**Testimony of**

**Donald J. Simon**

**Partner,**
**Sonosky, Chambers, Sachse, Endreson & Perry, LLP**

**Before the**
**Subcommittee on the Constitution, Civil Rights and Civil Liberties**
**Of the House Judiciary Committee**

# On the First Amendment and Campaign Finance Reform After *Citizens United*

**February 3, 2010**

Chairman Nadler and Members of the Subcommittee:

I appreciate the opportunity to testify on the impact of the Supreme Court's decision last month in *Citizens United v. Federal Election Commission,* and on the steps that Congress should take in response to that decision and that remain available to the Congress in light of the Court's ruling. Congress should act quickly in order to limit the damage that will result to our political system from the Court's decision.

I am an attorney in private practice but I have been deeply involved in campaign finance reform efforts for more than three decades. I am currently general counsel to Democracy 21, a nonpartisan nonprofit organization with a long history of supporting the nation's campaign finance laws as an essential means to protect against corruption and the appearance of corruption in the political process. Previously, I served for a number of years as Executive Vice President and general counsel to Common Cause. In that capacity, I was part of the effort to develop and enact the Bipartisan Campaign Reform Act of 2002 (BCRA), a portion of which was invalidated by the Court in the *Citizens United* opinion. In addition, I have served as counsel for parties or *amici* in numerous court cases involving the constitutionality of the campaign finance laws, including *McConnell v. FEC* and *Citizens United v. FEC*.

The majority decision in *Citizens United* is the most radical and damaging campaign finance decision in Supreme Court history. It is profoundly wrong.

In order to reach the decision, Justice Kennedy and his four colleagues abandoned longstanding judicial precedents as well as principles of judicial restraint to reach out and decide

an issue which (1) was waived by Citizens United in the court below, (2) was not brought to the Supreme Court by Citizens United on appeal, and (3) could have been avoided by resolving the case on any one of a number of narrower grounds.

Disregarding the cautions that Justices – particularly conservative Justices – usually invoke in the name of judicial modesty, the majority here engaged in breathtaking judicial activism to toss aside a settled legislative policy reaching back more than 100 years to restrict the influence of corporate money in the political process. It is fair to say, as Justice Stevens does in his dissent, that this case was brought by the Court itself.

This overreaching is all the more egregious because it was done by the Court without the benefit of any factual record. Because the constitutionality of the corporate ban was not litigated by Citizens United in the district court, there was no occasion for the government to compile and present a factual record in defense of the law. Accordingly, when the Supreme Court suddenly and unilaterally changed the nature of the case before it, and put the constitutionality of the corporate restriction at issue, there was no record before it to review with regard to that new question. The government was handicapped in its defense of the statute, because it had been denied the right to compile a judicial record that would show how corporate money could be used to corrupt the legislative process and to undermine the confidence that voters have in how elections are conducted and how legislative decisions are made.

Similarly, the majority opinion is cavalier in overruling the Court's precedents. It expressly overrules the *Austin* case, decided 20 years ago, and a significant portion of the *McConnell* case, decided seven years ago. But in practical effect, the Court also reversed the *Wisconsin Right to Life* case, decided just three years ago, because that case upheld the electioneering communication restrictions of BCRA at least insofar as they apply to express

advocacy and its functional equivalent, a position that the Court majority now abandons in *Citizens United.*

This overruling by the Court of three cases – two expressly – is an extraordinary act in itself. But even more so is how the Court took this action without honoring the standards of *stare decisis* that serve to protect judicial precedent and that give stability to the law. Nothing had undermined the validity or vitality of *Austin* and *McConnell*. They had not proved to be unworkable. They were not eroded by other precedent. Legislative reliance on those decisions at both the state and federal levels had been longstanding and important.

Just seven years ago in *McConnell,* the Court said that "Congress' power to prohibit corporations and unions from using funds in their treasuries to finance advertisements expressly advocating the election or defeat of candidates in federal elections has been firmly embedded in our law." 540 U.S. at 203 (emphasis added). Since 2003 when the *McConnell* Court made this statement and thereby reaffirmed *Austin*, nothing has changed – except the make-up of the Court itself, a point made by Justice Stevens, who said, "The only relevant thing that has changed since *Austin* and *McConnell* is the composition of this Court. Today's ruling thus strikes at the vitals of *stare decisis*…." (Op. of Stevens, J. at 23).

This casual abandonment of important case precedent that supported longstanding federal and state legislation which served to safeguard the integrity of the electoral process is a reckless act by the Court, one that will serve only to undermine the Court itself.

The *Citizens United* decision represents an enormous transfer of political power in our country from citizens to corporations. Until two weeks ago, the financing of federal elections in our country had been limited by law to individuals, and to groups of individuals functioning through political committees. Corporations were prohibited from using their corporate wealth to

influence federal campaigns, whether by making contributions or expenditures, a policy that dates back to 1907 when Congress first banned corporations from "directly or indirectly" making contributions in federal elections.

But now, corporate wealth accumulated in the economic marketplace can be brought to bear, directly and without limitation, on political campaigns. As a point of reference, the Fortune 100 companies alone had combined revenues of $13.1 trillion and profits of $605 billion during the last election cycle. (Although not addressed by the opinion, it is almost certainly true that under the Court's reasoning, labor unions are also now free to use their treasury funds to make independent expenditures as well, but their resources are dwarfed by corporate funds.)

The *Citizens United* decision will have a major negative impact on the conduct of federal, state and judicial elections throughout the country. Under this decision, insurance companies, banks, drug companies, energy companies and the like – and their trade associations – will be free to each run multi-million dollar campaigns to directly elect or defeat federal candidates. In addition to TV and radio ad campaigns, these efforts could include direct mail and phone bank campaigns, all urging voters to elect or defeat candidates.

It would not take very much corporate spending in a given election for one or more corporations to have a major impact on a particular House or Senate race. This is particularly true if the spending comes, as it often does with independent expenditures, in the form of negative attack ads. An avalanche of such attack ads funded by corporate wealth, particularly at the end of a campaign, would make it virtually impossible for the candidate to respond, and could easily have a decisive impact on the outcome of the election.

Even the threat of such spending is, in itself, likely to distort the legislative process. As *The New York Times* (January 22, 2010) said in a headline discussing the impact of this case,

lobbyists have gotten a new "potent weapon" to use in influencing legislative decisionmaking. The *Times* story says:

> The Supreme Court has handed lobbyists a new weapon. A lobbyist can now tell any elected official: if you vote wrong, my company, labor union or interest group will spend unlimited sums explicitly advertising against your re-election.
>
> "'We have got a million we can spend advertising for you or against you – whichever one you want,' a lobbyist can tell lawmakers," said Lawrence M. Noble, a lawyer at Skadden Arps in Washington and former general counsel of the Federal Election Commission.

Members of Congress will, in effect, have a sword of Damocles hanging over their heads. In the case of an incumbent, corporate spending decisions are likely to be made based on whether a Member voted the right way or the wrong way on issues of importance to the corporation or trade association. Any "wrong" vote by a Member could trigger a multimillion dollar campaign to defeat the Member. And every Member will be forced as a practical matter to consider this consequence in deciding how to vote on legislation.

It would not take many examples of elections where large corporate expenditures defeat a Member of Congress before all Members quickly learn the lesson: vote against the corporate interest at stake in a piece of legislation – whether it is a bill of interest to the banking industry, the defense industry, the insurance industry, the drug industry, or any other – and run the risk of being blindsided by a massive negative ad campaign funded by corporate dollars that would put that Member's reelection in jeopardy. The threat of this kind of retaliatory campaign spending, whether the threat is explicit or implicit, is likely in itself to exert undue influence on legislative decisionmaking, even in the absence of any formal *quid pro quo* relationship between the Member (or his opponent) and the corporate spender.

Former Senator Chuck Hagel (R-NE) understood well the stakes in the case and the impact this decision would have on how government works. He was interviewed for a story in *The Washington Post* before the decision was issued:

> Chuck Hagel, the Nebraska Republican who retired from the Senate last year after serving two terms, said in an interview that if restrictions on corporate money were lifted, "the lobbyists and operators . . . would run wild." Reversing the law would magnify corporate power in society and "be an astounding blow against good government, responsible government," Hagel said. "We would debase the system, so we would get to the point where we couldn't govern ourselves."

While it has long been true that individuals could use their personal wealth to run independent expenditure campaigns to advocate for or against the election of a candidate, the Court's extension of that right to corporations will have both a quantitatively and qualitatively different effect. The resources of large corporations are immense and the economic stakes they have in Washington decisions are enormous. These corporations have ongoing agendas in Washington that they are always trying to advance, and they now have a huge new opportunity to use their considerable financial resources directly in campaigns as a means to advance those agendas.

Some have argued, to the contrary, that *Citizens United* will have no more than a modest impact on political campaigns – that corporations will not be interested in making express advocacy expenditures or that, in any event, there will not be a big increase in corporate spending since corporations have already been able to spend treasury funds on sham issue ads to promote or attack candidates.

Experience shows that this view is not correct.

Indeed, that experience – the corrupt soft money system, closed down in 2002 by enactment of BCRA – demonstrates exactly what happens when the door is opened to influence-seeking corporate money being allowed to enter the political process. The soft money system, in

which corporations were allowed to use their corporate treasury funds to make unlimited donations to the political parties which then spent the money to influence federal campaigns, started as a trickle when the FEC first allowed the parties to raise soft money. But once it became clear that soft money was a way to buy access and influence with federal officeholders, soft money grew rapidly and by the mid-1990's amounted to hundreds of millions of dollars each election cycle, much of it from corporations. By the time the soft money system was shut down in 2002, it had grown to a half a billion dollars in a single election cycle.

Much of this was corporate money injected directly into federal campaigns. Corporations were not shy about making these donations, nor were Members of Congress or the political parties shy about soliciting them. The same arguments being raised about why corporations won't make independent expenditures now – fear of alienating their customers, the ability to run non-express advocacy "issue" ads – also applied to soft money donations then. Yet corporations aggressively participated in the soft money system as a way to buy access and influence with federal officeholders, and the corporate money that flooded into federal campaigns through the soft money system grew at an alarming rate.

The same is very likely true with the ability corporations now have to make independent expenditures. A report by Peter Stone and Bara Vaida last week in the *National Journal* (January 30, 2010) illustrates the danger. The story, called "Wild West on K Street," states:

> All across town, lobbyists and campaign consultants, media consultants, and pollsters discussed how and whether clients should take advantage of the January 21 Supreme Court decision, which ended a ban on direct spending by corporations and unions in political elections. Business groups, increasingly unhappy with President Obama's agenda, are buzzing about the potential for unleashing multimillion-dollar ad drives in the last months of the 2010 elections, while unions are jittery about their ability to match corporate war chests.

According to the story, one Republican strategist "predicted the change would be huge. 'That decision was like a cannon – the shot heard around the political world,' he said, adding that the ruling will take Washington back to 'the Wild, Wild West of spending money.'"

The *National Journal* report states that one Democratic campaign strategist "theorized that companies with fat profit margins might even look at ways to purchase Senate seats. 'No question, if you are looking at a strategy about how you buy a Senate seat, where is the cheapest place to go? The rural states, where $5 million can buy you a Senate seat and is nothing for a company like ExxonMobil.'"

As for the argument that large consumer-oriented companies may resist the temptation to make independent expenditures because of a concern about their public image, or for fear of alienating their customers, that may be true for some companies, and to some extent. But such corporations may not at all be constrained from making expenditures indirectly – and secretly – by giving corporate treasury funds to third party groups like the Chamber of Commerce, trade associations or other intermediaries, which then make expenditures for or against candidates. Those expenditures will be made in the name of the intermediary, but designed to further the political interests of the corporate donors who are the true source of the funds.

According to the *National Journal* report:

> [Republican strategist John] Feehery and others on K Street are likely to advise their clients to direct their money to tax-exempt 501(c)(4) and 501(c)(6) trade groups, which will now be freer to spend member money to explicitly target ads in support or opposition of candidates. These organizations do not have to disclose their donors.
>
> Established business groups, such as the U.S. Chamber of Commerce, which have become more strident about the direction that congressional Democrats and the Obama administration have taken energy, financial services, and health care reform in the past year, are seeing a big opportunity.

Further, the *Citizens United* opinion itself is likely to encourage corporations to exercise their newly discovered "First Amendment free speech right" to make expenditures to influence elections, even if they have not engaged in permissible non-express advocacy spending in the past. The fact that corporations are now unconstrained in mounting full-fledged and overt campaigns against Members of Congress – indeed, have a declared constitutional right to do so – is itself likely to encourage them to engage in such spending. So too, the fact that corporate spenders no longer have to worry about the line between so-called "issue" discussion and express advocacy or its functional equivalent is also likely to encourage an increase in corporate spending.

One of the most disturbing aspects of the majority opinion is its abrupt but unacknowledged re-definition of the "corruption" interest that can be used to support regulation of money in politics. In a series of cases, the Court had previously recognized that the government's anti-corruption interest extended well beyond *quid pro quo* corruption to include "improper influence," "opportunities for abuse," "undue influence," "influence-buying," and the appearance thereof. Indeed, in *Buckley v. Valeo,* the Court said in the context of upholding contribution limits:

> Laws making criminal the giving and taking of bribes deal only with the most blatant and specific attempts of those with money to influence governmental action. And while disclosure requirements serve the many salutary purposes discussed elsewhere in this opinion, Congress was surely entitled to conclude that disclosure was only a partial measure and that contribution ceilings were a necessary legislative concomitant to deal with the reality or appearance of corruption inherent in a system permitting unlimited financial contributions, even when the identities and of the contributors and the amounts of their contributions are fully disclosed.

The Court also stated in *Buckley*:

> Congress could legitimately conclude that the avoidance of the appearance of improper influence "is also critical . . . if confidence in the system of representative Government is not to be eroded to a disastrous extent."

In *Citizens United,* however, the majority opinion rejects the idea – previously accepted by the Court – that undue influence, buying access, or the appearance of corruption constitute the kind of "corruption" that will support the constitutionality of campaign finance rules that seek to deter corruption. The majority opinion indicates that only narrow *quid pro quo* arrangements now meet that standard – precisely what the Court expressly declined to hold in *Buckley,* and what the Court rejected as a "crabbed" view of corruption in *McConnell*.

But it is important to note as well that the majority opinion in *Citizens United* indicates that the Court is not attempting to undermine the constitutionality of contribution limits. The opinion recognizes that "restrictions on direct contributions are preventative, because few if any contributions to candidates will involve *quid pro quo* arrangements." The majority opinion further acknowledges that in *Buckley,* the Court "nevertheless sustained limits on direct contributions in order to ensure against the reality or appearance of corruption." Nothing in the *Citizens United* opinion undermines this holding of *Buckley*. Thus, the Court indicated that limits on contributions will continue to meet constitutional standards.

## Legislative Remedies

It is important that Congress respond to the Court's radical and erroneous decision in *Citizens United*, and that Congress do so quickly. The organizing principle for such legislation should be to favor proposals that will directly respond to the impact of this decision, and that can quickly pass both the Senate and the House so they can be enacted into law in time to be effective in the 2010 general election for Congress.

There are a range of legislative remedies that should be considered.

● Disclosure. First, the cornerstone of reform should be improvements in disclosure of expenditures and electioneering communications by corporations and unions. It is important to require disclosure not only of direct spending by corporations and unions, but also of their transfers of funds to others, where those funds are then used by the third parties for expenditures or electioneering communications. In other words, disclosure must reach the actual sources of the funding for independent expenditures and electioneering communications.

The Court in *Citizens United,* by a vote of 8-1, strongly affirmed the constitutionality of disclosure not only for express advocacy expenditures, but also for any electioneering communication – any broadcast ad that refers to a candidate within the immediate pre-election time frame. As the Court noted, "Disclaimer and disclosure requirements may burden the ability to speak, but they 'impose no ceiling on campaign related activities,' *Buckley*, 424 U. S., at 64, and 'do not prevent anyone from speaking,' *McConnell, supra*, at 201." (Op. at 51).

In particular, the Court reaffirmed its holding in *Buckley* that the governmental interest which supports the constitutionality of disclosure is the interest in "'provid[ing] the electorate with information' about the sources of election-related spending. 424 U. S., at 66." (Op. at 51). The Court stressed disclosure as an appropriate remedy: "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." (Op. at 55).

New rules should ensure there is full disclosure of campaign-related expenditures, the donors who are actually funding those expenditures, transfers of funds to and through third-parties in order to capture the actual source of the funds being used for the expenditures, and new disclaimer requirements on campaign-related ads.

A recent article in *National Journal* by Peter Stone (January 12, 2010) illustrates the reason new disclosure rules must be carefully and comprehensively designed. According to the article:

> Just as dealings with the Obama administration and congressional Democrats soured last summer, six of the nation's biggest health insurers began quietly pumping big money into third-party television ads aimed at killing or significantly modifying the major health reform bills moving through Congress.
>
> That money, between $10 million and $20 million, came from Aetna, Cigna, Humana, Kaiser Foundation Health Plans, UnitedHealth Group and Wellpoint, according to two health care lobbyists familiar with the transactions. The companies are all members of the powerful trade group America's Health Insurance Plans.
>
> The funds were solicited by AHIP and funneled to the U.S. Chamber of Commerce to help underwrite tens of millions of dollars of television ads by two business coalitions set up and subsidized by the chamber. Each insurer kicked in at least $1 million and some gave multimillion-dollar donations.
>
> The U.S. Chamber has spent approximately $70 million to $100 million on the advertising effort, according to lobbying sources. It's unclear whether the business lobby group went to AHIP with a request to help raise funds for its ad drives, or whether AHIP approached the chamber with an offer to hit up its member companies.
>
> The article further stated:
>
> Since last summer, the chamber has poured tens of millions of dollars into advertising by the two business coalitions that it helped assemble: the Campaign for Responsible Health Reform and Employers for a Healthy Economy.

Thus, an industry trade association solicited huge donations from its corporate members and that money was then funneled to the Chamber of Commerce which had established two “business coalitions” with innocuous names to actually buy the ads.

Assuming these ads had been run as express advocacy ads or as electioneering communications, as they now can be under *Citizens United*, new disclosure rules, in order to be effective, must capture the actual sources of the funding and the role of the Chamber as an

intermediary or pass-through for the funds, not just the generically-named front organizations that ultimately spent the money.

Similarly, existing "stand-by-your-ad" disclaimer provisions should be strengthened to clearly identify the corporation responsible for a broadcast independent expenditure or electioneering communication, and require the corporate CEO to appear in the ad and take responsibility for its contents.

- Foreign nationals. The law which bans spending by foreign nationals to influence U.S. elections needs to be strengthened in the wake of *Citizens United.* Although the existing statute, 2 U.S.C. § 441e, prohibits spending by foreign corporations to influence U.S. elections, it does not prohibit spending by domestic corporations owned or controlled by foreign nationals. An existing FEC regulation restricts the ability of a foreign national to participate in the "decisionmaking process" of a domestic corporation with regard to its political spending, but this is an inadequate safeguard against the danger posed by a domestic corporation owned or controlled by a foreign corporation or government from using its funds to advance the interests of the foreign parent. Prior to *Citizens United,* such spending of corporate treasury funds by the domestic subsidiary had been prohibited by the general ban on corporate spending, but that spending will now be allowed. In light of this change, the Congress should strengthen section 441e to ensure that domestic corporations owned or controlled by foreign interests are not used as vehicles to influence federal elections.

- Coordination. Current campaign finance rules relating to coordinated expenditures should be strengthened. The Court in *Citizens United* was clear that it believed the key hedge against corporate election spending resulting in *quid pro quo* corruption is the safeguard that such spending cannot be coordinated with the candidate who is benefited.

But FEC rules on what constitutes "coordination" as a matter of law are notoriously weak. So much so, that when it enacted BCRA in 2002, Congress repealed the then-existing FEC rules on coordination, and directed the agency to write new, stronger rules. The agency promulgated new regulations on coordination in 2003, but those rules were thrown out as inadequate by the D.C. Circuit in 2005. The FEC again re-wrote its rules – but made them worse instead of better. These new rules were again invalidated by the D.C. Circuit in a 2008 decision. The FEC is engaged yet again in a third rulemaking on this topic – but given the current state of dysfunctionality the agency is mired in, there is, unfortunately, little reason to believe it will issue adequate rules this time either. Thus, it has now been eight years since Congress directed the agency to come up with stronger coordination rules, and we are still without rules that comply with the law.

In light of *Citizens United,* strong rules defining coordination as a matter of law are more important than ever, in order to ensure that there is no *de facto* coordination between a candidate and an outside corporate spender. Such *de facto* coordination would present precisely the opportunity for corrupt *quid pro quo* deals to be made between the candidate and the spender that the Court assumed would not arise when corporations engage in "independent" spending.

It is time for Congress to step in and do what the FEC has been unable or unwilling to do – write a strict and realistic standard for what constitutes coordination, in order to ensure that the independent expenditures that corporations are now free to make are truly independent.

- Lowest unit rate. Congress should expand the lowest unit rate rules to provide candidates and parties with enhanced access to low cost and non-preemptible broadcast time. This would provide significant additional resources to candidates and parties that they can use to respond to outside spending by corporations and others.

But by the same token, Congress should strongly resist any attempt to reinstate the corrupt soft money system as an alternative means of providing additional resources to parties, either by repealing the soft money provisions of BCRA, or by raising the hard money contribution limits. To use *Citizens United* as an excuse to revive the soft money system is nothing less than an argument that one means of corruption justifies another means of corruption. Adding to a problem is no way to solve a problem.

● Pay-to-play. Congress should give careful consideration to strengthening existing "pay-to-play" rules. There is a longstanding ban on federal contractors making contributions in federal campaigns. The FEC, by regulation, has extended this prohibition to cover independent expenditures as well. The FEC rule should be codified. Federal contractors – such as defense contractors – have a direct contractual relationship with the federal government and a heightened financial interest in government contracting decisions. The government has a compelling interest in ensuring that federal contractors, including corporations, do not use the power of their treasuries to buy favoritism in the federal contracting process.

● Corporate governance. Related to disclosure, Congress should consider adopting corporate governance provisions that would grant shareholders a voice in the political spending done by their corporations. Again, this is an approach endorsed by the Court in *Citizens United.* The Court said, "Shareholder objections raised through the procedures of corporate democracy *see Bellotti*, supra, at 794, and n. 34, can be more effective today because modern technology makes disclosures rapid and informative." (Op. at 55).

Such shareholder provisions should include, for instance, a requirement that shareholders affirmatively approve on an annual basis a corporation's policy on making expenditures or electioneering communications to influence federal elections. When such expenditures are

made, the corporation should be required to provide notice of the specific spending to shareholders, as well as to the Securities and Exchange Commission, and to file an annual disclosure report on its political spending with the SEC. Finally, a corporation's CEO should be required to certify that the corporation's political spending does not constitute corporate waste, has been approved by the shareholders, has been fully disclosed and is in compliance with law.

- Other reforms. Finally, in the longer term, it remains essential for Congress to enact fundamental campaign finance reforms, including fixing the presidential public financing system, establishing a new system of public financing for congressional races and replacing the failed Federal Election Commission with a new, effective campaign finance enforcement body.

***

In *Citizens United*, a bare majority of five Justices dismantled a 100-year-old cornerstone of the Nation's effort to safeguard the integrity of federal elections against corruption and the appearance of corruption. Congress should do everything in its power to enact appropriate measures that will minimize the serious damage caused by the Court's ruling, and it should do so quickly.