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**Testimony of Monica Youn
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before the Congressional Forum
on “The Most Expensive Seat in the House:
The State of Our Campaign Finance System”
April 18, 2012**

I thank Ranking Member Gonzalez for convening this forum and for inviting me to testify.

In previous congressional testimony,¹ I explored the aftermath and implications of the Supreme Court’s watershed campaign finance decision *Citizens United v. FEC*.² Rather than reiterating that analysis here, I will focus my testimony more narrowly on the linkage between *Citizens United* and recent developments in our campaign finance system, paying particular attention to the “Super PAC” phenomenon that has dominated the early phases of the 2012 election cycle.

The Rise of Super PACs

Although the 2012 election cycle is still in its beginning stages, it is already clear that campaign fundraising will be dominated by the massive new independent expenditure vehicles nicknamed “Super PACs.” Unlike traditional federal PACs, Super PACs only engage in independent expenditures, and do not donate money directly to federal candidates. Also unlike

¹ *The Fair Elections Now Act: A Comprehensive Response to Citizens United: Hearing Before the S. Jud. Comm., Subcomm. on Constitution, Civil Rights & Human Rights*, 111th Cong. (2011) (statement of Monica Youn); *The First Amendment and Campaign Finance Reform after Citizens United: Hearing Before H. Jud. Comm., Subcomm. on Constitution., Civil Rights & Civil Liberties*, 110th Cong. (2010) (statement of Monica Youn). On the issue of campaign finance disclosure, I would also respectfully refer the Committee to the recent written testimony of my Brennan Center colleagues in the Senate Rules Committee’s hearings on the DISCLOSE Act of 2012. *The Democracy Is Strengthened by Casting Light On Spending in Elections Act (“DISCLOSE”) Act of 2012: Hearing on S. 2219 Before the S. Comm. on Rules and Admin.*, 112th Cong. (2012) (statement of Adam Skaggs and Mimi Marziani).

² 130 S.Ct. 876 (2010).

traditional PACs, which are bound by federal contribution limits and cannot accept corporate or union contributions, Super PACs can take in and spend unlimited amounts, including monies from corporate and union treasury funds.³

As of May 2012, Super PACs have raised almost \$160 million dollars this election cycle and have spent close to \$90 million—more than six months from the general election.⁴ In state after state, Super PACs have outspent the campaigns of those they are supporting.⁵ And, in numerous primaries, Super PAC spending has been credited as the deciding factor in electoral results.⁶

Although the Supreme Court's opinion in *Citizens United* did not create or contemplate Super PACs, the logic of *Citizens United* directed the result in *SpeechNow v. FEC*,⁷ the D.C. Circuit decision that legalized Super PACs. In *Citizens United*, Justice Kennedy's opinion stated that "independent expenditures, including those made by corporations, do not give rise to corruption or the appearance of corruption."⁸ Accordingly, under the Court's reasoning, since restrictions on independent expenditures serve no anti-corruption interest, they fail to pass constitutional muster. Following this reasoning, the *SpeechNow* court held that corporations and unions could make unlimited donations to PACs, so long as those PACs only engaged in "independent expenditures" and did not directly coordinate with a campaign.

The Super PAC phenomenon throws into sharp relief the faulty assumption that underlies the majority's reasoning in *Citizens United*—that no risk of corruption attaches to expenditures that are technically "independent" of a candidate's campaign. While Super PACs were freed from contribution limits because they declared themselves legally "independent" of candidate campaigns, the reality is that they are anything but independent.

³ See also FEC Advisory Opinion 2010-11, July 22, 2010, at <http://saos.nictusa.com/aodocs/AO%202010-11.pdf>.

⁴ *2012 Outside Spending, by Super PACs*, OPENSECRETS.ORG, <http://www.opensecrets.org/outsidespending/summ.php?cycle=2012&chrt=V&disp=O&type=S> (last visited April 13, 2012).

⁵ For instance, in Alabama and Mississippi almost all of the television ads promoting presidential contenders were paid for by Super PACs rather than the candidates' campaigns. Greg Giroux, *Super-PAC Ads Dominate Republican Race in Alabama, Mississippi*, BLOOMBERG BUSINESSWEEK (March 13, 2012), <http://www.businessweek.com/news/2012-03-12/super-pacs-dominate-republican-ads-aired-in-alabama-mississippi-primaries>.

⁶ See, e.g., Paul Blumenthal, *Newt Gingrich South Carolina Surge Boosted By Super PAC Spending Spree*, HUFFINGTONPOST.COM (Jan. 20, 2012, 2:05 PM), http://www.huffingtonpost.com/2012/01/20/newt-gingrich-south-carolina-super-pac-spending_n_1219093.html.

⁷ 599 F.3d 686 (D.C. Cir. 2010), *cert. denied*, 131 S.Ct. 553 (2010).

⁸ 130 S.Ct. at 909.

The Myth of “Independence”

Despite the Supreme Court’s repeated explanation that independent expenditures must be truly and wholly independent—made “without any candidate’s approval (or wink or nod),”⁹—the FEC has failed to promulgate regulations that “rationally separate[] election-related advocacy from other activity” since the Bipartisan Campaign Reform Act was enacted in 2002.¹⁰ As a result, under the FEC’s current regulations, candidates can coordinate extremely closely with a supportive Super PAC, and yet still be deemed not to have produced any “coordinated communications,”¹¹ and not to have “coordinated” with that candidate’s campaign.¹²

Since *Citizens United*, the FEC has deadlocked on several opinions concerning the meaning of “coordination” and “independent,” establishing beyond question that the agency will not meaningfully distinguish wholly independent groups from those that, in reality, coordinate closely with candidates. Most egregiously, the FEC failed to reject a Super PAC’s request that it be permitted to claim continued legal independence, and not be deemed to issue “coordinated communications” despite producing television ads that were “fully coordinated” with candidates. That the FEC deadlocked on this request, issuing no binding ruling, underscores that the agency tasked with overseeing the nation’s campaign finance laws is unable or unwilling to enforce any meaningful lines between groups that meet the Court’s strict definition as “wholly independent” from candidates, and those that claim independence while actually coordinating closely with candidates and undermining campaign finance rules. Indeed, the FEC has allowed candidates to appear at fundraisers, and solicit funds, for Super PACs that exist for the sole purpose of electing those candidates—while permitting the Super PACs to continue claiming legal independence.¹³ In short, the dysfunctional FEC has now effectively sanctioned almost limitless cooperation between Super PACs and the candidates they seek to elect—defying any notion that the groups meet any commonly-held definition of “independence.”

The result is that many candidates (including all of the competitive presidential candidates) have an affiliated Super PAC acting as a *de facto* arm of their campaign. The proliferation of candidate-specific Super PACs provides ample opportunity for corruption, as

⁹ *Colorado Republican Federal Campaign Comm. v. FEC*, 533 U.S. 431, 442 (1996); *McConnell v. FEC*, 540 U.S. 93, 221-22 (2003).

¹⁰ *See, e.g., Shays v. FEC*, 414 F.3d 76, 102 (D.C. Cir. 2005), *aff’d* 337 F. Supp. 2d 28 (D.D.C. 2004); *Shays v. FEC*, 528 F.3d 914, 925 (D.C. Cir. 2008), *aff’d* 508 F. Supp. 2d 10 (D.D.C. 2007).

¹¹ *See* 11 C.F.R. § 109.21.

¹² *See* 11 C.F.R. § 109.20.

¹³ Derek Willis *Federal Officials Can’t Raise Unlimited Funds, F.E.C. Says*, CAUCUS BLOG, NYTIMES.COM (June 30, 2011), <http://thecaucus.blogs.nytimes.com/2011/06/30/federal-officials-cant-raise-unlimited-funds-f-e-c-says/> (explaining that while the FEC rejected a request to allow federal officials to raise unlimited funds for Super PACs, such candidates would be allowed to solicit contributions for Super PACs up to the legal limits).

contribution limits have become irrelevant and supporters can give unlimited gifts that are functionally indistinguishable from contributions to the candidates. For this reason, Judge Richard Posner recently concluded, after considering the current state of affairs:

It thus is difficult to see what practical difference there is between super PAC donations and direct campaign donations, from a corruption standpoint. A super PAC is a valuable weapon for a campaign. . . . [T]he donors to it are known; and it is unclear why they should expect less *quid pro quo* from their favored candidate if he's successful than a direct donor to the candidate's campaign would be.¹⁴

Super PACS have further blurred the already problematic distinction between direct contributions and independent expenditures.

The End-Run Around Contribution Limits

Campaign contribution limits—including the century-old ban on corporate contributions to candidates—are one of the cornerstones of federal campaign finance regulation. The creation of Super PACs that function as shadow campaigns has eviscerated contribution limits and the ban on corporate campaign contributions.

First, Super PACs have rendered the dollar limits on individuals' direct contributions to candidates toothless, if not entirely illusory. Individuals who have donated the legal maximum to their favored candidate can still give unlimited amounts to a super PAC dedicated to electing that candidate, with knowledge that the latter contribution is just as valuable to the candidate as the former. Wealthy donors have seized on this contribution limit end-run. For example, in 2011, 84% of the 205 donors to the super PAC supporting Mitt Romney had given the maximum donation to Romney's primary campaign—including five donors who each gave \$1 million or more to the super PAC.¹⁵ The Super PAC supporting President Obama has also benefitted from the largesse of donors who have given the maximum amount to his campaign, receiving \$2 million from DreamWorks CEO Jeffrey Katzenberg (and another \$100,000 from DreamWorks partner Stephen Spielberg) and \$1 million from comedian Bill Maher. The \$2,500 contributions that all these donors have given to the candidate's actual campaign committees pale in comparison to what they have donated to candidates' shadow campaigns.

Second, candidate-specific Super PACs have made a mockery of the prohibition on corporate campaign contributions by allowing corporations to contribute millions for electioneering expenditures that are as valuable to candidates as contributions to their own war-chests. Even at this early stage of the campaign, numerous corporations have donated more than

¹⁴ Richard Posner, *Unlimited Campaign Spending—A Good Thing?*, The Becker-Posner Blog (April 8, 2012), <http://www.becker-posner-blog.com/2012/04/unlimited-campaign-spending-a-good-thing-posner.html>.

¹⁵ Paul Harris, *Super PAC Donors Often Max Out on Individual Donations, Study Finds*, GUARDIAN, Feb. 21, 2012.

\$1 million to Super PACs working to elect specific candidates; other companies have made valuable, albeit lesser, Super PAC contributions.¹⁶ We can expect corporate participation in Super PACs to increase as the election cycle moves from party primaries to the general election.

Moreover, corporations have made political contributions that favor candidates while avoiding public disclosure of this spending by routing their dollars through nonprofit organizations that spend money to influence elections—including by donating to Super PACs—but are not required to disclose their donors.¹⁷

The Concentration of Political Influence

Super PACs allow a few wealthy donors to wield disproportionate influence over candidates. Over \$50 million in contributions to Republican Super PACs during the current election has come from “[a]bout two dozen individuals, couples or corporations.”¹⁸ More than 78% of the money donated to the super PACs active in the presidential election has come from just ninety donors who each gave more than \$100,000.¹⁹ Over two-thirds of the money donated to Super PACs came from donors who gave \$500,000 or more.²⁰ A super PAC backing Newt Gingrich received almost all of its money from casino magnate Sheldon Adelson and his family, who donated over \$16 million.²¹ On the other side of the aisle, more than three-fourths of the money contributed to the Super PAC supporting President Obama has come from donors giving over \$500,000.²²

The enormous amounts given by a small number of donors raise the clear possibility that candidates will feel indebted to donors and grant them favors once in office. For instance, Billionaire Julian Robertson has acknowledged that, in light of the \$1.25 million he has given to

¹⁶ See Phil Hirschhorn, *Super PAC Donors by the Numbers*, CBS NEWS (Mar. 22, 2012), http://www.cbsnews.com/8301-503544_162-57402073-503544/super-pac-donors-by-the-numbers (listing several corporations that each gave \$1 million to super PACs).

¹⁷ Andrew C. Byrnes & Cortlin H. Lannin, *I Went Down to the Crossroads: Lifting the Blindfold about the Origin of 501(c)(4) Political Advertisements*, 46 U.S.F. L. REV. 481, 483, 493-96 (2011); see also Jonathan D. Salant, *Payday Lender Political Donors Hidden in Corporate Names*, BLOOMBERG.COM (Mar. 21, 2012, 8:00 PM), <http://www.bloomberg.com/news/2012-03-22/payday-lender-political-donors-hidden-in-corporate-names.html> (describing businesses’ use of limited liability corporations to secretly donate to super PAC supporting Romney).

¹⁸ Nicholas Confessore et al., *In G.O.P. Race, a New Breed of Superdonor*, N.Y. TIMES, Feb. 22, 2012, at A1.

¹⁹ Lee Drutman, *The Presidential Super PACs: Five Takeaways*, SUNLIGHT FOUNDATION BLOG (Feb. 1, 2012, 3:35 PM), <http://sunlightfoundation.com/blog/2012/02/01/superpac-takeaways>.

²⁰ Fredreka Schouten et al., *Big-bucks Donations to Super PACs Keep the GOP Race Going*, USA TODAY, Mar. 21, 2012.

²¹ *Id.*

²² *Id.*

Restore Our Future, Romney might take Robertson’s phone call if he became president.²³ It has long been an unfortunate truth of our politics that major donors receive increased access to candidates and officeholders,²⁴ but to have such expectations of access predicated on supposedly “independent” expenditures highlights the extent to which Super PACs’ purported “independence” is a widely-recognized fiction.

The Erosion of Public Confidence

Finally, Super PACs have created the appearance of corruption and seriously undermined public confidence in elections and democracy, as shown by media coverage and public opinion polls. There has been thunderous opposition to the opportunities for corruption created by unlimited Super PAC money in elections.²⁵ Public opinion polls reveal wide agreement with the news media’s concerns about super PACs and corruption. Americans strongly disapprove of Super PACs and independent spending in elections:

- One poll found that 69% of all Americans agree that Super PACs should be made illegal; the poll found majority support for banning Super PACs across political parties and the political spectrum.²⁶
- Sixty-seven percent of Americans—again including majorities of Republicans, Democrats, and independents—said that there should be legal limits on the amount independent groups can spend on advertisements during a presidential campaign.²⁷

²³ Wyatt Andrews & Phil Hirschorn, *Billionaire Super PAC Donor Julian Robertson Speaks Out*, CBS NEWS (Apr. 6, 2012), http://www.cbsnews.com/8301-503544_162-57410709-503544/billionaire-super-pac-donor-julian-robertson-speaks-out.

²⁴ Mike McIntyre & Michael Luo, *White House Opens Door to Big Donors, and Lobbyists Slip In*, NY TIMES, April 14, 2012 at A1.

²⁵ See, e.g., Editorial, *The Power of Super PACs*, WASH. POST, Jan. 9, 2012 (“The risk of corruption in candidate-specific super PACs is as great as the size of supporters’ checkbooks.”); Editorial, *The Broken System of Campaign Finance*, SAN DIEGO UNION-TRIBUNE, Dec. 5, 2011 (arguing that super PACs collaborate with campaigns and expressing concern about “the corrupting influence of money, or the appearance of such influence”); Editorial, *The Campaign Jungle*, N.Y. TIMES, Nov. 13, 2011, at SR10 (arguing that super PACs coordinate with candidates and concluding, “Limits on spending used to prevent donations from becoming outright bribes, but now the limits are gone, and the path to corruption is clear.”); Editorial, *Not So Super*, RALEIGH NEWS & OBSERVER, Oct. 14, 2011 (arguing that interest groups that donate to super PACs are “betting on dividends” once candidates are elected); Editorial, *Our View: Presidential Race Not the Place for Secret Donors*, USA TODAY, Aug. 21, 2011 (comparing use of super PACs and nonprofit corporations in election spending to organized crime).

²⁶ Damla Ergun, *Seven in 10 Would Send Super PACs Packing*, ABC NEWS (Mar. 13, 2012), <http://abcnews.go.com/blogs/politics/2012/03/seven-in-10-would-send-super-pacs-packing>.

²⁷ Brian Montopoli, *Poll: Most Want Limits on Campaign Spending*, CBS NEWS (Jan. 18, 2012), http://www.cbsnews.com/8301-503544_162-57361428-503544/poll-most-want-limits-on-campaign-spending.

- Of those who are aware of the post-*Citizens United* rules allowing unlimited independent expenditures on political advertisements, 65% say the regime is having a negative effect on the 2012 presidential campaign.²⁸
- And a majority of Americans believe the nation needs new campaign finance laws, “a marked increase from three years ago.”²⁹

These polling results demonstrate the fallacy of Justice Kennedy’s prediction in *Citizens United* that “the appearance of influence or access will not cause the electorate to lose faith in this democracy.”³⁰ But this crisis of confidence opens up new opportunities for reform.

The 2012 general election is barely underway, yet already the corrosive effects of Super PACs and similar failures of disclosure, coordination, and enforcement policy threaten to undermine the integrity of our electoral officials and the citizens’ faith in our electoral system. We strongly urge the Committee to hold hearings and take further action to prevent further erosion of the foundations of our democracy.

²⁸ *Super PACs Having Negative Impact, Say Voters Aware of ‘Citizens United’ Ruling*, PEW RESEARCH CENTER. 1 (Jan. 17, 2012), <http://www.people-press.org/files/legacy-pdf/1-17-12%20Campaign%20Finance.pdf>.

²⁹ *58% Say U.S. Needs New Campaign Finance Laws*, RASMUSSEN REPORTS (Jan. 22, 2012), http://www.rasmussenreports.com/public_content/politics/general_politics/january_2012/58_say_u_s_needs_new_campaign_finance_laws.

³⁰ 130 S.Ct. at 884.