EDMOND M. COLLER
[redacted]

September 14, 2012

Public Citizen, Inc.
1600 20th Street, NW
Washington, DC 20009

Gentlepersons:

I have admired your efforts to save campaign finance reform from the ravages of Citizens United and Montana by supporting a constitutional amendment and HR-4790 and its successors. A constitutional amendment will take some time, and passage of a bill along the lines of HR-4790 is problematic with the current or next Congress. So, as a corporate and securities lawyer, I write to discuss opportunities I perceive to achieve the objectives of HR-4790 without the need for a federal law and without running afoul of Citizens or Montana.

I believe that the influence that institutional investors and managers of large pools of investment capital can exert on corporate management, Securities Exchange practices, and state corporation laws offer pathways to ameliorate, if not eliminate, the corrupting and process distorting spending that is targeted by HR-4790's mandate that key decisions regarding corporate "political speech" must rest with the owners of corporations. I believe the need for this mandate is demonstrated by the Citizens decision itself. After noting that stockholders have the ability to not re-elect directors who have "gone too far" in their political speech decisions, the Court struck down McCain-Feingold because the delays and uncertainties inherent in that law would result in

it being too late for the corporation to make its political speech before Election Day. The opportunity to remove directors after they have made the speech and spent the money also comes "too late."

As you know, stockholders are free to require their approval of a particular management activity simply by voting to include that requirement in a corporation's governing documents. State corporate law and Exchange listing rules already require stockholder approval of certain significant actions proposed by corporate Boards, particularly those actions that are not in the ordinary course of business or involve unusual and significant activity affecting stockholders' interests. Political speech is clearly outside of the ordinary course, and matters such as adopting a budget for political speech, expressing overt support of a candidate, or contributing to SuperPACs or "Issue NFPs" clearly have significant potential effects on stockholders.

These basic principles suggest the following routes to achieving a requirement for stockholders approval of political speech:

Governing Documents

Stockholders and members of existing corporations, NFPs and unions can change governing documents to, among other things, prohibit, limit, or require their approval of the amount of expenditures on political speech; prohibit candidate endorsement; limit expenditures on political speech to national elections; limit political speech to matters "germane" to the entity's business (e.g., prohibit references to a candidate's personal characteristics and/or his or

her positions on issues not directly relevant to the organization's business or mission); and/or require independent fact-checking of Board-authorized speech.

Institutional Investors

Pension funds, other institutional investors, and mutual fund managers have placed on their "Don't Buy" and/or "Divest" lists, securities of companies that failed to adopt the Sullivan Principles; or were involved in the blood diamond trade; or cooperated with a trade boycott of a U.S. ally. They can do the same for companies that don't require stockholder approval of political speech budgets, of candidate endorsements, and/or of contributions to SuperPACs or Issue NFPs. Directors pay attention to institutions with power to move the needle on their company's stock price.

Shareholder Activism

The investment industry has already demanded far greater transparency regarding political speech expenditures and has the SEC on its side. As I am sure you are aware, the president of the Vanguard Funds has said that corporate management is more likely to push for government policies that favor their interests over those of the corporation's stockholders.[1] At least one study has shown that most corporations that spend great amounts of money on political speech underperform those that do not.[2] A commissioner of the SEC has indicated that nearly one-half of all stockholder proposals that were required, under SEC rules, to be included in 2011 company proxy statements related to demands for increased disclosure of corporate political

[1] Quoted in Speech by SEC Commissioner Louis A. Aguilar entitled "Shining a Light on Expenditures of Shareholders Money" delivered on February 24, 2012 at PLI's SEC Speaks 2012 program.

[2] Tim Mak. Lobbying Bad for Business? Politico, June 12, 2012 (reporting on a Rice University study).

speech activities. These are all indications that the great displeasure with Board freedom to spend at will in this arena (and to do so without full disclosure) is wide and deep and the possibility of bringing both institutional and individual stockholders together to force change is real. There is reason to believe that a substantial number of top managers of large investment pools are ready to move from just demanding more disclosure to leading the charge for stockholder participation in campaign spending decisions, either by adopting Don't Invest/Divest policies or by advocating the necessary amendments to companies' governing documents. It may only take a few bell cows to get this herd moving.

Exchange Listing Rules

In the same way they require stockholder approval of below market value stock issuances, the Securities Exchanges can require such approval for political speech budgets, candidate endorsements, and/or SuperPAC or Issue NFP contributions, and can require a supermajority vote on these questions. If FINRA, NYSE and Amex all do this, it is game on!

State Law

In the same way that they require stockholder approval of mergers and liquidations, state corporate and union enabling statutes and statutes applying to pre-existing corporations can (despite certain language in the majority opinion which I discuss later) require owner or union or NFP member approval of political speech expenditures and/or of candidate "endorsement," either by a majority or "supermajority" vote.

While I am optimistic that your organization and the many others who have made common cause with you on this issue have the knowledge, stature and resources to effectively reach out to those potential "game changers," there are a number of matters that I think must be considered in planning this effort.

It must be recognized that while widely held, publicly traded companies are surely major players in the political money game, the vast majority of existing corporations have only one or a few owners and would not be impeded from doing as they wish, except as they are limited by enabling law. While the vast majority of this vast majority of corporations lack the means to fund federal (or even statewide) campaign speech at "game changing" or quid pro quo corrupting levels and are not at the heart of the problem, those closely held corporations with substantial means (which are at least spending their owners' money with the approval of all, or most, of them), can only be limited by state law changes. They can, however, be made subject to disclosure laws and can be closely watched by IRS for any improper claims for deductions for political speech expenses. That "insiders" with less than a majority interest in public companies can often effectively control the results of stockholder votes must also be acknowledged. Supermajority requirements (or excluding Board members and CEOs from the vote) may be critical to the ultimate utility of a shareholder approval requirement.

As to state law changes, it must be noted that the majority opinion in Citizens included Justice Scalia's statement in a dissent in another case involving restrictions on speech of an existing corporation, that "...the State cannot exact as the price of [the special advantages

afforded to corporations] the forfeiture of First Amendment rights." It is unclear whether Justice Scalia meant by this that a state cannot, in its enabling statute, freely determine the terms upon which it will grant a corporate charter. Until it is organized, a corporation does not exist and can have no constitutional rights. Once organized, it has only the rights and powers provided for under the enabling law. A law that impinges on an existing corporation's political speech not in conflict with its enabling law is a totally different matter. I don't believe five justices would agree that an enabling statue can't limit political speech, at the very least to the extent of requiring the stockholder approvals envisioned here. As to existing corporations, even if Justice Scalia's formulation were the appropriate standard, the language of the majority opinion in Citizens suggests that state imposed stockholder approval requirements can be constitutional if they do not cause the fatal "chilling effect" that was found in the inevitable delays involved in obtaining stockholder approval under McCain–Feingold. That establishing the level of expense, classes of speech and candidate endorsement parameters that would require stockholder/member approval can be accomplished (and, in most cases, required specific approvals can also be obtained) early in the political season and, therefore, would not involve significant time constraints or create ambiguity as to what action is permitted without further stockholder approval. Reasonable approval requirements should not fail the Citizens "chilling effect" test as applied to McCain-Teugold.

There is also the "problem" of what to do about "media companies." Media companies are in the business of publishing and/or broadcasting political news, political opinion, political analysis, gotcha pieces on politicians and even candidate endorsements. That's their core business. This ordinary-course political speech can be excluded from special stockholder

approval requirements. None of it involves spending stockholder money outside the ordinary course. However, if a media company wants to donate to SuperPACs or to finance campaign attack ads that will be run by other media outlets, those actions would not be in the ordinary course and could be subject to stockholder approval requirements, either at the entity level or at the parent company level if the media company is a subsidiary of a public company.

There may be fear in some states that if changes to their corporate enabling laws are not matched by other states they will lose incorporations. In this case, as Delaware goes, so goes the nation, and it is interesting that the home state of our Vice President has not adopted a resolution in support of a constitutional amendment. For pension funds, investment managers and exchanges, there may be concern that they will be at a competitive disadvantage if they are lone rangers on "Don't Invest/Divest" policies, and some stockholders may be concerned that if their corporation can't spend along with its' competitors it will lose its place at the trough and suffer a business disadvantage. I believe that if any of the proposed "fixes" are adopted by a relatively low critical mass of actors, it is probable that all of their peers would feel compelled to follow.

Justice Scalia argued in Citizens that groups of people can't be denied First Amendment speech rights because they have associated or because their association speaks for them, and that a corporation is just one form of association. He cited the Republican and Democratic Parties as examples of organizations representing "the speech of many individual Americans who have associated in common cause [giving Party leadership the right to speak on their behalf]. The association of individuals in a corporation is no different ...." (Emphasis added). Of course, there is no such "association in common cause" among the people who buy HP stock or give to

the ASPCA. There are only independently arrived at concurrent beliefs that HP is a good buy or that the ASPCA does good work. The last thing any of them think they are doing is "associating in common cause" with other HP stockholders or ASPCA donors to help repeal Roe v. Wade, to help get "Obamacare" approved or to help Michelle Bachman or Herman Cain get the Republican nomination for President. This is the critical analytical error underlying the Citizens decision and I cite it to make clear that I understand the difficulties you face in attempting to restore an election process worthy of a democracy.

I express my profound appreciation for your dedication to the task of fending off what is truly an existential attack on our polity. If any of my thoughts are of interest to you, I am available to you at any time.

Sincerely,

Edmond M. Coller