221. See *Super PACs*, OPENSECRETS.ORG (CENTER RESPONSIVE POL.), <http://www.opensecrets.org/pacs/superpacs.php?q13> (last visited Jan. 18, 2012).

222. Greg Giroux, *Super-PACs Dominate Airwaves with Flood of Negative Commercials*, BLOOMBERG NEWS (Jan. 18, 2012), <http://www.bloomberg.com/news/2012-01-18/super-pacs-dominate-airwaves-with-flood-of-negative-commercials.html>.

223. Michael Beckel, *Super PACs a Hot Topic in GOP Debate*, OPENSECRETS BLOG (Jan. 17, 2012, 3:13 PM), <http://www.opensecrets.org/news/2012/01/super-pacs-a-hot-topic-in-gop-debat.html>.

progress has been made to close that gap.<sup>224</sup> A divided Congress means meaningful legislation has little potential to pass. Against that backdrop, even groups that disfavor the post-*Citizens United* regime may feel compelled to “play ball” or risk falling further behind in a campaign finance arms race.<sup>225</sup> Perhaps ironically, these groups’ acquiescence to the status quo may serve to increase their resistance to future structural changes.<sup>226</sup> In sum, near-term restrictions on *who* may fund political speech appear unlikely—particularly where the Supreme Court has now thrown the viability of many such proposals into doubt as a matter of constitutional law.

## B. Other Proposals

*Citizens United* has prompted a litany of “reform” proposals to address various aspects of the Court’s decision within the confines of the First Amendment rights of political speakers. Many of these proposals have been geared toward making it more difficult, or at least more complicated, for certain corporations to fund IEs and ECs.<sup>227</sup> Others have focused, as we have, on increasing disclosure of the money given and spent for IEs and ECs.

The best known and most comprehensive proposed reforms were set forth in the DISCLOSE Act (“Democracy Is Strengthened by Casting Light On Spending in Elections”), which passed the House but failed to achieve cloture by one vote the Senate in 2010.<sup>228</sup> Among

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224. See, e.g., Stone, *supra* note 95 (describing sharply different partisan reactions to the DISCLOSE Act).

225. See Mullins, *supra* note 18.

226. See Rutenberg, *supra* note 139.

227. See L. PAIGE WHITAKER ET AL., CONG. RESEARCH SERV., R41096, LEGISLATIVE OPTIONS AFTER *Citizens United v. FEC*: Constitutional and Legal Issues (2010) (discussing, in addition to disclosure of donors to § 501(c) organizations, proposals concerning increased disclaimer requirements, shareholder notification and approval, restrictions on foreign-owned corporations, conditioning government contracts or grants on forgoing right to political speech, taxation of corporate campaign-related expenditures, and public financing for congressional campaigns).

228. *Bill Summary & Status—111th Congress (2009–2010)—H.R. 5175*, THOMAS, <http://thomas.loc.gov/cgi-bin/bdquery/z?d111:HR05175:@@L&summ2=m&> (last visited Nov. 12, 2011) (passed 219-206 on June 24, 2010); *Bill Summary & Status—111th Congress (2009–2010)—S. 3628*, THOMAS, <http://thomas.loc.gov/cgi-bin/bdquery/z?d111:SN03628:@@L&summ2=m&> (last visited Nov. 12, 2011) (cloture not invoked by 59-39 party line vote). H.R. 5175 passed with support from just two Republicans, one of whom (Rep. Joseph Cao) represented a heavily Democratic district and was defeated in the 2010 general election, and the other of whom (Rep. Michael Castle) did not run for reelection to the House. 156 Cong. Rec. H4828 (daily ed. June 24, 2010) (Roll No. 391), <http://clerk.house.gov/evs/2010/roll391.xml>; *Statewide Election Results*, LA. SEC’Y STATE (Nov. 2, 2010), [http://staticresults.sos.la.gov/11022010/11022010\\_Congressional.html](http://staticresults.sos.la.gov/11022010/11022010_Congressional.html); see *Election Results*, STATE

numerous other provisions, DISCLOSE sought to dramatically expand the disclosure of contributions related to IEs and ECs by requiring any organization that makes IEs or ECs (or transfers funds to another person for the purpose of making an IE or EC) in excess of \$10,000,<sup>229</sup> including 501(c)(4)s, report certain donors depending upon the type of expenditure and from which account the money for the expenditure originated:

**Table 4: DISCLOSE Act Provisions Governing Disclosure of Contributors to IEs and ECs<sup>230</sup>**

Type of Expenditure	Contribution for Campaign-Related Purpose	Unrestricted Donor Payment—IEs <i>not</i> paid for out of segregated account	Unrestricted Donor Payment—IEs paid for out of segregated account
Independent Expenditures	\$600	\$600	\$6,000
Electioneering Communications	\$1,000	\$1,000	\$10,000

In addition, the top funder (i.e., the CEO or highest ranking official of an organization) of a political ad would be required to appear on camera and say that he or she “approves this message.”<sup>231</sup>

Given the defeat of DISCLOSE in 2010, when the Democrats controlled Congress following a substantial 2008 victory, the legislation

DEL. (Sept. 14, 2010), [http://elections.delaware.gov/archive/elect10/elect10\\_Primary/html/election.shtml](http://elections.delaware.gov/archive/elect10/elect10_Primary/html/election.shtml).

229. H.R. 5175, 111th Cong. § 211(a) (2010). The Act provided that a person shall be deemed to have transferred funds for the purpose of making campaign-related expenditures if there have been substantial discussions about such expenditures between the person making the transfer and the person receiving the funds, if the person making the transfer or the person receiving the transfer knows (or should have known) of the intent to make campaign-related expenditures by the person making the transfer, or if the person making the transfer or the person receiving the funds made a campaign-related expenditure in the last election cycle or the current cycle. *Id.* DISCLOSE contained an exception for 501(c)(4)s with (c)(4) status for ten years, a total of at least 500,000 dues paying members in every state, and funded by no more than 15% of corporate and labor funds, none of which is used for campaign-related activity. H.R. 5175, § 211(c).

230. H.R. 5175, §§ 211(a), 212(b)(1)(B). All amounts are aggregate, equal to or exceeding. *Id.* The original Senate version of the Act, S. 3295, provided for the same threshold for contributions to organizations making IEs as well as those making ECs, i.e., \$1000 and \$10,000. S. 3295, 111th Cong. § 211(a) (2010). An organization can also establish a separate “Campaign-Related Activity” account to receive and disburse political expenditures, which would require disclosure only of donors to that account. H.R. 5175, § 213.

231. H.R. 5175, § 214(b).



has not been seriously revived under a Republican-controlled House and a pared-back Democratic majority in the Senate. Accordingly, reformers and their allies have turned to options requiring no congressional approval. In April 2011, President Obama began circulating a draft executive order that would require companies seeking government contracts to disclose their contributions to fund IEs and ECs.<sup>232</sup> Although the President acting alone can chip away at the wall of secrecy around contributions to 501(c)(4)s to fund IEs and ECs, only more comprehensive legislation can give full effect to the important interests that disclosure serves.

### C. Our Proposal

Mindful both of the political realities hindering significant structural changes as well as the public interest in greater disclosure, we propose the following disclosure regime concerning any IE or EC expenditures, whether by 501(c)(4)s or other organizations:

- Disclosure of all contributors who make contributions aggregating \$100,000 to the person making a disbursement for an IE or EC by the end of the day following the disbursement.
- These obligations would not begin until the first day of the next odd-numbered year after enactment of the proposal.

Accordingly, our proposal balances: (1) the need for greater transparency of those attempting to have a major impact on American elections; (2) the organizational burden and potential disincentive for participation imposed by disclosure; and (3) the interests of contributors that have already contributed to these organizations under the present disclosure regime.

Critically, our proposed monetary threshold for disclosure—\$100,000 in the aggregate—is substantially higher than either any current campaign finance disclosure regime or other reform proposals. This threshold is intended so that those people or organizations that have a substantial stake and likely have a role in the IE or EC are disclosed, while less generous donors without such a stake or role remain anonymous. That fewer, larger contributors must be disclosed will also mitigate any administrative burden on the part of the organization making the IE or EC.

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232. Draft Exec. Order, *Disclosure of Political Spending by Government Contractors* (Apr. 13, 2011), available at [http://www.politico.com/static/PPM187\\_disclosure.html](http://www.politico.com/static/PPM187_disclosure.html); Kenneth P. Vogel, *Obama Administration Considers Moves to Limit Anonymous Donations*, *POLITICO* (Apr. 19, 2011, 8:46 PM), <http://www.politico.com/news/stories/0411/53445.html>.

Effective broadcast advertising campaigns, with rare exception, are expensive. Congressional campaigns often spend many hundreds of thousands of dollars on advertising, which is typically their largest expense, and senatorial and presidential campaigns will spend millions.<sup>233</sup> Section 501(c)(4) organizations making high-impact IEs and ECs, like Crossroads GPS, are likely to spend similar amounts.<sup>234</sup> It is unreasonable to think that a donor who gives \$1000 to a 501(c)(4) for ECs (or without a designation as to use) will have any influence on the content of the EC or the manner in which it is shown. Only donors whose contribution is sufficient to fund a substantial portion of an EC, or a 501(c)(4)'s EC program, are likely to have any strategic input. In addition, only substantial donors are likely to come to the attention of the affected candidate and potentially influence his or her actions in office.

We are mindful that this proposal would create a substantial differential between the threshold for disclosure for contributions furthering IEs and ECs as compared with contributions directly to candidates that must be disclosed if they exceed \$200.<sup>235</sup> While we disagree with the *Citizens United* Court's conclusion that IEs can never "give rise to corruption or the appearance of corruption,"<sup>236</sup> the threshold at which a contribution can corrupt is surely much higher in the context of an IE or EC than a direct contribution to a candidate.<sup>237</sup>

In addition, the disclosure of contributions without requiring a link to an IE or EC closes the FEC-created loophole permitting the contributor to evade disclosure simply by not telling the person mak-

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233. See, e.g., *Expenditures Breakdown: Barack Obama*, OPENSECRETS.ORG (CENTER RESPONSIVE POL.), <http://www.opensecrets.org/pres08/pend.php?cycle=2008&cid=N00009638> (last visited May 30, 2011) (noting that the Obama campaign spent over \$400 million on media and media-related expenses in 2008, accounting for well over half of its total expenditures); *Jim Costa: Campaign Finance/Money Expenditures 2010*, OPENSECRETS.ORG (CENTER RESPONSIVE POL.), <http://www.opensecrets.org/politicians/pend.php?cycle=2010&cid=N00026341&type=I> (last visited May 30, 2011) (noting that Costa campaign spent \$1.4 million on media in 2010); *Dan Lungren: Campaign Finance/Money Expenditures 2010*, OPENSECRETS.ORG (CENTER RESPONSIVE POL.), <http://www.opensecrets.org/politicians/pend.php?cycle=2010&cid=N00011971&type=I> (last visited May 30, 2011) (noting that Lungren campaign spent almost \$1 million on media in 2010).

234. See *supra* Part VI.B. (discussing Crossroads GPS' anti-Costa ads).

235. See 11 C.F.R. § 102.8(a) (2011).

236. See *Citizens United v. FEC*, 130 S. Ct. 876, 909 (2010).

237. We do not believe that, given the current costs of running for federal office, that a contribution of \$200 could possibly corrupt a candidate or elected official. Whether the disclosure threshold for contributions to candidates should be raised, however, is beyond the scope of this Article.

ing an IE or EC that the contribution is specifically for the purpose of that particular IE or EC, even if circumstances make that particular use of the contribution certain. Tracking the money utilized for an IE or EC is therefore essential. Although we do not believe that the regulations should require it, organizations may wish to ease any additional administrative burden by creating a separate segregated fund for IEs and ECs so that it need not parse out which heretofore commingled funds were utilized for IEs and ECs.

Finally, we suggest that our proposal become effective the first day of the next odd numbered year following the next general election. While the delay may have the added benefit of increasing the proposal's political viability, there are good substantive reasons not to change the rules of the game during the heat of the 2012 campaign. As an initial matter, many contributors have already donated to 501(c)(4) organizations in anticipation of the 2012 election likely did so with the understanding that their identity would not be disclosed. At least certain (if not many) of them may have chosen to give because of their ability to remain anonymous. Moreover, we presume some 501(c)(4)s have been newly formed and/or operated in a particular manner in reliance on the current disclosure scheme. While we believe that a regime under which donors are disclosed is vastly preferable, we acknowledge changing the rules during an election cycle can be damaging not only to those directly impacted but also to the process as a whole.

## Conclusion

Having seen their potential in the Republican wave of 2010, a legion of 501(c)(4)s and other tax-exempt organizations on both sides of the political aisle are mobilizing to make an impact in the 2012 elections. Even if a small fraction of the trillions of dollars of corporate money that can now be spent for IEs and ECs is utilized for that purpose, it will have a major and growing impact in 2012 and beyond. Typically dozens of congressional races—and even the presidency itself—are decided by margins narrow enough to be closed by a well-financed, targeted EC campaign.<sup>238</sup> Without question, there is a tremendous amount at stake.

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238. See *House Big Board: Election Results 2010*, N.Y. TIMES, <http://elections.nytimes.com/2010/results/house/big-board> (last visited May 30, 2011); *Senate Big Board: Election Results 2010*, N.Y. TIMES, <http://elections.nytimes.com/2010/results/senate/big-board> (last visited May 30, 2011). In 2010, 46 House races and seven Senate races were decided by a five point or smaller margin. *House Big Board, supra*; *Senate Big Board, supra*. In addition,

The shift in the locus of electoral influence toward these outside groups has ignited a battle over disclosing their donors in Congress, at the FEC, and among the interested public. That the prudence, not to mention the constitutionality, of disclosure is debated so vigorously after years of relative consensus shows how important contributions to these groups have become to American elections.

Further, in part because conservative groups have thus far taken greatest advantage of *Citizens United*, the battle to expand disclosure to encompass contributions to these outside groups has become—like so many others in politics today—vehemently partisan. Many Republicans see the drive for disclosure as a liberal attempt to suppress through retaliation, the otherwise-anonymous corporate contributions on which they will likely increasingly rely. In turn, many Democrats see opposition to disclosure as evidence of the singular fidelity of American conservatism to big business and salivate over the prospect of running advertisements tying Republican candidates to their putative corporate masters.

We understand that this partisan chasm makes it difficult to change the status quo so that certain contributors to 501(c)(4)s that make IEs or ECs are disclosed. We believe, however, that the Supreme Court's jurisprudence on disclosure has it right. The gatekeeper of our democracy, an informed electorate, demands disclosure of those contributors that are having a substantial impact on our elections. For example, in a race like the Costa-Vidak race, in which spending by Crossroads GPS and other 501(c)(4)s amounted to a large percentage of the amount spent by the campaigns and parties, it is nonsensical that a \$201 contributor to Vidak was disclosed and a hypothetical multi-million dollar contributor to Crossroads GPS was not.

This Article proffers a new reform proposal, combining policy-minded principles and politically-minded pragmatism. Informing the electorate about large contributors to organizations running IEs and ECs, while permitting smaller contributors to remain anonymous, and delaying enactment so as not to disrupt the present election cycle may not provide comprehensive campaign finance reform. Nonetheless, it is a critical step toward a fully informed electorate and, in turn, a more vibrant democracy.

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President Obama would have lost in 2008 if only about 500,000 of his voters in seven states (Colorado, Florida, Indiana, New Hampshire, North Carolina, Ohio, and Virginia) had voted for John McCain instead. FEC, OFFICIAL GENERAL ELECTION RESULTS FOR UNITED STATES PRESIDENT (2008), available at <http://www.fec.gov/pubrec/fe2008/2008pres.pdf> (last visited May 30, 2011).