SHAREHOLDERS UNITED?

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INTRODUCTION

Securities regulation has a way of crossing into other lanes. *What* public companies do is substantive regulation.[1] *How* they govern themselves while doing it—or more importantly, how they disclose it—is securities regulation.[2] So it is no surprise that the perennial concern over regulating money in politics should also become a question of federal *securities* regulation. The Shareholders United Act (the "Act")—passed by the House of Representatives as part of House Bill 1, an early, major piece of legislation in the 116th Congress—does just that. The Act would require that before engaging in political spending, public companies poll shareholders on how they want corporate political dollars to be spent, or not spent. It further bars public companies from political spending if they are majority owned by certain nonpartisan investors.

The Act offers an answer to the question *as a matter of corporate democracy, what do shareholders need to know about how managers are spending resources on political advocacy*? If enacted, however, it is unlikely to vindicate this or other shareholder interests. This Essay highlights legal and pragmatic issues with the Act. The core assumption it makes—that corporate political spending "speaks for" shareholders who need protecting—as well as the shareholder-polling mechanism it

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1 A mine operator, for example, must meet health and safety regulations. *See generally* 29 C.F.R. §§ 2700.1–2706.999 (2018) (mine health and safety regulations administered by the Federal Mine Safety and Health Review Commission). But what it tells, or does not tell, investors about its compliance with these regulations is governed by federal securities law. *See* 17 C.F.R. § 229.104 (2018) (requiring public companies to disclose health and safety information about mines they operate).

2 Matt Levine, a financial and legal commentator, has taken this point to almost absurd ends with his aphorism "Everything is securities fraud." *See, e.g.*, Matt Levine, *Exxon Is in Trouble over Climate Change*, BLOOMBERG (Oct. 25, 2018), https://www.bloomberg.com/opinion/articles/2018-10-25/exxon-is-in-trouble-over-climate-change; Matt Levine, *Securities Fraud Was Lurking in the Orca Pool*, BLOOMBERG (Sept. 21, 2018), https://www.bloomberg.com/opinion/articles/2018-09-21/seaworld-s-strange-securities-fraud.

would require, risk running headlong into constitutional injunction. More, the polling mechanism it would require is impractical and inconsistent with the disclosure-based U.S. securities regulatory framework. As a better approach, if we are to address corporate political spending through securities regulation, the way forward is through the existing disclosure framework. Using this framework will not only help ensure that a securities-law response to corporate political spending survives constitutional challenge, but it will also be more effective at empowering shareholders to police political spending.

I.

The For the People Act of 2019 ("House Bill 1") is omnibus legislation designed to bolster voting rights, reform campaign finance, and impose new ethics rules on members of Congress.[3] Just prior to its passage in the House of Representatives, Speaker Nancy Pelosi hailed House Bill 1 as a step toward "restor[ing] the people's faith that government works in the public's interest, the people's interest, not the special interests."[4] Among its provisions, House Bill 1 expands access to voter registration and early and mail voting, creates a small-dollar matching program for congressional races, requires members of Congress to repay the government for employment-discrimination settlements, and further defines conflict-of-interest rules for members of Congress and their staffs.[5]

As legislation focused on voting rights, campaign finance, and ethics reform, it might seem odd at first glance that House Bill 1 also touches on a seemingly unrelated policy area: federal securities regulation.[6] But, just as securities law has been deployed to address broader public concerns—like civil war in the Democratic Republic of the Congo[7] and income inequality[8]— House Bill 1 looks to securities

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3 For the People Act of 2019, H.R. 1, 116th Cong. (as passed by House of Representatives, Mar. 8, 2019).

4 Press Release, Nancy Pelosi, Speaker, House of Representatives, Pelosi Remarks at Press Event Ahead of Passage of H.R. 1, The For the People Act (Mar. 8, 2019), https://www.speaker.gov/newsroom/3819-2. The prospects for near-term enactment of House Bill 1 are doubtful, however, to say the least. *See* Opinion, *Only One Roadblock on the Road to Reform: Mitch McConnell*, N.Y. TIMES (Mar. 8, 2019), https://www.nytimes.com/2019/03/08/opinion/mcconnell-hr1-democrats-ethics-voting-rights.html (describing Senate Majority Leader Mitch McConnell's strident opposition to House Bill 1 and noting that in the Senate, he "get[s] to decide what we vote on.").

5 *See generally* H.R. 1.

6 *Id.* § 4502(a) (amending the Securities Exchange Act of 1934, 15 U.S.C. §§ 78a–78qq (2012) (the "Exchange Act") to insert a new section, Section 10E). For the full text of the Shareholders United Act, see the Appendix to this Essay.

7 15 U.S.C. § 78m(p)(1)(A) (2012) (requiring the Securities and Exchange Commission (SEC) to promulgate rules mandating the investigation and disclosure of the use of conflict minerals in public-company supply chains). *But see* Nat'l Ass'n of Mfrs. v. SEC, 800 F.3d 518 (D.C. Cir. 2015) (holding that mandating conflict-minerals disclosure violates the First Amendment).

8 *See* Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111-203, § 953(b), 124 Stat. 1376, 1904 (2010) (requiring the SEC to promulgate rules mandating the disclosure of the pay ratio between a public company's chief executive officer and its median-compensated employee).

law to curb "big" and "dark" money in politics. During floor debate on House Bill 1, Representative Jamie Raskin of Maryland offered Amendment 56, the Shareholders United Act.[9] In support of the amendment, Raskin raised this question:

> For decades, the law prevented business corporations from engaging in campaign spending. But the Supreme Court destroyed that prohibition with its watershed decision in 2010, in the Citizens United case, which, for the first time, defined for-profit business corporations as political membership associations and, thereby, unleashed billions of dollars in corporate treasury money into the political system.
>
> Since then, corporations have taken advantage of this newfound constitutional identity and political freedom by investing hundreds of millions of dollars, perhaps billions, in campaign expenditures and the torrent of "dark money" now coursing through the political system.
>
> But who are these corporations speaking for?[10]

As Raskin explained on the floor, the Supreme Court's decision in *Citizens United v. FEC*[11] unleashed corporations to engage in political spending based on their possession of First Amendment free-speech rights. Apart from the merits of that holding, for Raskin that raises a troubling question: If corporations are exercising First Amendment rights to spend in the political theater, for *whom* do they speak? In his view, the answer seems clear: corporate political spending is speech on behalf of shareholders, whether they like it or not.[12] And although in *Citizens United* the Court observed that public disclosure would make management accountable for its political spending as a matter of shareholder democracy,[13] Raskin noted that those disclosures mostly have not emerged.[14] The Act, according to Raskin, would thus "begin to change the secrecy, darkness, and oligarchical implications of the current system" by "requir[ing] publicly-traded corporations to get shareholder buy-in on the front end before their money is channeled into political campaigns."[15]

9 165 CONG. REC. H2482 (daily ed. Mar. 6, 2019).

10 *Id.* (statement of Rep. Raskin).

11 558 U.S. 310 (2010).

12 *See* 165 CONG. REC. H2482 (daily ed. Mar. 6, 2019) (statement of Rep. Raskin) ("I know that I would be mad as hell to learn that my retirement money was being spent, being given away to Donald Trump and the RNC; just as I assume my GOP friends don't want their pension dollars going to the DNC or to help ELIZABETH WARREN'S Presidential campaign."); *see also id.* (describing corporate political spending as the "CEO . . . *speaking for* institutional shareholders" (emphasis added)).

13 *See Citizens United*, 558 U.S. at 370 ("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.").

14 165 CONG. REC. H2482 (daily ed. Mar. 6, 2019) (statement of Rep. Raskin).

15 *Id.* This Essay takes the Shareholders United Act on Raskin's terms and so assumes that corporate political spending on some level represents or "speaks for" shareholders. The idea that a corporation's spending "speaks for" shareholders, rather than for itself, is not, however, a necessary conclusion of *Citizens United*. *See* Anne Tucker, *Flawed Assumptions: A Corporate Law Analysis of Free Speech and Corporate Personhood in* Citizens United, 61 CASE W. RES. L. REV. 497, 519–20 (2011) ("In reaching its conclusion to overturn [the] ban on independent corporate campaign expenditures, the Court employed both the entity theory, reasoning that corporate political speech has the same value as individual speech in the marketplace of ideas, and

In brief, the Act prohibits publicly traded companies from engaging in political spending[16] without first polling their shareholders on how that spending should be done and where it should be directed.[17] The Act imposes no requirements on what public companies are to do once they have gathered this information. They are not required, for example, to follow their shareholders' preferences in how they engage in political spending, explain why they are not following shareholder preferences, or even disclose anything about that spending. The Act would, however, bar public-company political spending when a majority of outstanding equity securities is "held by persons who are prohibited from expressing partisan or political preferences by law, contract, or the requirement to meet a fiduciary duty."[18]

The Act addresses an unrealized promise of the *Citizens United* majority: if companies engage in political spending, their shareholders will know about it and discipline management as a matter of corporate democracy if it is inappropriate. Since *Citizens United*, there has been a "cottage industry" of proposed corporate and securities reforms to rein in its effects.[19] By mere virtue of being passed by a house of Congress, the Act has made the most progress toward becoming law of any such proposal. It has thus set the table stakes. But corporate- and election-reform advocates should take caution before embracing the Act because it is highly vulnerable to constitutional challenge. More, the policy it offers is inconsistent with the framework of U.S. securities law, and would be potentially unworkable to implement and counterproductive to its goals. With its inclusion in House Bill 1, the Act is part of the public agenda and debate around the role of money in politics. Thus it is critical to lay out and consider its potential deficiencies now in view of the goal of allowing shareholders to hold management accountable for corporate political spending.

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the aggregate-rights theory, reasoning that corporations are protected associations." (footnote omitted)). In general, what a company spends money on is a business judgment for the entity, not an aggregated decision on behalf of shareholders. *See* Lucian A. Bebchuk & Robert J. Jackson, Jr., *Corporate Political Speech: Who Decides?*, 124 HARV. L. REV. 83, 83–84 (2010) (observing that under existing law, political spending is an ordinary business decision, while arguing that special rules should apply for such speech). A company that buys a firearm subsidiary, for example, does so for profit-driven reasons, not to express the values of shareholders (some of whom might passionately support gun control); this point holds if that company then spends on profirearm political messaging come election time in hopes of bolstering its business.

16 The Act defines political spending as disbursements for independent campaign expenditures, electioneering communications, communications "which expressly advocate[] the election or defeat of a clearly identified candidate for election for Federal office," communications "which refer[] to a clearly identified candidate for election for Federal office and which promote[] or support a candidate for that office," or "[a]ny other disbursement which is made for the purpose of influencing the outcome of an election for a public office." For the People Act of 2019, H.R. 1, 116th Cong. § 4502(a) (as passed by House of Representatives Mar. 8, 2019) (adding section 10E(c)(1) to the Exchange Act).

17 The Act is short, and the Appendix to this Essay provides its full text.

18 H.R. 1 § 4502(a) (adding section 10E(a)(2) to the Exchange Act).

19 *See* Leo E. Strine, Jr. & Nicholas Walter, *Conservative Collision Course?: The Tension Between Conservative Corporate Law Theory and* Citizens United, 100 CORNELL L. REV. 335, 377–78 (2015).

In this Essay, I explore why the Act doesn't work as a matter of law and pragmatism. In the alternative, I propose that a securities-regulation response to corporate political spending must first be based in *disclosure*, and if stronger medicine is needed, then in other existing securities-regulation tools.[20]

II.

The Act has two critical flaws: it would be held unconstitutional—at least under current precedent—and it is pragmatically unworkable.[21]

A. Constitutional Issues

The Act is not the first legislation related to corporate political spending to be justified on the shareholder-protection grounds of "preventing the use of corporate resources in furtherance of views with which some shareholders may disagree."[22] But as with past uses of this justification, the Act is not well aligned with that purpose[23] and instead serves to prevent public companies from exercising the First Amendment liberties recognized in *Citizens United*.

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20 Although this Essay focuses on using federal securities regulation to police corporate political spending, states also have the opportunity to legislate in this area with respect to the governance rules in their corporate statutes. Investors can also take the initiative of sponsoring proxy proposals for new intracorporate procedures and rules around political spending. *See* Leo E. Strine, Jr., *Fiduciary Blind Spot: The Failure of Institutional Investors to Prevent the Illegitimate Use of Working Americans' Savings for Corporate Political Spending* (Univ. Pa. Law Sch. Inst. for Law & Econ., Research Paper No. 19-03, 2019), https://ssrn.com/abstract=3304611 (urging major institutional investors to support shareholder proposals to impose new internal rules on corporate spending).

21 The Essay lays out the Act's chief flaws, but it is not an exhaustive accounting. For example, the polling feature could provide an indirect means for foreign nationals to direct political spending in the United States. *Citizens United*—and the D.C. Circuit's subsequent expansion of *Citizens United*, *SpeechNow*—did not directly address political spending by foreign nationals. *Cf.* Citizens United v. FEC, 558 U.S. 310 (2010); SpeechNow.org v. FEC, 599 F.3d 686 (D.C. Cir. 2010). Federal law, however, continues to bar political spending by foreign nationals, including direct contributions to candidates *and* independent expenditures. 52 U.S.C. § 30121(a) (Supp. V 2018); 11 C.F.R. § 110.20 (2018). These restrictions continue to be enforced. *See, e.g.*, Right to Rise USA, MUR 7122 (Fed. Election Comm'n Mar. 6, 2019) (conciliation agreement), https://www.fec.gov/files/legal/murs/7122/19044461648.pdf; Am. Pac. Int'l Capital, Inc., MUR 7122 (Fed. Election Comm'n Dec. 13, 2018) (conciliation agreement), https://www.fec.gov/files/legal/murs/7122/19044461675.pdf (imposing fines on Right to Rise USA, a political committee supporting former presidential candidate Jeb Bush, and Chinese nationals, majority owners of American Pacific International Capital, Inc., for violating the foreign-contribution ban).

22 *See* First Nat'l Bank of Bos. v. Bellotti, 435 U.S. 765, 792–93 (1978) (invalidating a Massachusetts statute barring corporations from making expenditures for referenda unrelated to their own business or property).

23 *Cf. id.* at 793; *see also id.* at 794 n.34 (questioning why "the dissenting shareholder's wishes are entitled to such greater solicitude in this context than in many others where equally important and controversial corporate decisions are made by management or by a predetermined percentage of the shareholders").

Strikingly, the Act's prohibition on public spending by corporations that are majority owned by "persons who are prohibited from expressing partisan or political preferences by law, contract, or the requirement to meet a fiduciary duty"[24] would serve effectively to ban any political spending by public companies. This "nonpartisan shareholder" description is vague, but it in general sweeps up governmental bodies, pension funds, and nonprofits that own shares, as well as mutual and other investment funds.[25] In his floor statement in support of the Act, Raskin explained that "institutional investors, like pension funds, States, and cities, mutual funds, universities or charities, [] are categorically forbidden from expressing partisan political preferences."[26] In Raskin's view, corporate political spending paradoxically expresses political views on behalf of shareholders that are forbidden from speaking themselves on those issues.[27] The nonpartisan shareholder minority requirement ("minority nonpartisan requirement") thus effectively prohibits any public company that is majority owned by institutional investors from engaging in political spending. That is no small thing: institutional investors own a supermajority of U.S. public equities.[28] In other words, the Act would bar most public companies from engaging in political spending at all.[29]

Whether this implication of the Act is unintended is uncertain. In *Citizens United*, however, the Supreme Court expressly rejected this kind of shareholder-protection reasoning:

> The Government contends further that corporate independent expenditures can be limited because of its interest in protecting dissenting shareholders from being compelled to fund corporate political speech. This asserted interest . . . would allow the Government to ban the political speech even of media

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24 For the People Act of 2019, H.R. 1, 116th Cong. § 4502(a) (as passed by House of Representatives Mar. 8, 2019) (adding section 10E(a)(2) to the Exchange Act).

25 It is not entirely clear which investors will be prohibited by law, contract, or fiduciary duty from expressing partisan views or preferences. The Act offers no mechanism for assessing whether a shareholder is nonpartisan (e.g., by allowing public companies to rely on shareholders' self-assessment or self-certification of status). This lack of clarity over who is a nonpartisan shareholder and how that status may be determined could itself complicate compliance with the Act.

26 165 CONG. REC. H2482 (daily ed. Mar. 6, 2019) (statement of Rep. Jamie Raskin).

27 *Id.*

28 *See* Charles McGrath, *80% of Equity Market Cap Held by Institutions*, PENSIONS & INV. (Apr. 25, 2017), https://www.pionline.com/article/20170425/INTERACTIVE/170429926/80-of-equity-market-cap-held-by-institutions.

29 The provision also sets an arbitrary majority-shareholding cutoff for triggering its total ban on corporate political spending. Raskin explained that this provision aims to ensure that shareholders who cannot speak on political issues are not indirectly "spoken for." *See supra* note 26 and accompanying text. Yet in a company with nonpartisan shareholders in the minority, there is no limitation on the company's ability to engage in political spending. For example, if nonpartisan shareholders own 49.99% of the outstanding equity securities, then the company would be free to engage in political spending. Under Raskin's reasoning, $49.99 of each one hundred dollars in political spending would be attributable to the nonpartisan shareholders. If they owned 50.01% of the company, however, then the company would be barred from all political spending. Raskin makes a categorical argument that it is inappropriate for corporate resources to be used for political purposes if nonpartisan shareholders have an interest in them. But in this example, 0.02%, or two cents, is all that separates free spending and total prohibition.

> corporations . . . . The First Amendment does not allow that power. There is, furthermore, little evidence of abuse that cannot be corrected by shareholders "through the procedures of corporate democracy."[30]

Even more striking is the Act's definition of political spending.[31] It incorporates spending definitions from the Federal Election Campaign Act of 1971 (the "FEC Act"), a starting point that raises little concern as it goes.[32] But then it steps further with a catchall that covers "[a]ny other disbursement which is made for the purpose of influencing the outcome of an election for a public office."[33] The breadth and vagueness of this catchall are hard to miss. The trouble with its inclusion becomes especially clear when thinking about publicly held media companies. The press, particularly newspapers, regularly endorse candidates for office. This is a well-established tradition[34] that has long been recognized as enjoying First Amendment protection.[35] But because political endorsements involve spending—the salaries of the editorial staff, the cost of ink or electricity to publish the endorsement, etc.—under the Act a newspaper would be barred from making endorsements if it has the wrong shareholders (i.e., it is majority owned by nonpartisan shareholders) or fails to follow the requirement to assess shareholder views on whom it should endorse.[36] Beyond this endorsement context—in which outlets spend corporate resources expressly to advocate the election or defeat of candidates—nonopinion reporting could also be alleged to be "for the purpose of influencing the outcome of an election for a public office."[37] This scenario opens

30 Citizens United v. FEC, 558 U.S. 310, 361–62 (2010) (quoting First Nat'l Bank of Bos. v. Bellotti, 435 U.S. 765, 794 (1978)).

31 *See* 165 CONG. REC. H2483 (daily ed. Mar. 6, 2019) (statement of Rep. Rodney Davis) ("I am opposed to this amendment because it is vague and impractical, and would, again, infringe upon free speech. It is not clear what speech is covered under this amendment and that is, perhaps, the worst part.").

32 *See* For the People Act of 2019, H.R. 1, 116th Cong. § 4502(a) (as passed by House of Representatives Mar. 8, 2019) (incorporating spending definitions in the FEC Act by reference).

33 *Id.* (adding section 10E(c)(1)(D) to the Exchange Act).

34 *See* Maxwell McCombs, *Editorial Endorsements: A Study of Influence*, 44 JOURNALISM Q. 545 (1967) (discussing the history of newspaper endorsements as "overt attempts at influencing the behavior of the audience").

35 *See* Grosjean v. Am. Press Co., 297 U.S. 233 (1936) (holding that publishing businesses enjoy First Amendment press freedoms).

36 Raskin seems to have recognized this problem with applying the Act to the press. The Act has its origins in another bill—the Citizens' United Shareholder Democracy and Protection Act—that he proposed as a Maryland state senator. S. 809, 2014 Leg., 434th Sess. (Md. 2014). Unlike the Shareholders United Act, the Maryland bill contained a carve-out for media outlets' content. *Id.*

37 For example, a news story released just before an election about a scandal involving a candidate could influence voter behavior. Nonmedia companies could similarly struggle with allegations that business decisions are intended to influence the outcome of an election. For example, a major employer that announces employee bonuses just before a tax-cutting incumbent's reelection, or a retailer that announces it will no longer sell guns at a time that gun control is a hot electoral issue, might be accused of attempting to influence an election without having first complied with the Shareholders United Act.

the door to the sort of governmental policing of speech that the Supreme Court has held the First Amendment forbids.[38]

As a straightforward application of *Citizens United*, once challenged, the Act would be enjoined from enforcement. Regardless one's views on *Citizens United*'s merits, the project of increasing accountability around, and decreasing the role of money in, politics can be little advanced through unenforceable laws. More, setting aside the constitutional challenges of the Shareholder United Act's polling scheme and minority nonpartisan requirement, the overbreadth of its political-spending definition raises separate constitutional concerns. The chilling effect for a free press is clear enough; public companies in other industries will face similar effects when they speak or take stands on issues with electoral valence, including economic and environmental policy, civil and workers' rights, criminal justice, and so on.

B. Regulatory Framework and Other Pragmatic Issues

Among other things, federal securities law regulates the interstate sale of securities, the operation of securities exchanges, and the solicitation of proxy votes from shareholders of public companies.[39] From its beginning, this system focused on *disclosure* as its primary regulatory tool, which its intellectual forebears believed would "encourage corporate managers to exercise their power with a greater sense of fiduciary obligation, both toward shareholders and toward the public."[40] And to this day, it has maintained that disclosure-based framework.[41] Even in instances where Congress has imposed new governance requirements that issuers seek investor input—such as say-on-pay votes—it has done so in the context of disclosing information and allowing shareholders a public expression of their views.[42] Where it has sought to require substantive governance changes, it has done so indirectly by requiring stock exchanges—as private regulators of issuers whose securities they list—to adopt and enforce new listing rules (for example, the Sarbanes-Oxley Act's reforms around director independence and board-committee structure).[43] The Act, however, goes beyond these tools to create a novel shareholder-polling mechanism.

The Act can be viewed as a cautionary example about designing securities-regulation approaches to substantive reforms. Existing frameworks and tools offer sound solutions, legally and pragmatically, for doing so. Mandatory disclosure can enable shareholders to discipline management through voting, selling, suing, or, in

38 *See* Citizens United v. FEC, 558 U.S. 310, 361 (2010).

39 *See generally* Securities Act of 1933, 15 U.S.C. § 77a (2012); *id.* § 78f (national securities exchanges); *id.* § 78n (solicitation of proxies).

40 Cynthia A. Williams, *The Securities and Exchange Commission and Corporate Social Transparency*, 112 HARV. L. REV. 1197, 1211–12 (1999).

41 *See* THOMAS LEE HAZEN, THE LAW OF SECURITIES REGULATION 18 (7th ed. 2017) ("The federal legislation . . . did not (and, as amended, still does not) establish a system of merit regulation. . . . The focus on disclosure was based on the conclusion that sunlight is the best disinfectant.").

42 *See* 15 U.S.C. § 78n-1 (2012) (shareholder approval of executive compensation).

43 *See, e.g.*, *id.* § 78j-3 (directing the SEC to require stock exchanges to require that listed companies have only independent directors on their compensation committees).

some cases, proposing that governance reforms be added to the proxy ballot.[44] When stronger medicine is needed, Congress can mandate disclosure-enabled advisory votes as part of the proxy rules, or it can require stock exchanges to add governance reforms to their listing standards. This framework does yeoman's work in its core investor-protection and capital-formation roles, in addition to helping enforce compliance with substantive regulations that public companies operate under. It is already fit for the purpose of aiding substantive regulatory objectives. This point counsels against adding novel mechanisms to the securities-regulation framework absent evidence that old tools will not effectively address new areas of concern.[45]

Within the U.S. securities-regulation framework, designing and implementing a shareholder-polling system would be onerous, and perhaps even infeasible. Other than including political-spending polling in proxy materials, a public company would struggle to develop a reliable method for identifying its shareholders, determining how many shares they own, and getting them to respond to a poll. Public companies generally do not have a full view of who their shareholders are or how many shares they own. Although some insider and large shareholders must disclose their positions publicly,[46] most shares are held in "street name": the company's share registry reflects only the names of custodians, not individual beneficial owners/shareholders.[47] Brokerages forward proxy materials to their customers when it comes voting time, but they otherwise view a company's shareholders as *their customers* whose identities they consider proprietary. With this opacity around just who their shareholders are, public companies will struggle to create an effective polling program without using the proxy process.

But including a political-spending poll in proxy materials is not a simple, or even feasible, solution. The process of preparing, sending, and tracking proxy materials requires significant personnel time and expense.[48] Making political

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44 *See* J.A. LIVINGSTON, THE AMERICAN STOCKHOLDER 40–41 (1958) (identifying voting, selling, and suing as shareholders' primary powers); *see also* Strine, *supra* note 20, at 63 (urging large institutional investors to support shareholders proposals on corporate political spending).

45 *But see* Strine & Walter, *supra* note 19 ("Because *Citizens United* unleashes corporations to act directly on the election process and constitutionalizes the issue in a manner that disables many legislative policy options—and because many investors do not support the use of corporate funds for that purpose—*Citizens United* has stimulated a new cottage industry in suggesting corporate and securities law changes that will enable stockholders to directly constrain boards from engaging in political contributions.").

46 *See* 15 U.S.C. § 78p (2012) (requiring disclosure of securities holdings by a company's directors, officers, and shareholders of more than ten percent).

47 Marcel Kahan & Edward Rock, *The Hanging Chads of Corporate Voting*, 96 GEO. L.J. 1227, 1237–38 (2008) ("By now, most shares of publicly held corporations are held in 'street name' through custodians such as banks and brokerage firms, with the custodians, in turn, holding the shares through accounts at Depository Trust Company (DTC), a depository institution and the record owner registered on the books of the company.").

48 *See* Maxwell Murphy, *Mailing Proxy Statements Costs Companies Big Bucks*, WALL ST. J. (Feb. 21, 2012), https://blogs.wsj.com/cfo/2012/02/21/mailing-proxy-statements-costs-companies-big-bucks ("The Big Number: 425[.] That's the cost in millions of dollars for more

polling part of these materials would add incremental, but not insignificant, cost.[49] More, shareholder nonvoting is a recurring issue when it comes to proxies, which can affect voting quorums.[50] Including political-spending polling in proxy materials could lead to higher levels of nonvoting due to longer ballots or shareholders' reluctance to express political views, which they may hold as personal, sensitive, or even religiously objectionable.[51]

These proxy issues point to another concern: if the proxy process is the only feasible way to comply with the Act, disputes over corporate political spending could become disruptive to a company's governance and investor relations. Management might feel forced to stop all corporate political spending to avoid controversy in the high-stakes context of proxy voting and shareholder meetings. Critics of corporate political spending might find this to be a satisfying side effect, but imposing such a dilemma would bolster claims that the Act impermissibly infringes on First Amendment rights recognized by *Citizens United*.

Beyond practical considerations, like how to set up and run a polling system, the Act undermines its own policy goals. Take the minority nonpartisan requirement, for instance. Even for companies that meet the requirement, the Act may not give shareholders meaningful input into corporate political spending. That is because it requires no disclosure about the company's political spending or any explanation or disclosure around how it uses the inputs from shareholder polling. The Act is premised on the idea that it is wrong to "speak for" shareholders in ways they would not choose to speak themselves. This is the sin of not-asking. But paradoxically, the solution the Act offers—polling—exacerbates the problem by allowing companies to "speak for" shareholders in ways that are contrary to their expressed views. This is the perhaps more egregious sin of asking-and-then-disregarding.

No doubt, nonbinding shareholder inputs can have an impact on management behavior. For example, say-on-pay—which allows shareholders an advisory proxy vote on executive compensation—can have a disciplining effect on management.[52] Although shareholder disapproval of executive compensation does not bind a board

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than 12,000 U.S. companies to print and mail proxy statements in fiscal 2011, according to Broadridge Financial Solutions.").

49 *Cf.* Letter of Barbara Novick, Vice Chairman, BlackRock, to Brent J. Fields, Sec'y, SEC 3 (Nov. 16, 2018), https://www.blackrock.com/corporate/literature/publication/sec-roundtable-proxy-process-111618.pdf (estimating that the average shareholder proposal costs an issuer $87,000).

50 *See* Andrew R. Brownstein & Igor Kirman, *Can a Board Say No When Shareholders Say Yes? Responding to Majority Vote Resolutions*, 60 BUS. LAW. 23, 33 (2004) (noting that a majority of states follow the Revised Model Business Corporation Act, in which broker non-votes do not count toward a quorum).

51 Members of the Bahá'í faith, for example, do not partake in politics. *See* ABDU'L-BAHÁ, SELECTIONS FROM THE WRITINGS OF ABDU'L-BAHÁ 132 (2010) ("O handmaid of the Lord! Speak thou no word of politics.").

52 *See* Stephani A. Mason et al., *Say-on-Pay: Is Anybody Listening?*, 20 MULTINATIONAL FIN. J. 273, 307 (2016) (citing studies showing that "votes do affect pay-performance sensitivity; CEOs of firms with negative votes face a greater penalty for poor performance than other CEOs").

to alter its plan, it can chasten management, particularly members of the compensation committee.[53] And nonresponsiveness to shareholder views can factor in the next director election. Yet unlike the Act, say-on-pay provides the necessary disclosures for shareholders to hold management accountable via voting, selling shares, or bringing shareholder-derivative suits.[54] Shareholders receive qualitative and quantitative disclosure on executive compensation *before* having their say on pay, and the results of the vote are then publicly released on a Form 8-K.[55] In contrast, under the Act, shareholders need not be told how the company spends (or plans to spend) political dollars, and they will not necessarily learn what preferences shareholders collectively expressed to the company. Despite being a reaction against "secrecy" and unaccountability in corporate political spending,[56] the Act offers a solution in which secrecy could hinder accountability.[57]

Even if there were some enforcement mechanism in the Act—for example, requiring companies to follow the wishes expressed through shareholder polling—the solution it offers runs counter to its premise: that companies should not "speak for" their shareholders in ways that the shareholders would not themselves choose. As Raskin observed, some people who own an economic interest in a public company may be supporters of President Donald Trump and the Republican National Committee ("RNC"), others of Senator Elizabeth Warren's presidential campaign.[58] One group, he aptly noted, would be upset to learn that "its money" was being used to support the other cause. Accepting that premise, the Act would not solve the problem. After all, if RNC supporters own a majority of the company's shares, they could direct corporate political spending to that cause. Outvoted, the minority of Elizabeth Warren-backing shareholders would thus be forced "to fund" an RNC-backed cause in proportion to their shareholding. That result takes it all back to the beginning. Or, as Representative Rodney Davis warned on the floor, the Act would "turn businesses and corporations into partisan political entities and shareholder meetings and votes into political conventions."[59]

53 *See, e.g.*, INSTITUTIONAL SHAREHOLDER SERVICES, UNITED STATES PROXY VOTING GUIDELINES 13 (2018) (recommending case-by-case voting on compensation-committee members when say-on-pay votes receive less than seventy percent shareholder support).

54 *See supra* note 44 and accompanying text (discussing shareholder governance powers); *cf.* First Nat'l Bank of Bos. v. Bellotti, 435 U.S. 765, 795 (1978) ("[M]inority shareholders generally have access to the judicial remedy of a derivative suit to challenge corporate disbursements alleged to have been made for improper corporate purposes or merely to further the personal interests of management.").

55 *See* 17 C.F.R. § 229.402 (2018) (annual executive compensation disclosure); SEC. & EXCH. COMM'N, SEC 873 (05-19), FORM 8-K, INSTRUCTION 1 TO ITEM 5.07 (requiring disclosure of voting results within four business days of the results being known).

56 165 CONG. REC. H2482 (daily ed. Mar. 6, 2019) (statement of Rep. Raskin).

57 This point assumes that, hypothetically, a company could create shareholder-polling procedures that do not include the proxy process. If the polling were part of the proxy process, there would be disclosure requirements around the voting items and results.

58 165 CONG. REC. H2482 (daily ed. Mar. 6, 2019) (statement of Rep. Raskin).

59 *Id.* (statement of Rep. Rodney Davis).

III.

The Act is unlikely to survive legal challenge or to achieve its goal of giving shareholders meaningful input into corporate political spending. But there are compelling reasons why shareholders may need more disclosure and input into corporate political spending. Proposals for mandating new public-company disclosure are often met with skepticism: Is new disclosure aimed at enhancing corporate democracy and shareholder protection, or is it just securities regulation veering into unrelated, "societal" lanes?[60] But there is a strong case that political-spending disclosure would fall into the former category.[61] Examples of the benefits of greater transparency around spending include allowing shareholders to monitor market risk, mitigate agency costs, and assess the quality of business results:[62]

A. Monitoring Market Risk

To monitor market risk, shareholders will want to know if management is entangling the company with candidates or causes that could lead to backlash from customers, employees, or suppliers, thus creating financial and operational risk.[63] In this scenario, political spending that is financially immaterial could nevertheless result in material impacts on business results and the company's goodwill. Beyond enabling shareholders to monitor the risks management is taking, public disclosure could also have ex ante disciplining effects on who or what the company supports, thereby reducing the reputational risks associated with political spending.[64]

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60 *See, e.g.*, Mary Jo White, Chair, Sec. & Exch. Comm'n, The Importance of Independence, 14th Annual A.A. Sommer, Jr. Corporate Securities and Financial Law Lecture, Fordham Law School (Oct. 3, 2013) ("Seeking to improve safety in mines . . . or to end . . . atrocities in the Democratic Republic of the Congo are compelling objectives . . . . But . . . I must question, as a policy matter, using the federal securities laws and the SEC's powers of mandatory disclosure to accomplish these goals.").

61 *See* Hillary A. Sale, *Disclosure's Purpose*, 107 GEO. L.J. 1045, 1065–66 (2019) (suggesting that a public entity's "publicness" has substantive effects on how an issuer behaves beyond its internal context); *see also* Ann M. Lipton, *Mixed Company: The Audience for Sustainability Disclosures*, 107 GEO. L.J. ONLINE 81, 84 (2018) (describing the sustainability-disclosure movement's view that investors "*care about things other than* financial returns" as elements of "publicness," the "societal demand that corporate managers make decisions with due concern for their impact on the country as a whole").

62 These benefits are most salient to shareholders who want to ensure management is maximizing long-term profits. Other commentators have written about external interests in disclosure, including expressive and divergent economic interests. *See* Lucian A. Bebchuk & Robert J. Jackson, Jr., *Corporate Political Speech: Who Decides?*, 124 HARV. L. REV. 83, 91 (2010) (offering the example of management that engages in political spending to oppose proshareholder reforms that are favored by shareholders).

63 *See, e.g.*, Brody Mullins & Ann Zimmerman, *Target Discovers Downside to Political Contributions*, WALL ST. J., Aug. 7, 2010, at A2 (discussing customer backlash against Target Corporation for indirectly supporting a gubernatorial candidate who opposed same-sex marriage).

64 *See* Citizens United v. FEC, 558 U.S. 310, 370 (2010) ("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.").

B. Mitigating Agency Costs

To mitigate agency costs, shareholders will want to assess whether management is merely converting corporate resources to support personal political objectives without regard for the corporate interest. Here, not only would disclosure of political expenditures be in order, but some discussion about management's political-spending strategy would allow shareholders to assess the reasonableness of that spending.

C. Assessing Sustainability of Results

To the extent that corporate political giving allows companies to seek rent, ingratiate themselves with elected officials, or recognize other opportunities, having a sense of these expenditures will allow shareholders to assess the long-term sustainability of the resulting earnings. If a company's fortunes are directly tied to a party or candidate being in power, disclosure of the company's support for that party or candidate will allow shareholders to assess the political risks that could come with the next election or other changes in the political landscape.[65]

There is sound justification, in other words, for *disclosure* around corporate political spending, just as federal securities law mandates public companies disclose a wide array of material quantitative and qualitative information about corporate finances, operations, and risk.[66] This sort of disclosure for political spending would allow shareholders to vote against directors who permit inappropriate spending, to sell shares, or even to file a derivative suit if spending violates management's fiduciary duties.[67] It would also allow market intermediaries like proxy advisors to develop policies around corporate political spending and encourage best practices for that spending.

It is possible, of course, that mere disclosure may not be enough. Few shareholders are likely to be so concerned over political spending as to vote against a director slate, or to sell their shares if they would not have done so otherwise. Beyond disclosure, an advisory proxy vote on a political-spending plan might be in order.[68] Although, as with the Act, such a vote would not oblige boards or

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65 *See also* Jay B. Kesten, *Shareholder Political Primacy*, 10 VA. L. & BUS. REV. 161, 209 (2016) ("[M]anagers have strong incentives to engage in corporate political activity to rent-seek if doing so would maximize their own firm's value. However, rational, diversified investors should curtail that activity if the rent-seeking results in intra-portfolio wealth transfers. Because rent-seeking is not costless, the transaction costs constitute a deadweight loss.").

66 *See generally* 17 C.F.R. pt. 210 (2018); 17 C.F.R. pt. 229 (2019).

67 Political spending is rich with opportunities for managers to impose agency costs on their shareholders. Imagine, for example, a CEO who uses corporate political spending to raise her own profile for a run for office, to support personal friends seeking office, or to engage in quid pro quo behavior that could lead to a costly investigations and enforcement actions against the company.

68 This would be an up-or-down vote on a comprehensive plan, as reflected by spending disclosures, rather than a system for assessing discrete investor preferences on corporate political spending. *But cf.* H.R. 1, 116th Cong. § 4502(a) (2019) (requiring "procedures to assess the preferences of the shareholders of the issuer with respect to making such disbursements").

management to *do* anything, it would send a strong and meaningful signal to management—just as say-on-pay votes do now.

Requiring political-spending disclosure is constitutional (indeed, the Supreme Court gave assurance in *Citizens United* that disclosure would allow shareholders to police that spending), is consistent with the existing regulatory framework of U.S. securities law, and is likely to produce real results for the movement to rein in the role of money in politics. In recent years, the SEC has sought to mandate political spending disclosure, an effort that has been blocked by Congress.[69] But, beyond offering the wrong approach—the Act—for dealing with corporate political spending, H.R. 1 also suggests the right one. Its Section 4501 lifts the statutory ban on the SEC mandating disclosure of political spending by public issuers.[70] Congress may want to go further by requiring the SEC mandate such disclosure. If stronger medicine is needed, Congress has other policy options that have precedent in federal securities regulation. It could, for example, require an advisory say-on-politics proxy vote. Or, if it determines that more proactive governance reforms around political spending are needed, it could require stock exchanges to implement those reforms in their listing standards. One such listing standard, for example, might require that a designated board committee preapprove any political spending, thus creating tighter oversight over the reputational risks and agency costs that spending can create.

H.R. 1, and the Act, will perhaps not become law. After a party-line 234–193 vote in the House of Representatives,[71] it is unlikely to be passed by the Senate or to receive a signature from the President.[72] It is thus best understood as a messaging bill laying the groundwork for an ongoing policy agenda. As part of the democracy-enhancing goal of that agenda, requiring greater transparency and accountability for corporate political spending is an appropriate and worthwhile policy objective. Achieving that objective, however, should follow existing experience for using federal securities law to effect proshareholder and prosocial ends: require disclosure, and let the capital markets act on that information accordingly.

CONCLUSION

The Act is admirable in that it seeks to effect both a proshareholder and a democratic reform by making management more accountable for its use of corporate resources in political spending. It is not, however, the right way forward, not only because it is unlikely to withstand legal challenge, but also because its structure leads to secondary consequences that undermine its very mission of combating secrecy

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69 *See* Financial Services and General Government Appropriations Act, 2019, Pub. L. 116-6, § 629.

70 *See* H.R. 1, 116th Cong. § 4501 (2019) (repealing section 629 of the Financial Services and General Government Appropriations Act, 2019 (division D of Public Law 116-6)).

71 *Final Results for Roll Call 118*, U.S. HOUSE OF REPRESENTATIVES (Mar. 8, 2019), clerk.house.gov/evs/2019/roll118.xml.

72 Exec. Office of the President, Office of Mgmt. & Budget, Statement of Administration Policy: H.R. 1—For the People Act of 2019 (Mar. 5, 2019) ("If H.R. 1 were presented to the President, his advisors would recommend he veto the bill.").

and promoting accountability. Securities regulation has a way of crossing into other lanes. And as a system driven by disclosure, when it comes to campaign finance, it should keep its hands on that wheel.

APPENDIX

Section 1. Short Title.

This Act may be cited as the "Shareholders United Act of 2019".

Sec. 2. ASSESSMENT OF SHAREHOLDER PREFERENCES FOR DISBURSEMENTS FOR POLITICAL PURPOSES.

(a) Assessment Required.—The Securities Exchange Act of 1934 (15 U.S.C. 78a et seq.) is amended by inserting after section 10D the following:

"SEC. 10E. ASSESSMENT OF SHAREHOLDER PREFERENCES FOR DISBURSEMENTS FOR POLITICAL PURPOSES.

"(a) Assessment Required Before Making A Disbursement For A Political Purpose.—

"(1) REQUIREMENT.—An issuer with an equity security listed on a national securities exchange may not make a disbursement for a political purpose unless—

"(A) the issuer has in place procedures to assess the preferences of the shareholders of the issuer with respect to making such disbursements; and

"(B) such an assessment has been made within the 1-year period ending on the date of such disbursement.

"(2) TREATMENT OF ISSUERS WHOSE SHAREHOLDERS ARE PROHIBITED FROM EXPRESSING PREFERENCES.—Notwithstanding paragraph (1), an issuer described under such paragraph with procedures in place to assess the preferences of its shareholders with respect to making disbursements for political purposes shall not be considered to meet the requirements of such paragraph if a majority of the number of the outstanding equity securities of the issuer are held by persons who are prohibited from expressing partisan or political preferences by law, contract, or the requirement to meet a fiduciary duty.

"(b) Assessment Requirements.—The assessment described under subsection (a) shall assess—

"(1) which types of disbursements for a political purpose the shareholder believes the issuer should make;

"(2) whether the shareholder believes that such disbursements should be made in support of, or in opposition to, Republican, Democratic, Independent, or other political party candidates and political committees;

"(3) whether the shareholder believes that such disbursements should be made with respect to elections for Federal, State, or local office; and

"(4) such other information as the Commission may specify, by rule.

"(c) Disbursement For A Political Purpose Defined.—

"(1) IN GENERAL.—For purposes of this section, the term 'disbursement for a political purpose' means any of the following:

"(A) A disbursement for an independent expenditure, as defined in section 301(17) of the Federal Election Campaign Act of 1971 (52 U.S.C. 30101(17)).

"(B) A disbursement for an electioneering communication, as defined in section 304(f) of the Federal Election Campaign Act of 1971 (52 U.S.C. 30104(f)).

"(C) A disbursement for any public communication, as defined in section 301(22) of the Federal Election Campaign Act of 1971 (52 U.S.C. 30101(22))—

"(i) which expressly advocates the election or defeat of a clearly identified candidate for election for Federal office, or is the functional equivalent of express advocacy because, when taken as a whole, it can be interpreted by a reasonable person only as advocating the election or defeat of a candidate for election for Federal office; or

"(ii) which refers to a clearly identified candidate for election for Federal office and which promotes or supports a candidate for that office, or attacks or opposes a candidate for that office, without regard to whether the communication expressly advocates a vote for or against a candidate for that office.

"(D) Any other disbursement which is made for the purpose of influencing the outcome of an election for a public office.

"(E) Any transfer of funds to another person which is made with the intent that such person will use the funds to make a disbursement described in subparagraphs (A) through (D), or with the knowledge that the person will use the funds to make such a disbursement.

"(2) EXCEPTIONS.—The term 'disbursement for a political purpose' does not include any of the following:

"(A) Any disbursement made from a separate segregated fund of the corporation under section 316 of the Federal Election Campaign Act of 1971 (52 U.S.C. 30118).

"(B) Any transfer of funds to another person which is made in a commercial transaction in the ordinary course of any trade or business conducted by the corporation or in the form of investments made by the corporation.

"(C) Any transfer of funds to another person which is subject to a written prohibition against the use of the funds for a disbursement for a political purpose.

"(d) Other Definitions.—In this section, each of the terms 'candidate', 'election', 'political committee', and 'political party' has the meaning given such term under section 301 of the Federal Election Campaign Act of 1971 (52 U.S.C. 30101).".

(b) Conforming Amendment To Federal Election Campaign Act Of 1971 To Prohibit Disbursements By Corporations Failing To Assess Preferences.—Section 316 of the Federal Election Campaign Act of 1971 (52 U.S.C. 30118) is amended by adding at the end the following new subsection:

"(d) Prohibiting Disbursements By Corporations Failing To Assess Shareholder Preferences.—

"(1) PROHIBITION.—It shall be unlawful for a corporation to make a disbursement for a political purpose unless the corporation has in place procedures to assess the preferences of its shareholders with respect to making such disbursements, as provided in section 10E of the Securities Exchange Act of 1934.

"(2) DEFINITION.—In this section, the term 'disbursement for a political purpose' has the meaning given such term in section 10E(c) of the Securities Exchange Act of 1934.".

(c) Effective Date.—The amendments made by this section shall apply with respect to disbursements made on or after December 31, 2019.