Former Leaders of the American Civil Liberties Union

September 4, 2014

Chairman Patrick Leahy
U.S. Senate Committee on the Judiciary
224 Dirksen Senate Office Building
Washington, DC 20510

Ranking Member Charles Grassley
U.S. Senate Committee on the Judiciary
135 Hart Senate Building
Washington, DC 20510

Chairman Richard Durbin
U.S. Senate Subcommittee on the Constitution, Civil Rights, and Human Rights
711 Hart Senate Building
Washington, DC 20510

Ranking Member Rafael Cruz
U.S. Senate Subcommittee on the Constitution, Civil Rights, and Human Rights
185 Dirksen Senate Building
Washington, DC 20510

Dear Chairman Leahy, Ranking Member Grassley, Subcommittee Chairman Durbin, and Subcommittee Ranking Member Cruz:

This summer, some have taken to citing a June 2014 letter from the ACLU to bolster opposition to a constitutional amendment that would change the way Congress can regulate election spending.[1] While, as present and former leaders of the ACLU, we take no position in this letter on whether a constitutional amendment is the most appropriate way to pursue campaign finance reform, we believe that the current leadership of the National ACLU has endorsed a deeply contested and incorrect reading of the First Amendment as a rigid deregulatory straitjacket that threatens the integrity of American democracy.

In 1998, some of us signed the enclosed letter circulated by every then-living retired leader of the ACLU, protesting the ACLU's erroneous insistence that the First Amendment makes it impossible to regulate massive campaign spending by the richest 1/10 of 1% of the American

[1] Letter from Laura W. Murphy & Gabriel Rottman, ACLU, to Sens. Patrick Leahy & Charles Grassley, U.S. Senate Committee on the Judiciary (June 3, 2014), *available at* http://www.aclu.org/sites/default/files/assets/6-3-14_--_udall_amendment_letter_final.pdf.

electorate.[2] Things have only gotten worse since 1998. The passage of 16 years means that fewer 20th century ACLU leaders are left to sign this letter. More importantly, over the past 16 years, using the ACLU's erroneous reading of the First Amendment as a fig leaf, five justices have added huge multi-national corporations to the list of unlimited campaign spenders,[3] and authorized wealthy individuals to contribute virtually unlimited sums to party leaders in a never-ending search for wealth-driven political influence.[4] Under the ACLU's erroneous reading of the First Amendment, it is no exaggeration to label today's version of American democracy as "one dollar-one vote." We reiterate the substance of the 1998 letter, and add the following additional comments in light of the unfortunate events of the last 16 years.

Our campaign finance system, already in dreadful shape in 1998, has only gotten worse. Today, American democracy is almost irretrievably broken because it is dominated by self-interested, wealthy interests. We believe that reform of our campaign finance system is the only way to fulfill Lincoln's hope that government of the people, by the people, and for the people shall not perish from the earth. The 2012 federal election cycle was the most expensive in our history, with a combined price tag of $6.3 billion.[5] Most of the money came from the top 1% of the economic tree. Indeed, even within the 1%, the top 10% of the 1% exercised overwhelming influence.[6] Purportedly independent groups, including super PACs, collectively spent $1 billion.[7] It is the supremely wealthy that provide the bulk of that money. And because of loopholes in the reporting statutes, we don't even know who many of them are.

Super PACs, in particular, have become a mechanism for the wealthy to exert even greater influence over our elections and our elected officials. Only 1,578 donors, each of whom gave at least $50,000, were responsible for more than $760 million — or 89.3% — of all donations to super PACs in 2012.[8] Thus, a microscopic percentage of the population is funding a significant percentage of the political spending in this country.

Equally, many likely 2016 presidential candidates have made pilgrimages to wealthy independent spenders hoping to bolster their electoral chances.[9] Such opportunities for candidates to, as many outlets put it, "kiss the ring" of a major political donor rightfully cause the public to question whether candidates are tailoring their views to the highest bidder.

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[2] Norman Dorsen et al, Statement of Persons Who Have Served the American Civil Liberties Union in Leadership Positions Supporting the Constitutionality of Efforts to Enact Reasonable Campaign Finance Reform 1 (June 19, 1998), *available at* http://www.brennancenter.org/sites/default/files/legacy/d/aclu.pdf.
[3] Citizens United v. FEC, 558 U.S. 310, 357 (2010).
[4] McCutcheon v. FEC, 134 S. Ct. 1434 (2014).
[5] Russ Choma, Ctr. for Responsive Politics, *The 2012 Election: Our Price Tag (Finally) for the Whole Ball of Wax*, OPENSECRETS.ORG (Mar. 13, 2013), http://www.opensecrets.org/news/2013/03/the-2012-election-our-price-tag-fin/.
[6] *Cf.* BLAIR BOWIE & ADAM LIOZ, BILLION-DOLLAR DEMOCRACY: THE UNPRECEDENTED ROLE OF MONEY IN THE 2012 ELECTIONS 8 (2013).
[7] Ctr. for Responsive Politics, *Outside Spending by Cycle*, OPENSECRETS.ORG, https://www.opensecrets.org/outsidespending/ (last visited July 25, 2014).
[8] *See* Brief of the Brennan Ctr. for Justice at N.Y.U. School of Law as *Amicus Curiae* in Support of Appellee at 34, McCutcheon v. FEC, 134 S. Ct. 1434 (2014) (No. 12-536); BOWIE & LIOZ, *supra* note 6, at 8.
[9] *See, e.g.*, Maeve Reston, *Jeb Bush leads GOP hopefuls to Vegas to woo Sheldon Adelson*, L.A. TIMES (Mar. 24, 2014, 3:00 AM), http://www.latimes.com/nation/politics/politicsnow/la-pn-possible-gop-contenders-head-to-vegas-to-woo-sheldon-adelson-20140323-story.html.

We believe that the Supreme Court's campaign finance decisions from *Buckley*[10] to *Citizens United* to *McCutcheon* are based on three fallacies. First, the Court wrongly equates spending unlimited sums of money with pure speech. We agree that campaign spending is a mix of speech and conduct. At reasonable spending levels, the speech element predominates, rendering unreasonably low campaign spending levels (like the absurdly low spending levels in *Buckley*) unconstitutional. But there comes a point where the conduct element of unlimited spending predominates, permitting content-neutral regulation of massive electoral spending to preserve the ideal of political equality at the heart of American democracy, and to protect the public from the corruption risks associated with vast political spending.

Second, the Court improperly distinguishes between political contributions and expenditures. Under the Court's reasoning, contributions given directly to candidates may be limited, but independent spending may not be. Given the courting by candidates of big independent spenders since the *Citizens United* decision, it's clear this distinction makes little sense. Massive contributions and massive independent expenditures each buy undue influence.

Third, the Court has failed to recognize that political equality is a compelling interest that justifies reasonable limits on massive political spending. Rather than interpreting the First Amendment as assuring everyone a reasonable opportunity to be heard, the Court (and the National ACLU) has turned the First Amendment on its head by guaranteeing the wealthy an expensive set of stereo speakers and leaving the average citizen with a bad case of laryngitis. Most Americans would find it preposterous to allot more time in a debate to the speaker with the most money. Yet, that is precisely how our campaign finance system functions today.

Adoption of the National ACLU's misreading of the First Amendment by the Supreme Court's five justice majority has made things much worse in the last few years. *Citizens United* has enabled big corporate money to run amok in our political system. *McCutcheon* struck down the generous limit of $123,200 that an individual was permitted to contribute during a given election cycle.[11] After *Citizens United* and *McCutcheon*, the sky's the limit for supremely wealthy folks on the hunt for political influence. New joint fundraising committees have already emerged to channel money to candidates even more efficiently.[12]

Most disturbing of all is that the current Supreme Court applauds the undue influence that big money can buy. As the Court majority said in *McCutcheon*, "Ingratiation and access . . . are not corruption. They embody a central feature of democracy—that constituents support candidates who share their beliefs and interests, and candidates who are elected can be expected to be responsive to those concerns."[13] That is, of course true. But it is supposed to apply to all of us, not merely the supremely wealthy. Taken to its logical extreme, as the Court seems poised to do, the voices of ordinary Americans will be drowned out entirely by their rich "neighbors" who live nearby in the gated community.

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[10] Buckley v. Valeo, 424 U.S. 1 (1976).
[11] *McCutcheon*, 134 S. Ct. 1434.
[12] *See, e.g.*, Eliza Newlin Carney, *Costly Midterms Fuel Hundreds of Joint Fundraising Committees*, ROLL CALL (May 28, 2014, 1:59 PM), http://blogs.rollcall.com/beltway-insiders/fundraising-campaign-committee-kay-hagan-mitch-mcconnell/; Byron Tau, *GOP creates new fundraising group after McCutcheon ruling*, POLITICO (Apr. 11, 2014, 11:12 AM), http://www.politico.com/story/2014/04/gop-fundraising-mccutcheon-105627.html.
[13] *McCutcheon*, 134 S. Ct. at 1441 (internal citation and quotation marks omitted).

We share a profound respect for the ACLU's magnificent efforts to defend constitutional rights in this country since its founding almost a century ago. We are proud to have devoted significant portions of our careers to the organization's work, and look forward to continuing to support the ACLU in the future. On this important issue, however, we believe the ACLU is mistaken. The time has come for a change in the Supreme Court's campaign finance jurisprudence. We believe that overturning many of the Court's narrow 5-4 campaign finance precedents and implementing generous, content neutral political spending limits is the best way to fulfill the promise of James Madison's First Amendment as democracy's best friend.

Sincerely,

Norman Dorsen, Frederick I. and Grace A. Stokes Professor of Law at NYU School of Law; ACLU President, 1976-91, and General Counsel, 1969-76

Aryeh Neier, President Emeritus of the Open Society Foundations; ACLU Executive Director, 1970-78; New York Civil Liberties Union Executive Director, 1965-70

Burt Neuborne, Inez Milholland Professor of Civil Liberties at NYU School of Law; ACLU National Legal Director, 1981-86

John Powell, Director of the Haas Institute for a Fair and Inclusive Society and The Robert D. Haas Chancellor's Chair in Equity and Inclusion at University of California, Berkeley; ACLU National Legal Director, 1987-93

John Shattuck, President and Rector of Central European University; Executive Director of the ACLU Washington Office, 1976-84

Mel Wulf, ACLU National Legal Director, 1962-77

*Organizations Listed for Identification Purposes Only