

**H.R. 5175, THE DISCLOSE ACT, DEMOCRACY IS
STRENGTHENED BY CASTING LIGHT ON SPENDING
IN ELECTIONS**

HEARING
BEFORE THE
**COMMITTEE ON HOUSE
ADMINISTRATION**
HOUSE OF REPRESENTATIVES
ONE HUNDRED ELEVENTH CONGRESS
SECOND SESSION

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H.R. 5175, THE DISCLOSE ACT, DEMOCRACY IS STRENGTHENED BY CASTING LIGHT ON SPENDING IN ELECTIONS

THURSDAY, MAY 6, 2010

HOUSE OF REPRESENTATIVES,
COMMITTEE ON HOUSE ADMINISTRATION,
Washington, DC.

The committee met, pursuant to call, at 11:03 a.m., in room 1310, Longworth House Office Building, Hon. Robert A. Brady (chairman of the committee) presiding.

Present: Representatives Brady, Lofgren, Capuano, Gonzalez, Davis of California, Lungren, McCarthy, and Harper.

Staff Present: Khalil Abboud, Professional Staff; Darrell O'Connor, Professional Staff; Victor Arnold-Bik, Minority Staff Director; and Katie Ryan, Minority Professional Staff.

The CHAIRMAN. The hearing of the Committee on House Administration will come to order. Today we will hear testimony on H.R. 5175, Democracy Is Strengthened By Casting Light on Spending in Elections Act. This bipartisan legislation was introduced on April 29th and a nearly identical version was introduced in the Senate by Rules and Administration Committee chairman, Chuck Schumer, of New York.

This is the second time that the committee has held hearings to address the Supreme Court decision in Citizens United. During the first hearing, we heard from campaign finance experts on how the decision will open the flood gates of unregulated money into the political system. While there may be many disagreements on the Court's decision, I am confident that we all agree that the American people deserve to know who is attempting to influence American elections.

That is why I am pleased that H.R. 5175 focuses on increasing transparency and strengthening our disclosure of political spending by all groups. The Watergate scandal of 1970 taught us a lot about secret campaign cash. Anonymous donations permitted corporations to funnel large sums in cash to candidates despite an existing ban on corporate contributions.

Instead, our Federal disclosure laws have been strengthened to prevent Federal election officials from taking advantage of unreported donations and political spending. Campaign disclosure laws are effective, have bipartisan appeal, and by an 8 to 1 vote were upheld by the Supreme Court in Citizens United as constitutional.

The DISCLOSE Act recognized that the American voters are at a minimum entitled to full and accurate reporting of campaign

spending so that voters may know who is attempting to influence their vote. Disclosure laws expose corruption, alert voters to who is behind the candidate on valid measures, and help to ensure that other campaign finance laws are being followed.

In addition, H.R. 5175 will improve transparency by requiring the CEOs, union presidents, and top donors to stand by their ad instead of funneling money through sham organizations.

Americans deserve honesty from those seeking to influence elections and legislation. They deserve to know that the drill here, drill now ad is funded by BP, not citizens concerned about Gulf Coast wetlands.

I am also pleased that the DISCLOSE Act will close some glaring loopholes left open by the Citizens United decision, loopholes that threaten to corrupt our democracy. These loopholes must be closed so that well-funded special interests are not elevated over the American people.

H.R. 5175 will prevent government contracts and entities receiving TARP funds from spending money on elections. Corporations should not be using taxpayers' money dollars to influence the election of those in a position to distribute those resources. And a ban on election spending will protect those government contractors who simply do not want to get involved in the pay-to-play politics.

H.R. 5175 will also close the loophole that would allow foreign corporations from influencing American elections through foreign controlled U.S. subsidiaries. Foreign countries should not be able to elect our leaders or decide our policy. Our national security depends upon it.

I am also pleased that this bill has bipartisan and popular support. Since I have been chairman on this committee, the committee has never heard from so many concerned citizens since the Citizens United decision came down. According to numerous polls, 8 out of 10 Americans are concerned about the decision's impact on our democracy. The American people expect us to act and act we will. Our democracy should be and by for the people, not special interests.

And I thank our panel for being here today. I look forward to your testimony.

I would now like to recognize the ranking member, Mr. Lungren, for any statement that he may have.

Mr. LUNGREN. Thank you very much, Mr. Chairman. I thank you for this and I know we are going to have another hearing on this matter. I might say, Mr. Chairman, I have appreciated the bipartisan spirit with which you have conducted this committee and the work that has been done with both of our staffs on most issues. Unfortunately, this is not one of them.

It is more than irony that the title of the bill before us is Democracy is Strengthened By Casting Light on Spending in Elections, because I believe democracy is strengthened by casting light on the legislative process. Despite my request to have a cooperative spirit on this and despite my earnest desire to work on a bipartisan basis on this, our two letters to the leadership on the Democratic side asking for cooperation on this and asking if we could work on a bill to respond to any legitimate concerns was met by silence for more than a month.

I love the word “bipartisan” in reference to this bill when in fact a couple of members on my side of the aisle, not on this committee, were contacted by the authors of this bill and were instructed not to give copies of the bill to anybody on the Republican side on this committee. And being men of their word, they did not. And so the idea that we are here in a real effort to shine the light on the political process is overwhelmed by the fact that there was a refusal to shine light on the legislative process. Why did we have months of work behind closed doors with the refusal to even acknowledge letters that we had sent out and in fact instructions that anybody on our side of the aisle who might have seen it were not to show any part of the suggested legislation to members of this committee on the Republican side. This is, however, the authorizing committee or the committee of jurisdiction in this matter. So it is disappointing.

I didn’t also realize I was going to hear an opening statement that was going to refer to things as wide ranging as offshore oil drilling and Watergate. I guess we ought to be ready for everything here today.

Mr. Chairman, this legislation is troubling. It is troubling because we are dealing with a crucial part of the Constitution, the First Amendment and the essence of the First Amendment free speech protection, which is political speech.

Mr. Chairman, I have not had as much experience as Mr. Olson has presenting cases before the U.S. Supreme Court. But for 8 years of my life, I spent a good deal of time preparing briefs, editing briefs, overseeing presentations to the U.S. Supreme Court. The California Department of Justice appears before the U.S. Supreme Court perhaps more than any other entity other than the Solicitor General’s Office. I had the opportunity to argue a case before the Supreme Court. I understand how important words are, phrases are in context, particularly when you are dealing with an essential part of our Constitution. And I would argue, Mr. Chairman, that the First Amendment dealing with free speech, particularly as it affects political speech, is as important as any other part of our Constitution. And it seems to me it ought to have the highest degree of discernment, the highest degree of light, and the highest degree of consideration by this panel and the Congress at large.

So I do thank you for having the hearings, but I must register my disappointment in the manner in which this has been presented. Senator Schumer and Mr. Van Hollen are outstanding representatives of your side of the aisle. They have led your political operation on your side of the aisle, one of whom continues to do that, and it is more than ironic that they would be the ones to take the lead on this bill.

In an April 29th political article, Senator Schumer stated that unions should be treated the same as corporations, no more, no less. If you are going to do these ads, you shouldn’t be exempt no matter who you are. Well, if we are going to try and find some substantial way of restricting political speech—and I say if we are going to—I would agree with that statement. But this legislation does not follow that standard whatsoever. It does not even come close.

The sections of the bill dealing with government contractors and TARP recipients exclude unions. I believe also media corporations.

So they are making a distinction in the bill before us between media corporations and other corporations, which the Supreme Court directly dealt with in their opinion. They said you can't do that. And yet we are bringing a bill here before us that does exactly what the Supreme Court told us we could not do.

This legislation punishes businesses with more onerous mandates at a time when we need a thriving marketplace and business environment to help people find meaningful work. If you happen to have a government contract for a good or service, you will now need to make sure it is not over an arbitrarily set limit. This legislation would punish American subsidiaries of companies that may have a percentage of foreign ownership. The voices of American citizens working for those U.S. subsidiaries would now be eliminated.

As Nancy McLernon, President of the Organization for International Investment, an organization which represents U.S. Subsidiaries, stated, the legislation chips away at the political rights of 5 million American workers who collect over \$400 billion in paychecks from the U.S. subsidiaries of companies based abroad or insourcing companies.

I have got to ask this question. If we do this, what precedent does this set for foreign governments? We do have American companies working in foreign countries. Are those governments now going to have the opportunity to bring criminal sanctions against American companies who complain about laws that are directed against them by these foreign countries?

I mean, we ought to understand what we are doing and how we may be advancing along a road which is going to harm American businesses doing international work, and that directly affects American jobs at a time when small businesses across this country are being forced to lay off employees. I have an employer in my district that laid off 75 employees immediately after the health care bill was passed as a direct result of the health care bill. They have hundreds of employees that are now at risk. But yet we go blithely on our way passing legislation and not being concerned on the impact of employees. And now we are going to have our employees worried about the threat of perjury and litigious requirements.

As one former FEC Chairman has stated, the First Amendment says Congress shall make no law abridging the freedom of speech. Not Congress should protect some speech, but feel free to hyperregulate the political speech of businesses and nonprofits.

Mr. Chairman, in all my years in Congress, I have yet to ascertain what the full definition of campaign finance reform really means. The goalposts frequently change. We are now frequently here for voting about the corporate takeover of our elections. I would like the help of this committee to be able to identify the people who ran suppression—voter suppression ads against my district in the last election. But we don't do that sort of thing here.

I find these ominous warnings intriguing. Are corporations the real enemy? Which ones, the big corporation, the small corporation, the medium corporation, the one you agree with or I agree with or I disagree with? The ones that happen to be in disfavor with the government today but may be in favor of the government tomor-

row? Is money the real enemy since many reformers support taxpayer funded campaigns?

Mr. Chairman, our Republic has always had free, open, and robust debate. We have had a robust political culture. We all have had our complaints about the media, I guess, but the media and mediums change, the right of political speech does not and should not.

As Justice Kennedy wrote in his majority opinion, rapid changes in technology and the creative dynamic inherent in the concept of free expression counsel against upholding a law that restricts political speech in certain media or by certain speakers.

Today, 30-second television ads may be the most effective way to convey a political message. Soon, however, it may be that Internet sources such as blogs and social networking websites will provide citizens with significant information about political candidates and issues.

The First Amendment does not permit Congress to make these categorical distinctions based on the corporate identity of the speaker and the content of the political speech.

Mr. Chairman, the bill before us is 84 pages long. That is 27 pages longer than the decision it seeks to change. It adds to the lengthy restrictions already in place. There are now apparently 33 specific types of political speech needing regulation, 71 different types of speakers and statutory and regulatory edicts totaling more than 800 pages. The FEC has issued more than 1,700 advisory opinions since its creation in 1976. I don't believe campaigns and elections should be this complicated.

Mr. Chairman, with all due respect, this bill should really be called the Distract Act. It is a distraction. It is a distraction from what we should be doing. What we should not be doing is regulating what can be spent on disseminating political speech. We should not be trying to control the quantity, the content, or the timing of political speech. The government has no right deciding what the proper quantity of political speech is meant to be.

This bill requires by its new disclosure in some cases for a 30-second ad where 14 seconds will have to be the disclosure. Is that chilling speech? I think it is. You take up over half, over half of the time of the commercial with a disclosure.

As one Justice wrote, the amendment—speaking of the First Amendment—is written in terms of speech, not speakers. Its text offers no foothold for excluding any category of speaker, from single individuals to partnerships of individuals to unincorporated associations of individuals to incorporated associations of individuals.

Mr. Chairman, I would just say we need a vibrant and healthy campaign in our political process. We need civility in the way we conduct ourselves. We need transparency in the way we conduct our campaigns. We do not, however, need to stifle speech, and we surely don't need any more indecipherable regulations attempting to do so.

The last thing I would say is this, as someone who has practiced law for nearly 40 years, this system is set up such that people who otherwise would be positively affected by the decision of the Supreme Court will have their free speech rights chilled. Why? Because we have let in this bill as it stands, a litigation process which

is going to be more extended than that which is allowed under current law for campaign rules, And it will mean that, much like Mr. Bossie's organization, who presented to the FEC in 2008 a request and got their decision by the Supreme Court nearly 2 years later, it will basically mean that people will be put under the threat of civil and criminal penalty if they make the wrong decision with respect to a subsequent judgment by the Court.

That is not the essence of the First Amendment. The essence of the First Amendment is to allow as much speech as possible. Some I don't like. I don't like some Supreme Court decisions that have allowed what I consider to be pornography out in the public square, yet that is what they have decided with respect to the First Amendment.

Political speech ought not have less protection than obscenity, and I am afraid that what we have done in this bill in an effort to try and alter a Supreme Court decision without the cooperation of our side of the aisle, without looking at the constitutional questions inherent here, without being concerned about the underlying protection of free and fair and open speech, that we have gone down the wrong path.

Thank God the writers of the Federalist papers didn't have to worry about this kind of legislation or the great pamphleteers during the period of time of our Revolution. They would have found themselves subject to King George.

Thank you, Mr. Chairman.

The CHAIRMAN. I thank the gentleman. Anybody else care to make an opening statement?

Ms. Lofgren.

Ms. LOFGREN. Mr. Chairman, thank you all. I will be brief because I want to hear our witnesses. I do want to thank you for holding this hearing today.

When I read Justice Kennedy's opinion, I will be honest, I didn't agree with it. But so what? It is the Supreme Court. It is the decision. We have got to deal with it and I very much accept that, the rule of law. So as I read through the decision, I was actually heartened to see the reliance on the opportunity for disclosure to remedy some of the concerns I had in reading the decision, and I think the bill before us goes a long way in that regard. Obviously we are having a hearing to see if improvements can be made. But I think disclosure was really what the Court looked at, and it is really what this bill does.

I would like to just note—I mean, you can never legislate on the basis obviously of a poll, but I will say that the public is with us on this one. Recently there was a poll on what people thought about Citizens United and the ability of corporations to have unlimited expenditures in the political arena. 85 percent of Democrats oppose the ruling, 76 percent of Republicans oppose the ruling, 81 percent of Independents oppose the ruling. And I think the reason is this: We have a history that goes back—I am from California. I remember one time as an undergraduate there was a move that the trustees vetoed to make our school mascot at Stanford the Robber Barons. Certainly we are familiar 100 years ago with the kind of role that money played in politics, and it is not something that people want to go back to.

I have a number of questions. I had some other ideas on how to approach some of these issues. I have not yet introduced a bill, but I am looking forward to getting some thoughts really of a very distinguished panel on some other possibilities. And, Mr. Chairman, I believe you think that this hearing is very important. And I thank you and I yield back.

The CHAIRMAN. I thank the lady. Mr. McCarthy.

Mr. MCCARTHY. Thank you, Mr. Chairman, and thank you for calling this important hearing. This bill's supporters have been using the phrase "sunlight is the best disinfectant." I think this bill can benefit from a little sunlight itself, and this hearing is a first step.

While both Senator Schumer and Representative Van Hollen commented that this bill will cover unions as well as corporations and trade associations, it seems they were conveniently left out of a key portion of the legislation.

For example, union members' annual dues don't generally meet the \$600 threshold required for reporting. Unions representing government employees have the same conflict concerns as government contractors, but those unions are left out of the bill. There are many international unions who raise the same concerns over foreign influence that the bill claims to address, but those unions are not affected by the bill. The author of this legislation would want to say that this bill treats everyone equally, but they have cherry-picked what provisions they want to apply to their supporters and which provisions it would just be more convenient for their campaigns if they ignore it.

Plain and simple, this legislation is an incumbent protection bill that is intended to stop speech. Why else would independent expenditures and electioneering communications be held to higher standards than even candidate ads are for the disclaimer and stand-by-your-ad portion of the bill?

The Democrats who introduced this legislation do not want individuals or groups to have the same opportunity to speak that Members of Congress do or, for that matter, unions do. For all practical purposes, unions have been carved out of this legislation.

Mr. Chairman, we had an opportunity to work bipartisanly here in a way that brought about meaningful reform that still protects the First Amendment rights of the American people. Instead, we reached out repeatedly to our colleagues on the other side of the aisle in hopes of crafting a solution that would be able to garner wide bipartisan support but shut out the process of drafting this bill, and looking at this legislation, it shows.

I look forward to hearing the testimony of our witnesses today and hope that they can shed some more light on the legislation we have before us. Again, I thank the chairman. And as my colleague from California said, maybe she was drafting a bill of her own. Once again, the minority on this side of the aisle will reach out and look to draft legislation not based upon campaign committees but based upon real policy that protects the American people. And I yield back.

Ms. LOFGREN. Would the gentleman yield? I would look forward to working with you. I have not yet decided whether to introduce a bill, but I would look forward to working with you.

Mr. MCCARTHY. Well, I appreciate that and I would gladly introduce a bill.

The CHAIRMAN. I thank the gentleman. Any other opening statements?

Mr. HARPER. Mr. Chairman.

The CHAIRMAN. Mr. Harper.

Mr. HARPER. Thank you, Mr. Chairman. As Mr. Lungren pointed out earlier, I have to begin by noting that the bill at 84 pages is actually longer than the 57-page court opinion it seeks to overturn, but this bill is about much more than disclosure. And I certainly think well enough of my colleagues on the Democratic side to believe that this bill cannot really be what they intended. And I would like to offer a few examples if I may.

As a result of section 102, American-based companies apparently now are going to be prevented from creating PACs, limiting the voices of their American employees and shareholders. And any time any corporation makes a donation, the CEO of that company is going to have to file certification with the FEC, even if it appears that that donation is to a charity and has nothing to do with an election.

Under the coordination rules proposed by the majority in sections 103 and 104, a candidate could be found to have coordinated and campaign-related spending based solely on the content of the communication without ever having had any interaction or knowledge or contact with the group making the expenditure.

Now, if union dues are going to be treated under this bill as donations and payments subject to the reporting and disclosure requirements in sections 211 and 212, union members who don't agree with their leadership may have to affirmatively refuse to allow their union dues to be used for campaign purposes every time they get a paycheck. That would also mean that union leaders would have to send certification letters every paycheck to those members assuring them that their dues will not be used for political activity.

Furthermore, the required disclaimer language for television commercials in section 214 is so long that it could easily take up a group's entire ad time. It even appears that some ads will require two separate stand-by-your-ad disclaimers from different people. This confusion and ambiguity would be bad enough in any bill, but it is especially bad here.

This bill has implementing language that makes it take effect 30 days after enactment, regardless of whether the FEC has published its regulations. That means there will be no guidance to clear up this ambiguity, no instructions for how to comply and no way to participate in the political process with confidence that your speech will not land you in jail.

Those who seek to challenge this bill's ambiguity and potentially unconstitutional provisions in court are going to be faced with a judicial review process that will be designed for delay and frustration. The procedure in this bill conflicts with the processes created in both the Federal Election Campaign Act and the Bipartisan Campaign Reform Act, opening the door to collateral litigation to decide what court to be in before this case is even heard.

It appears that section 401 is congressional forum shopping. The only conclusion one can draw from the immediate implementation without regulatory guidance and the protracted court process is that this bill was designed to affect the outcome of the 2010 elections and protect the majority's incumbencies.

Mr. Chairman, I echo the sentiments of my colleagues, Mr. Lungen and Mr. McCarthy, when I say that I had hoped that we could work together on this bill. There is common ground on a number of these issues, but this bill does not even attempt to reach it.

I hope that our panel here today will be able to speak to some of these concerns that I have raised, and I look forward to their testimony. Thank you, Mr. Chairman. I yield back.

The CHAIRMAN. I thank the gentleman. We have to take a walk for about an hour. We have got three votes on the floor. Rather than introduce the panel and make you stop, I would rather introduce you and let you continue to speak. You look pretty comfortable. I hope that you are. We should be back in about 45 minutes.

We have three votes on the floor. Again, we have to recess this hearing until approximately 45 minutes. My colleague reminds me to remind you there is a cafeteria in the basement. We wouldn't mind your patronage, and you can bring me back a decaf if anyone chooses to.

Thank you.

[Recess.]

The CHAIRMAN. I would like to call our hearing back to order. And again, thank you for your patience. And I would like to introduce our panel.

First we have Donald Simon. Mr. Simon represents a number of campaign finance reform organizations and is an expert on campaign finance and election law issues. Prior to his work on his current firm, he spent 5 years as Executive Vice President and General Counsel of Common Cause, directing the organization's legislative and legal programs.

Nick Nyhart is Co-Founder and President of Public Citizen, a nonprofit organization dedicated to campaign finance reform. Prior to serving as President of Public Citizen, Mr. Nyhart was national field director and deputy director for the organization.

Theodore B. Olson. Mr. Olson is a partner at Gibson, Dunn & Crutcher. Mr. Olson was also lead counsel for Citizens United during the Citizens United v. FEC case before the Supreme Court. Prior to his work with the firm, he was Solicitor General of the United States, as well as Assistant Attorney General in charge of the Office of Legal Counsel in the United States Department of Justice.

Ms. LOFGREN. Mr. Chairman, would you yield for just one moment for Mr. Olson?

The CHAIRMAN. Yes, I will.

Ms. LOFGREN. I have a meeting with the Speaker at 12:30. I may not get the chance to thank him for his pro bono effort on gay marriage in California. It really is something I appreciate, and I wanted to take this opportunity to thank him for that.

Mr. OLSON. Thank you very much.

Ms. LOFGREN. I thank you, Mr. Chairman.

The CHAIRMAN. You are welcome.

David Bossie. David Bossie is the President of Citizens United. Prior to working at Citizens United, Mr. Bossie served as chief investigator for the United States House of Representatives Committee on Government Reform and Oversight, as well as investigator for Senator Faircloth's special Senate campaign to investigate Whitewater Development Corporation.

Lisa Gilbert, the rose amongst the thorns. Lisa Gilbert is a Democracy Advocate with U.S. PIRG, the federation of State public interest research groups. Ms. Gilbert works on measures to make government more transparent and elections more fair, as well as accessible. Prior to joining U.S. PIRG, Ms. Gilbert worked with the Fund for the Public Interest, where she ran large citizen outreach campaigns.

Dr. Craig Holman. Mr. Holman is a Legislative Representative for Public Citizen. Mr. Holman assists in drafting campaign finance reform legislation and conducts numerous research projects on the impact of money in politics. In addition, he has been called upon to assist as a researcher and/or expert witness defending in court the bipartisan Campaign Reform Act of 2002 as well as the campaign finance reform laws of various States. Previous, Mr. Holman was Senior Policy Analyst at the Brennan Center for Justice.

I thank you all for being here and I would ask you if you would just push your button and pull that mic a little closer to you, and we would hope that you would have your statements reach 5 minutes because I am sure we have questions, you may have to elaborate something you may have missed, and we will also accept any statements for the record.

Mr. Simon.

STATEMENTS OF DONALD J. SIMON, GENERAL COUNSEL, DEMOCRACY 21; NICK NYHART, PRESIDENT AND CEO, PUBLIC CAMPAIGN; THEODORE B. OLSON, PARTNER, GIBSON, DUNN & CRUTCHER, LLP; DAVID N. BOSSIE, PRESIDENT, CITIZENS UNITED; LISA GILBERT, DEMOCRACY ADVOCATE; AND CRAIG HOLMAN, GOVERNMENT AFFAIRS LOBBYIST, PUBLIC CITIZEN

STATEMENT OF DONALD J. SIMON

Mr. SIMON. Thank you, Mr. Chairman. I appreciate the opportunity to testify this morning on behalf of Democracy 21 on the DISCLOSE Act that was introduced last week in response to the Citizens United decision. The legislation provides Congress with the opportunity to mitigate some of the destructive impact of Citizens United, which has opened the door for corporations, labor unions and other organizations to flood Federal elections with special interest money and thereby to buy influence over government decisions with potentially massive campaign expenditures.

The DISCLOSE legislation is fair and equitable and not partisan in its impact. The bill applies alike to corporations, labor unions, trade associations, and nonprofit advocacy organizations across the political spectrum. At the heart of the legislation are comprehensive new disclosure requirements that will provide for prompt pub-

lic disclosure of campaign-related spending by corporations and other covered organizations.

Importantly, these reporting organizations are required to identify the sources of the funds they use for campaign spending. This essential provision is necessary in order to ensure that public disclosure of campaign-related spending is effective, that the money used to influence Federal campaigns cannot be hidden behind conduits, intermediaries or front groups used to mask the true source of funds.

But the legislation is also fair to donors. Under the legislation, any donor to any organization can restrict the donated funds from being used for campaign spending. And if so, the donor will not be subject to any disclosure requirement. Thus, whether the donor's identity is disclosed or not is fully within the donor's control.

Now, there was discussion earlier from Mr. Lungren and others about the constitutionality of these provisions, and I want to address that.

Dating back to the Buckley decision more than 30 years ago, the Supreme Court has consistently endorsed the principle that the public has an important interest of constitutional significance in knowing about expenditures being made to influence election campaigns and about the sources that are providing the funds used for such expenditures. In upholding similar disclosure laws in the McConnell case, the Supreme Court by an 8 to 1 majority took note of spending done by generically named front groups such as Americans Working for Real Change or Citizens for Better Medicare. And with reference to those challenging the constitutionality of new disclosure rules that would unmask the sources behind what the Court called these dubious and misleading names, the Court said, "plaintiffs never satisfactorily answer the question of how uninhibited, robust and wide open speech can occur when organizations hide themselves from scrutiny of the voting public."

Indeed, the Citizens United decision itself, after it first opened the door to corporate spending, then strongly reaffirmed the constitutionality of laws which require the disclosure of money spent by corporations to influence Federal elections.

The Court in Citizens United, again by an 8 to 1 majority that included 4 of the 5 conservative justices, the Court rejected the argument that disclosure requirements chill the exercise of First Amendment rights. Disclosure requirements, the Court said, "impose no ceiling on campaign-related activities" and "do not prevent anyone from speaking." The Court held that disclosure of campaign-related spending serves an important governmental interest "in providing the electorate with information about the sources of election-related spending."

The Court recognized that disclosure "permits citizens and shareholders to react to the speech of corporate entities in a proper way." This transparency "enables the electorate to make informed decisions and give proper weight to different speakers and messages."

The Court also squarely rejected the argument that only expenditures containing the expressed advocacy or its functional equivalent can be subject to disclosure requirements.

Finally, I want to note that there has always been strong and broad bipartisan support on Capitol Hill for full and timely disclosure of campaign spending. Even the most vocal congressional opponents of other campaign finance measures have argued that disclosure is the one reform that makes sense.

For instance, as we quote in our written testimony, Senator McConnell, who was second to none in his opposition to campaign finance reform, said on national TV a few years ago that Republicans are in favor of disclosure and disclosure, he said, needs to be “meaningful” and “real.” With regard to a bill that at the time addressed spending by 527 groups, Senator McConnell said, “and so what we ought to do is broaden the disclosure to include at least labor unions and tax-exempt business associations and trial lawyers so that you include the major political players in America. Why would a little disclosure be better than a lot of disclosure?”

On that at least Senator McConnell was right, a little disclosure is not better than a lot of disclosure. And what this legislation provides is comprehensive disclosure, disclosure that includes corporations and labor unions and trade associations and other groups now empowered by the Citizens United decision to spend their Treasury funds on Federal campaigns. And disclosure by them that—to use Senator McConnell’s terms—would be meaningful and real. Republicans who have supported disclosure in the past should support the disclosure rules in this legislation.

In his radio address last Saturday, President Obama strongly endorsed this legislation. The President said that in the wake of Citizens United, “what we are facing is no less than a potential corporate takeover of our elections and what is at stake is no less than the integrity of our democracy. This shouldn’t be a Democratic or Republican issue. This is an issue that goes to whether or not we will have a government that works for ordinary Americans, a government of, by, and for the people. That is why these reforms are so important.”

We agree. The public is entitled to know whose money is behind campaign-related spending and, ensuring there will be an effective answer to this question, this legislation serves as an important protection to safeguard the integrity of the democratic process.

We urge you to act quickly to enact the DISCLOSE Act so it can be effective in time for this year’s elections. Thank you very much.

[The statement of Mr. Simon follows:]

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Testimony of

Donald J. Simon

**General Counsel
Democracy 21**

Before the

Committee on House Administration

on

**H.R. 5175, The DISCLOSE ACT,
“Democracy is Strengthened by Casting Light on Spending in Elections”**

May 6, 2010

Chairman Brady and Members of the Committee:

I appreciate the opportunity to testify on behalf of Democracy 21 on H.R. 5175, the DISCLOSE Act, which was introduced last week as a legislative response to the Supreme Court's recent decision in *Citizens United v. Federal Election Commission*, 130 S.Ct. 876 (2010).

I am an attorney in private practice at the law firm of Sonosky, Chambers, Sachse, Endreson & Perry in Washington DC, and I serve as 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.

Introduction and Summary

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

It is also wildly unpopular with the American public. A new poll shows the American people overwhelmingly oppose the *Citizens United* decision. According to a recent Quinnipiac Poll (April 21, 2010):

Voters disapprove 79 – 14 percent of the Supreme Court's January ruling removing limits on the amount corporations and unions could spend attacking or boosting political candidates, with consistently strong opposition across the political spectrum.

The legislation introduced in the House last week by Representative Chris Van Hollen, joined by Chairman Brady and Representatives Castle and Jones – the DISCLOSE Act –

provides Congress with the opportunity to mitigate the destructive impact of the *Citizens United* decision, which has opened the door for corporations, labor unions and other organizations to flood federal elections with special interest money and to buy influence over government decisions with massive campaign expenditures.

The DISCLOSE legislation is fair and equitable, and not partisan, in its impact. The bill applies alike to corporations, labor unions, trade associations and non-profit advocacy organizations.

At the heart of the legislation are comprehensive new disclosure requirements that will provide for prompt public disclosure of campaign-related spending by corporations and the other covered organizations. Importantly, reporting organizations are required to identify the sources of the funds they use for campaign spending. This essential provision is necessary in order to ensure that public disclosure of campaign-related spending is effective – that the money used to influence federal campaigns cannot be hidden behind conduits, intermediaries and front groups used to mask the true sources of funds.

But the legislation is also fair to donors. Under the legislation, any donor to any organization can restrict the donated funds from being used for campaign-related expenditures, and if so, the donor will not be subject to any disclosure requirement.

Thus, whether a donor's identity is disclosed or not is fully within the control of the donor.

Although critics claim that disclosure requirements are unconstitutional, this is a myth. Dating back to the landmark *Buckley* decision more than 30 years ago, the Supreme Court has consistently endorsed the principle that the public has the right to know about expenditures being

made to influence election campaigns, and about the sources that are providing the funds used for such expenditures.

Indeed, the *Citizens United* decision itself, after it first opened the door to corporate spending in federal campaigns (including spending by incorporated non-profit organizations, such as Citizens United), then strongly reaffirmed the constitutionality of laws that require the disclosure of the money spent by such corporations to influence federal elections.

The Court in *Citizens United* – by an 8 to 1 majority – rejected the argument that disclosure requirements “chill” the exercise of First Amendment rights.

Disclosure requirements, the Court said, “impose no ceiling on campaign related activities,” and “do not prevent anyone from speaking.” 130 S.Ct. at 914. The Court held that requiring the disclosure of campaign-related expenditures serves an important governmental interest in “provid[ing] the electorate with information about the sources of election-related spending.” *Id.*

The Court – including four of the five Justices who voted to strike down the ban on corporate spending – recognized that “disclosure permits citizens and shareholders to react to the speech of corporate entities in a proper way. This transparency enables the electorate to make informed decisions and give proper weight to different speakers and messages.” *Id.* at 916.

The Court also squarely rejected the claim that only expenditures that contain “express advocacy” (or the functional equivalent of express advocacy) can be made subject to disclosure requirements.

Indeed, that claim was a central issue in *Citizens United*. And the Court said: “[W]e reject Citizens United’s contention that the disclosure requirements must be limited to speech that is the functional equivalent of express advocacy.” *Id.* at 915.

There has always been strong and broad bipartisan support on Capitol Hill for full and timely disclosure of campaign finance activities. Even the most vocal congressional opponents of various other campaign finance reforms have argued that full and timely disclosure of campaign-related spending is the one reform that makes sense.

For example, according to an article in *The Hill* (April 22, 2010):

Even Senate Minority Leader Mitch McConnell (R-Ky.), who has spent his political career fighting more restrictions, in 2000 called for broad new disclosure requirements in response to an effort by Sen. John McCain (R-Ariz.) to crack down on so-called “527” political groups.

The Hill article further stated (emphasis added):

“Republicans are in favor of disclosure,” McConnell told Tim Russert on NBC’s “Meet the Press” at the time. In fact, he said, the more disclosure, the better.

“If you’re going to do that, and the Senate voted to do that, and I’m prepared to go down that road, then it needs to be meaningful disclosure, Tim,” he said. “527s are just a handful of groups. We need to have real disclosure. And so what we ought to do is broaden the disclosure to include at least labor unions and tax-exempt business associations and trial lawyers so that you include the major political players in America. Why would a little disclosure be better than a lot of disclosure?”

If Senator McConnell is true to his words, he and other Republicans who have supported full and timely disclosure in the past should have no problem supporting the important campaign finance disclosure requirements established by the DISCLOSE Act.

In his radio address last Saturday, President Obama strongly endorsed the DISCLOSE Act. The President said that in the wake of *Citizens United*, “What we are facing is no less than a potential corporate takeover of our elections. And what is at stake is no less than the integrity of our democracy. This shouldn’t be a Democratic issue or a Republican issue. This is an issue that goes to whether or not we will have a government that works for ordinary Americans – a government of, by, and for the people. That’s why these reforms are so important.”

Congress should act quickly to enact the DISCLOSE Act so that it can be effective in time for the 2010 congressional elections.

1. The impact of the *Citizens United* decision.

The *Citizens United* decision represents an enormous transfer of political power in our country from citizens to corporations. Until three months ago, the financing of federal elections in our country had been limited by law to individuals, and to groups of individuals (most commonly organized as 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 and thereby, on government decisions. 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 directly 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. Their resources, however, 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 the decision, insurance companies, banks, drug companies, energy companies and the like – and their trade associations – as well as labor unions, will each be free to run multi-million dollar campaigns to directly advocate the election or defeat of federal candidates. In addition to TV and radio ad campaigns, these

advocacy efforts could include direct mail and phone bank campaigns, all urging voters to elect or defeat candidates.

It would not take very much 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, 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 said:

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 incumbents, corporate spending decisions are likely to be made based on whether a Member voted the right way or the wrong way on an issue (or 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: If you 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 – you run the risk of being faced with a massive negative ad campaign funded by corporate dollars that will put your reelection in jeopardy. Just 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, regardless of whether any formal *quid pro quo* relationship exists between the Member (or his opponent) and the corporate spender.

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. Major corporations have ongoing agendas in Congress 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.

Even an article in *The New England Journal of Medicine* (April 15, 2010) has expressed alarm about the impact of the decision:

Although it may not initially appear to concern health, *Citizens United* has important implications for health care providers and public health. The Court has effectively opened the financial floodgates to give corporations unprecedented influence over the election of people who determine health policy...With *Citizens United*, the Court has given corporations a powerful tool for promoting their interests, regardless of health or other consequences.

[A]s health care reform efforts continue, insurance companies can select candidates who represent their interests (*e.g.*, increased profits or less regulation for health plans) and devote unlimited funds to advertisements supporting those candidates and attacking their opponents. Critically, these advertisements can run in the days immediately preceding an election, when many voters make a final

decision. . . This strategy can also be used to influence incumbents. For example, Congress is currently considering a bill to loosen restrictions on the importation of drugs, which could lower prices for certain drugs. Domestic pharmaceutical companies that oppose this bill can influence an incumbent's vote with the threat of well-funded attack advertisements throughout the reelection campaign.

A report by Peter Stone and Bara Vaida in the *National Journal* (January 30, 2010)

further 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.'"

2. The central importance of disclosure in light of *Citizens United*.

The spending unleashed by the *Citizens United* decision will be particularly damaging to the conduct of federal elections if the sources of the money remain hidden from public view.

The Supreme Court spoke to this problem in the *McConnell* case where, again, by an 8 to 1 vote, it upheld disclosure provisions for electioneering communications that include the

disclosure of donors who give money to a group that makes disbursements for such campaign-related speech. The Court explained:

The factual record demonstrates that the abuse of the present law not only permits corporations and labor unions to fund broadcast advertisements designed to influence federal elections, but permits them to do so while concealing their identities from the public. BCRA's disclosure provisions require these organizations to reveal their identities so that the public is able to identify the sources of the funding behind broadcast advertisements influencing certain elections. Plaintiffs' disdain for BCRA's disclosure provision is nothing short of surprising. Plaintiffs challenge BCRA's restrictions on electioneering communications on the premise that. . . speech needs to be "uninhibited, robust, and wide-open." Curiously, Plaintiffs want to preserve the ability to run these advertisements while hiding behind dubious and misleading names like: "The Coalition-Americans Working for Real Change" (funded by business organizations opposed to organized labor), "Citizens for Better Medicare" (funded by the pharmaceutical industry), "Republicans for Clean Air" (funded by brothers Charles and Sam Wyly). Given these tactics, Plaintiffs never satisfactorily answer the question of how "uninhibited, robust, and wide-open" speech can occur when organizations hide themselves from the scrutiny of the voting public.

McConnell v. FEC, 540 U.S. 93, 196-97 (2003) quoting 251 F. Supp. 2d at 237 (citations omitted) (emphasis added).

As the Supreme Court has long held, and reaffirmed in *McConnell* and again in *Citizens United*, citizens have a basic right to know who is spending money to influence our campaigns, and the sources of their money.

Some observers argue 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 or shareholders. 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.

Such expenditures clearly will occur and, absent the enactment of the DISCLOSE Act, the money will be masked.

According to the *National Journal* report cited above:

[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.

Another recent article in *National Journal* by Peter Stone (January 12, 2010) illustrates the reason new disclosure rules must be carefully designed in order to prevent circumvention of disclosure requirements through the use of conduits and front groups. 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 then transferred the money to two “business coalitions” it established (with innocuous-sounding names) that actually bought the ads. Anyone viewing an ad run by “the Campaign for Responsible Health Care” would have absolutely no idea that insurance companies were funding the ad.

If the kind of spending described above had targeted Members of Congress and qualified as campaign-related expenditures, voters would have had no idea who the actual interests were behind the effort to elect or defeat those candidates.

This kind of deliberate scheme to mask the money behind an advocacy campaign is far from atypical. To counter this, using the example above, an effective new disclosure law would require:

- (1) the insurance companies to disclose the contributions they gave to the Chamber to pay for the ads;
- (2) the Chamber to disclose the money that it gave to the front groups it created to pay for the ads (and the donors to the Chamber who provided the money), and
- (3) the front groups to disclose the expenditures they made on campaign-related ads and the donors who provided them with the funds to pay for the ads.

In other words, if these had been election-related ads, and if the insurance companies paid for the ads, even in part, the public should know this.

The disclosure provisions of the DISCLOSE Act would accomplish this.

A recent story by *Pro Publica* ("Higher Corporate Spending on Election Ads Could Be All But Invisible," March 10, 2010) notes that current disclosure laws are simply not up to the task:

Under current disclosure laws for federal elections, it's virtually impossible for the public to track how much a business spends, what it's spending on, or who ultimately benefits. Experts say the transparency problem extends to state and local races as well.

"There is no good way to gauge" how much any given company spends on elections, said Karl Sandstrom, a former vice chairman of the Federal Election Commission and counsel to the Center for Political Accountability. "There's no central collection of the information, no monitoring."

Companies invest in politics to win favorable regulations or block those "that could choke off their business model," said Robert Kelner, chairman of Covington & Burling's Washington, D.C., political law group. But they'd rather hide these political activities, he said, because they fear backlash from customers or shareholders.

As a story in *The New York Times* (Feb. 27, 2010) explained:

The Supreme Court decision last month allowing corporations to spend unlimited money on behalf of political candidates left a loophole that campaign finance lawyers say could allow companies to pay for extensive political advertising while avoiding the disclosure requirements the court appeared to leave intact.

Experts say the ruling, along with a pair of earlier Supreme Court cases, makes it possible for corporations and unions to donate anonymously to nonprofit civic leagues and trade associations. The groups can then use the money to finance the types of political advertisements that were at the heart of last month's ruling, in *Citizens United v. Federal Election Commission*....

That means that those nonprofit groups, which are not required to disclose their donors, can now use corporate contributions to buy political commercials, and the corporations can potentially operate behind the anonymity of their donations. "Clearly, that's where the action's going to be," said Kenneth A. Gross, a Washington lawyer who advises corporations on political law.

As the first and most urgent task of responding to the *Citizens United* decision, Congress should enact the DISCLOSE Act in order to ensure that all spending to influence federal elections, and the true sources of the funds used to make those expenditures, are disclosed.

3. How the DISCLOSE Act provides for comprehensive disclosure.

The key provisions of the DISCLOSE legislation are comprehensive new disclosure requirements for corporations, labor unions, trade associations and non-profit advocacy groups that spend money for independent expenditures or electioneering communications to influence federal elections.

The new disclosure requirements are intended to ensure that there is disclosure not only of the identity of the organization that spends the money for campaign-related ads, but also that there is full disclosure of the true sources of the money used for such ads, even if funds are transferred through conduits, intermediaries or front groups.

The legislation defines corporations, unions, trade associations, non-profit advocacy groups and section 527 groups as “covered organizations” that are required to report their campaign-related spending and, where relevant, the donors who fund that spending.

The legislation defines “campaign-related” spending to include both independent expenditures and electioneering communications. Independent expenditures are defined to include public communications which contain express advocacy as well as those containing “the functional equivalent of express advocacy” – a term the Supreme Court has used to mean any ad which can be understood by a reasonable person only as advocating the election or defeat of a candidate.

The legislation modifies current law to expand the definition of “electioneering communications” to include any broadcast ad that refers to a federal candidate during the period

30 days before a primary, or 120 days before the general election. Since the definition of “electioneering communications” now has relevance only for purposes of requiring disclosure of corporate and union spending (as opposed to prohibiting such spending, as it did prior to *Citizens United*), the expansion of the time frame for the general election period (as compared to current law) serves the important public interest in enhancing disclosure of the sources of money used to fund broadcast ads in the pre-election period.

At the outset, it is important to note that any donor to an organization can restrict the funds contributed by that donor from being used for campaign-related expenditures. If the donor makes such a restriction, the donor will not be subject to any disclosure requirements established by this legislation.

Thus, whether a donor is disclosed or not is fully within the control of the donor. This is fair both to donors and to the organizations to which they donate.

A “covered organization” that makes “campaign related” expenditures has the option of setting up a “Campaign-Related Activities Account,” which is a separate bank account to be used for the purpose of making such expenditures.

Covered organizations are not required, however, to set up such an Account and they may instead make campaign-related expenditures out of their general treasury funds.

If a covered organization does not set up an Account and makes expenditures from its general treasury funds, it is subject to the following disclosure requirements:

- If the organization makes independent expenditures of \$10,000 or more, it must file a report disclosing the expenditures and include the identification of all donors of \$600 or more of unrestricted funds to the organization's general treasury during the 12-month period prior to the disbursement. (As noted above, a donor to a covered organization can “restrict” the funds donated, so that the organization cannot use the funds for campaign-related spending and the donor will not be disclosed.)

- If the organization makes disbursements for electioneering communications of \$10,000 or more, the report must include identification of all donors of \$1,000 or more of unrestricted funds to the organization's general treasury during the 12-month period prior to the disbursement.

- Each time the organization makes additional campaign-related disbursements aggregating \$10,000 or more, it is required to file a new disclosure report that updates the disbursement and donor information.

If a covered organization opts to set up a separate Campaign-Related Activities Account, it must make all of its campaign-related expenditures from the Account and is subject to the following disclosure requirements:

- If the organization makes disbursements of \$10,000 or more out of the separate Account for independent expenditures, it must disclose all donors of an aggregate of \$600 or more to the Account during the 12-month period prior to the disbursement.

- If the organization makes disbursements of \$10,000 or more out of the separate Account for electioneering communications, the report must disclose all donors of an aggregate of \$1,000 or more to the Account during the 12-month period prior to the disbursement.

- Each time the organization makes additional campaign-related disbursements aggregating \$10,000 or more from the Account, it is required to file a new report that updates the disbursement and donor information.

If a covered organization sets up an Account (and does not transfer funds aggregating \$10,000 or more from its general treasury to the Account), the organization never has to disclose any of the donors to its general treasury. The only disclosure required is for donations made to the Account for the purpose of campaign-related spending. If, however, the organization makes a transfer of \$10,000 or more from its general treasury to its separate Account, and then makes independent expenditures, it must then disclose all donors of \$6,000 or more to its general treasury (whose donations are not restricted) during the 12-month period prior to the transfer; if the organizations makes such a transfer to its separate Account and then makes disbursements for electioneering communications, the disclosure threshold for donors to its general treasury is

\$10,000 or more. In either event, this disclosure must be updated after each transfer of \$10,000 or more.

Finally, the legislation requires disclosure of transfers made by a covered organization to another person for the purpose of making campaign-related expenditures, or where the transfers are deemed to have been made for such purpose. In those circumstances, the transfers are treated as if they were themselves campaign-related expenditures made by the transferor, and the transferor organization is then subject to the applicable reporting requirements set forth above, including disclosure of its donors. The legislation provides a set of standards for when a transfer is “deemed” to be made for the purpose of making campaign-related expenditures.

In addition to filing disclosure reports with the FEC, a covered organization that already sends periodic reports to its shareholders, members or donors is required to include in such reports a list of the campaign-related expenditures the organization has made, the amounts it has spent, and the source of the funds used. Where the covered organization had made transfers to another person, it must disclose the name of the recipient and the date and amount of funds transferred. And if the covered organization has an Internet site, the same information must be posted on its website, with a link from the homepage.

Some have argued that non-profit groups that raise money only from individuals (so-called “MCFL groups”) should be exempt from these disclosure requirements, arguing that if such groups do not take any corporate money, there is no legitimate public interest in the sources of their funding.

Such an exemption is unwarranted, because it is based on a claim that completely misses the point of donor disclosure – which is to shed light on where covered organizations, including incorporated non-profit groups, are getting the money they then use for campaign-related

disbursements. This rationale for disclosure applies whether that money comes from an individual or from a corporation. If wealthy individuals inject large amounts of money into federal campaigns through non-profit organizations they donate to, they should not be able to hide behind non-profit front groups in order to mask their identity. The public is still entitled to know who is funding the organization's campaign-related expenditures, even if those funders are individuals.

Existing donor disclosure provisions for independent expenditures and electioneering communications apply to *any person*, including to "MCFL groups." The current rules, however, are ineffective and easily evaded because they require disclosure only where donations are earmarked for campaign spending. The DISCLOSE Act strengthens the donor disclosure provisions and shuts down this route for easy circumvention.

Further, if an exemption from enhanced disclosure were granted to "MCFL groups," it would threaten to unravel the whole disclosure regime. "MCFL groups" would quickly become the circumvention vehicle-of-choice for individual donors who want to spend money on campaign-related expenditures without disclosing their involvement. And if such an exemption was given to "MCFL groups," then other types of non-profit organizations would quickly claim they are being treated unfairly and would demand a similar exemption for donations from their individual donors. We would end up with a disclosure regime in which wealthy individuals who are providing the funds for campaign-related ads would remain undisclosed, and the use of front groups to mask campaign spending would flourish.

4. The constitutionality of the disclosure requirements.

The Supreme Court has long upheld the constitutionality of provisions enacted by Congress to require disclosure of money spent to influence federal elections.

Indeed, in *Citizens United* itself, the Court – by an 8 to 1 vote – reaffirmed the constitutionality of disclosure requirements for election-related spending. The Court said, “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 (internal quotation marks and brackets omitted).” 130 S.Ct. at 914 (emphasis added).

The Court said that disclosure laws serve the governmental interests in “providing the electorate with information” about the sources of money spent to influence elections so that voters can “make informed choices in the political marketplace.” *Id.* Importantly, the Court specifically noted the problem that results when groups run ads “while hiding behind dubious and misleading names,” thus masking the true source of funds used for political spending:

In *Buckley*, the Court explained that disclosure could be justified based on a governmental interest in “provid[ing] the electorate with information” about the sources of election-related spending. 424 U. S., at 66. The *McConnell* Court applied this interest in rejecting facial challenges to BCRA §§201 and 311. 540 U. S., at 196. There was evidence in the record that independent groups were running election-related advertisements “while hiding behind dubious and misleading names.” *Id.*, at 197 (quoting *McConnell I*, 251 F. Supp. 2d, at 237). The Court therefore upheld BCRA §§201 and 311 on the ground that they would help citizens “make informed choices in the political marketplace.” 540 U. S., at 197 (quoting *McConnell I*, *supra*, at 237); see 540 U. S., at 231.

Id. (emphasis added).

The Court also specifically rejected the argument that disclosure requirements can constitutionally apply only to ads which contain express advocacy (or its functional equivalent). Indeed, a central issue raised by the plaintiff in *Citizens United* was whether disclosure requirements could constitutionally be applied to broadcast ads run by the Citizens United group to promote its movie. The ads did not contain express advocacy, but they did refer to a candidate. In rejecting Citizen United’s challenge, the Court said:

The Court has explained that disclosure is a less restrictive alternative to more comprehensive regulations of speech. See, e.g., *MCFL*, 479 U. S., at 262. In *Buckley*, the Court upheld a disclosure requirement for independent expenditures even though it invalidated a provision that imposed a ceiling on those expenditures. 424 U. S., at 75–76. In *McConnell*, three Justices who would have found §441b to be unconstitutional nonetheless voted to uphold BCRA’s disclosure and disclaimer requirements. 540 U. S., at 321 (opinion of KENNEDY, J., joined by Rehnquist, C. J., and SCALIA, J.). And the Court has upheld registration and disclosure requirements on lobbyists, even though Congress has no power to ban lobbying itself. *United States v. Harriss*, 347 U. S. 612, 625 (1954) (Congress “has merely provided for a modicum of information from those who for hire attempt to influence legislation or who collect or spend funds for that purpose”). For these reasons, we reject Citizens United’s contention that the disclosure requirements must be limited to speech that is the functional equivalent of express advocacy.

Id. at 916 (emphasis added). Even for the ads at issue in *Citizens United* “which only attempt to persuade viewers to see the film,” and that “only pertain to a commercial transaction,” the Court found a sufficient “informational interest” to justify disclosure requirements in the fact that the ads referred to a candidate in an election context. *Id.*

Additionally, the Court noted that among the benefits of disclosure is increased accountability – including the accountability of corporations to their shareholders when corporate managers decide to spend shareholder money to influence federal elections:

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. . . . 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. Shareholders can determine whether their corporation’s political speech advances the corporation’s interest in making profits, and citizens can see whether elected officials are “‘in the pocket’ of so-called moneyed interests.” 540 U. S., at 259 (opinion of SCALIA, J.); see *MCFL, supra*, at 261. The First Amendment protects political speech; and disclosure permits citizens and shareholders to react to the speech of corporate entities in a proper way. This transparency enables the electorate to make informed decisions and give proper weight to different speakers and messages.

Id. at 916 (emphasis added).

Thus, while a bare majority of the Court opened the door to unlimited campaign spending by corporations, eight Justices strongly endorsed disclosure as the means to “provide shareholders and citizens with information needed to hold corporations and elected officials accountable for their positions and supporters,” and recognized that “transparency enables the electorate to make informed decisions.” This should put to rest any concerns that the disclosure requirements in the DISCLOSE Act will fail to meet constitutional standards.

5. Other provisions in the DISCLOSE Act.

The DISCLOSE Act contains other important reforms that also serve to respond to the *Citizens United* decision.

A. Improved disclaimer requirements. The legislation requires the CEO of a corporation or head of any other covered organization to personally appear in the organization’s independent expenditure or electioneering communication TV ads and take responsibility for the ad by stating that the corporation or other organization approves the message. The same statement must be read by the CEO or head of the organization in a radio ad.

This stand-by-your-ad provision is similar to the stand-by-your-ad requirement that applies to federal candidates under current law.

In addition, the legislation requires the top funder (“significant funder”) of a TV or radio ad also to appear in the ad and take responsibility for it. The “significant funder” is defined as any person or organization who made the largest payment of \$100,000 or more to be used for a specific ad or race, or if there is no such person, then the person or organization who made the largest payment to the organization that is available for use by the organization to pay for its campaign-related spending.

Additionally, for independent expenditure or electioneering communication ads that appear on TV, a covered organization must also list the top 5 funders who provided the largest payments to the covered organization that are available to be used to pay for the ads.

The purpose of these provisions is simply to ensure that members of the public, at the time they view the ad, have better information about the sponsors and funders of an ad. Like disclosure more generally, these disclaimer provisions provide information to the public that helps viewers evaluate the ad and “make informed decisions” because they can “give proper weight to different speakers and messages.”

In *Citizens United*, the Supreme Court upheld disclaimer provisions like these on grounds similar to the reasons it cited in support of disclosure requirements. The Court noted that, like disclosure, disclaimer requirements “impose no ceiling” on campaign-related activities, and “do not prevent anyone from speaking.”

They do, however, “provid[e] the electorate with information,” and “insure that the voters are fully informed about the person or group who is speaking.” Indeed, the Court said, “At the very least, the disclaimers avoid confusion by making clear that the ads are not funded by a candidate or political party.” 130 S.Ct. at 915.

B. Improved limitations on government contractors. Under current law, government contractors are barred from making contributions to federal candidates. 2 U.S.C. § 441c. Under existing FEC regulations, they are also barred from making expenditures to influence federal elections. 11 C.F.R. § 115.2(a).

The reason for this longstanding law is that 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.

The DISCLOSE legislation provides that contractors who have contracts with a value of \$50,000 or more are prohibited from making independent expenditures or electioneering communications in federal elections. The same restrictions apply to recipients of TARP funds until such funds have been paid back.

These requirements simply build on existing law and regulations, which have long prohibited contributions and expenditures by government contractors – whether such contractors are corporations or not. Government contractors have been permitted, and will continue to be permitted, to make expenditures from a federal PAC.

The rationale for continuing the longstanding prohibition on expenditures by government contractors is the same as that which supports anti pay-to-play provisions found in state and local laws throughout the country – that those who do business with the government have a direct financial motive to incur gratitude or outright *quid pro quo* favors from government officials with power over their contracts, by making expenditures that benefit those officials. Conversely, contractors are in a position where they are vulnerable to government officials who might directly or indirectly pressure them to make expenditures in order to receive, or keep, contracts vital to their business. The integrity of the government contracting process – which involves untold billions of dollars – has long been, and should continue to be, protected from coercion that runs in either direction by requiring government contractors to abstain from making campaign-related expenditures.

C. Expanded restrictions on foreign nationals. Under current law, foreign nationals are prohibited from making expenditures or contributions in any federal, state or local election.

2 U.S.C. § 441e. Foreign nationals include foreign governments, foreign individuals and foreign corporations – those organized under the law of a foreign country or with a principal place of business in a foreign country. Under current law, however, foreign nationals do not include domestic U.S. corporations that are owned or controlled by foreign nationals.

Prior to *Citizens United*, the spending of corporate treasury funds by such domestic subsidiaries of foreign corporations for campaign-related expenditures had been prohibited by the general ban on corporate spending. But that spending is now allowed. In light of this change, there is a need to strengthen section 441e to ensure that domestic corporations owned or controlled by foreign interests are not used as vehicles for foreign interests to influence U.S. elections.

The legislation strengthens existing law by expanding the definition of a foreign national to include a U.S. corporation in which a foreign national directly or indirectly owns 20 percent or more of the voting shares of the domestic corporation; a U.S. corporation in which foreign nationals constitute a majority of the board of directors; or a U.S. corporation in which one or more foreign nationals have the power to control the decision-making process of the company with respect to the company's interests in the U.S. or its activities in connection with U.S. elections.

In order to ensure compliance with these rules, the legislation requires the CEO of a corporation to file an annual certification with the FEC prior to the corporation making any contribution or expenditure in that year with regard to a U.S. election, attesting that the company is not prohibited from making the contribution or expenditure by the new foreign national rules.

Here, again, the legislation builds on longstanding provisions of existing law which are designed to protect the integrity of U.S. elections against foreign influence – influence that could pose a threat to vital national security interests.

Although 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, that 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.

Thus, without the provisions in the DISCLOSE Act, a foreign government (or foreign corporation) could inject unlimited funds into U.S. elections through the campaign-related expenditures made by a domestic subsidiary it owns or controls. By guarding against this, the DISCLOSE Act, like the existing law it builds on, serves important governmental interests by preventing the reality or appearance of foreign intervention in U.S. elections.

D. Strengthened rules on coordination. The *Citizens United* decision allows corporations and labor unions to make campaign-related expenditures, as long as that spending is independent from any candidate or party. Expenditures by corporations and unions that are coordinated with a candidate or party – and which are accordingly treated by law as contributions – are still restricted.

Thus, the definition of “coordination” becomes the important line between spending by a corporation (or union) which is permissible, and that which is not. The Court in *Citizens United* was clear that it believed the key hedge against *quid pro quo* corruption resulting from campaign-related corporate spending is the requirement that such spending be independent of, *i.e.*, not coordinated with, the candidate who is benefited.

The legislation strengthens and codifies existing FEC regulations that define the types of public communications that are subject to the coordination standard. Under the legislation, a public communication is subject to the coordination test if it refers to a presidential candidate during the period beginning 120 days prior to the earliest primary through the general election, or if it refers to a congressional candidate during the period beginning 90 days before the candidate's primary through the general election. With regard to the presidential election, the legislation simply codifies an existing FEC rule. With regard to congressional elections, the legislation proposes a modest expansion of the current FEC rule in order to fill a gap that exists in some states between the date of a primary and the beginning of the 90 day pre-election window for the general election.

The legislation takes no position on the coordination rules for public communications made in the periods outside these windows, and thus leaves in place existing law for those periods.

It is important to note that the public communications that fall within these windows simply become subject to the coordination rules. They are treated as "coordinated" only if, in addition to referring to a candidate within the specified time frames, the communications actually are made "in cooperation, consultation, or concert with" a candidate or party, as defined by existing FEC regulations. Absent such coordination in fact, the spending will not be treated as a contribution.

The legislation also provides that spending by a political party is subject to the coordinated party spending limits only if the candidate directs or controls the spending of party funds. This provides parties and candidates more flexibility to work together on the spending of

party funds and, in so doing, responds to the expected increase in spending by outside interests in the wake of the *Citizens United* decision.

By strengthening the coordination rules, the legislation guards against evasion of the prohibition on contributions by corporations and unions made in the guise of coordinated expenditures. The change to existing rules proposed in the legislation, although modest, is nonetheless an important anti-circumvention measure.

E. Improved disclosure by lobbying organizations. The legislation requires any lobbyist or lobbying organization that files periodic reports under the Lobbying Disclosure Act to include in those reports a list of independent expenditures or electioneering communications made by the lobbyist or lobbying organization of \$1,000 or more, and the name of each candidate supported or opposed by the expenditure, if applicable.

This provision will improve disclosure of activities by lobbyists, who are in the business of trying to influence government decisions. When lobbyists or lobbying organizations make expenditures to influence elections, that is often done as a part of their efforts to influence legislation. By requiring campaign spending by registered lobbyists to be reported together with their other lobbying activities, the public will have better access to the full picture of how lobbyists operate to affect government outcomes. This more complete and comprehensive disclosure will serve as a check on the ability of lobbyists to exert undue influence over elected officials.

Conclusion

The DISCLOSE Act is a careful and constitutional response to the serious dangers posed by the *Citizens United* decision. Above all, it provides for effective and timely disclosure of the money spent by corporations, labor unions, non-profit groups and trade associations to influence

federal elections. The public is entitled to know whose money is behind campaign-related spending. In ensuring there will be an effective answer to that question, the DISCLOSE Act serves as an important protection to safeguard the integrity of the democratic process.

The Congress should enact the DISCLOSE Act expeditiously to ensure that it is in place for the 2010 election.

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Donald J. Simon is a partner in the Washington, DC office of Sonosky, Chambers, Sachse, Endreson & Perry, LLP. He rejoined the firm in 2000 after serving for five years as Executive Vice President and General Counsel of Common Cause. In that capacity, Mr. Simon directed the legislative and legal programs for Common Cause, one of the nation's leading public-interest organizations.

Mr. Simon is an expert on campaign finance and election law issues, and has been involved in numerous legislative initiatives and litigation matters on campaign finance and related issues. He has testified numerous times before Congress and the Federal Election Commission on issues relating to the federal campaign finance laws. Currently, Mr. Simon is general counsel to Democracy 21, a leading campaign finance reform organization.

Mr. Simon received his B.A., *magna cum laude*, in 1975 from Harvard College, and his J.D., *cum laude*, from Harvard Law School in 1978.

The CHAIRMAN. I thank the gentleman.
Mr. Nyhart.

STATEMENT OF NICK NYHART

Mr. NYHART. Thank you very much, Chairman Brady. Ranking Member Lungren and distinguished members of the committee, I am appreciative of the opportunity to give testimony today.

I am Nick Nyhart, the President and CEO of Public Campaign actually, not Public Citizen, although my colleague, Craig, may invite me over to his side. We are a nonpartisan organization dedicated to changing the role of money in elections in a way that expands democracy in a public campaign. Our major Federal policy focus has been on the Fair Elections Now Act, which is Representative Larson's bipartisan legislation that offers candidates an alternative way to fund their campaigns, relying on small donations and limited public funds.

But I am here today to support a different piece of important legislation, the DISCLOSE Act. The DISCLOSE Act is a critical response to the Supreme Court's recent decision in Citizens United that throughout decades of common sense practice limiting the influence of corporate and using Treasury funds in our elections. That decision, coupled with the skyrocketing cost of running for office, has made a bad situation worse.

In my written testimony, I have provided my reasons for supporting the bill and suggestions that I believe will strengthen it.

As I sit here today in front of you, I cannot help but use another example that is unfolding on our TV screens nightly, mentioned by Chairman Brady, that illustrates why this bill is so important. Over the last few weeks, Americans have watched a human ecological and economic tragedy unfold in the Gulf with tens of thousands of gallons of oil pouring into the ocean off our Gulf Coast. We have all come to understand that the cleanup of this disaster will take years. As children, we are all taught that we are responsible to clean up our own messes.

Right now, oil companies like BP have their liability on a mess like this one capped at \$75 million. Experts say this is a drop in the ocean, so to speak, compared to the actual cost of lost jobs, damage to the environment, increases in energy prices, and changes in the way of life throughout the Gulf Coast.

Legislation called the Big Oil Bailout Prevention Act has been introduced in both Chambers to increase oil company liability from \$75 million to \$10 billion, and I know Mr. Davis on the committee is a leading cosponsor of the House measure.

Our political system, given the Supreme Court's recent decision, allows companies like BP to spend their Treasury money to influence elections. What would stop BP, a foreign-owned corporation, facing the projected penalty of a \$10 billion cleanup bill from spending \$10 million or \$50 million or even \$100 million or more to elect candidates who—it is simple math to see that their financial interest is in spending maybe \$100 million to save as much as \$10 billion. The DISCLOSE Act prevents foreign-owned corporations from doing that, and that is one reason it should pass.

But the oil industry as a whole would certainly think that there for the grace of God go I. Executives at Exxon Mobil and others

like Citizens United will have the chance to spend political money from their treasuries also and do it in secret unless this passes. DISCLOSE will make the identities of those behind the acts public, in some cases requiring that companies' executives take personal responsibility for the ad.

Public disclosure is an important principle here that will give voters more information as they make decisions knowing that an attack ad is paid for by a big oil company with a vested interest in who wins an election and certainly provides an essential perspective on the, quote-unquote, facts by a group that might officially be called something like Americans for Jobs, Health, and Security.

Transparency will help stop further erosion of our public trust in corporations and in our government. And even when DISCLOSE passes, oil companies will remain political actors, funding campaigns of Members of Congress. The oil and gas industry as a whole has given nearly a quarter of a billion dollars, and that is why we also need a fair election system, so candidates don't need to chase oil industry checks to pay for their campaigns.

In this past month, we have seen plenty of stories about campaign fund-raising alongside the Senate debate on financial regulation. Wall Street is spending money to shape policy. The full list of other big money issues on the table is a long one.

In conclusion, neither DISCLOSE with its many provisions nor the Fair Elections Now Act alone address the entirety of these problems. But together they can make a big difference. That is why today I urge your support of DISCLOSE that will improve our political system for American voters.

Thank you.

[The statement of Mr. Nyhart follows:]

**Testimony before the
United States House of Representatives Committee on Administration on
H.R. 5175, "The DISCLOSE ACT, Democracy is Strengthened by Casting Light on Spending in
Elections"**

Testimony on the DISCLOSE Act (H.R. 5175)
By Nick Nyhart, President and CEO, Public Campaign
May 6, 2010

Good morning, Chairman Brady, Ranking Member Lungren, and distinguished members of the committee. Thank you for your invitation to give testimony today. I am Nick Nyhart, the president and CEO of Public Campaign—a non-partisan organization dedicated to changing the role of money in elections in ways that expand democracy within the political process. At Public Campaign, our federal policy focus has been on the Fair Elections Now Act, which would offer candidates an alternative way to fund their campaigns, allowing them to rely entirely on a blend of small donations and limited public financing. I am here today, however, to support a different piece of important legislation—the DISCLOSE Act. This measure is a critical response to the Supreme Court's narrow 5-4 decision in *Citizens United v. FEC* that threw out decades of common sense measures limiting the influence of corporate and union treasury funds in our elections. That decision, coupled with the skyrocketing cost of running for office, has made a bad situation worse.

The average cost of winning a U.S. House race has increased 111 percent in the last decade, significantly outpacing the rate of inflation. While we have yet to see the full impact of the *Citizens United* decision, we can expect, with near certainty, even more money will find its way into our elections, forcing you and your colleagues to spend more time fundraising to keep pace with the new political expenditures of the post-*Citizens* campaign world.

In this new, wide open, more expensive, and less regulated political environment, transparency is a must to maintain what little public trust remains on our political process. A University of Texas poll from November 2009 found that, as constituents, voters rank themselves last as a consideration when Congressional lawmakers decide how to vote. They ranked themselves below campaign contributors, political parties, and lobbyists. Surely, our citizens, the true owners of the public square and the ultimate beneficiaries of public debate, have a right to know who is saying what about whom on their property and across their airwaves. The more facts they have, the better informed their decisions will be.

Knowing that an attack ad is paid for by wealthy corporate contributors with a vested interest in who wins an election certainly provides an essential perspective on the "facts" presented in a thirty second spot. Moreover, after billions of dollars in bonuses and bailouts, the last thing millions of jobless Americans need to see is increased deep-pocketed corporate manipulation of our elections. Transparency and related common sense restrictions on expenditures are necessary to prevent further erosion of the public trust in our corporations and our politicians. A report from the Center for Economic Development put it more eloquently, "A vibrant economy and well-functioning business system will not remain viable in an environment of real or perceived corruption, which will corrode confidence in government and business." A new deluge of undisclosed political ads will only increase cynicism about the role of corporations in government.

Put another way, it is simply hard to imagine the broad benefits to voters of keeping the identity of the key players in our politics a secret. Through numerous provisions, which others here will speak to in detail, the

DISCLOSE Act takes dead aim at preventing a new regime of secrecy when it comes to the political process. If information is power, then closely held control of information is the opposite of democracy. Transparency is the policy that best represents our country's democratic ideals. Disclosure, moreover, is the one area in campaign finance regulation where, historically, Democrats and Republicans have agreed and I am pleased that the DISCLOSE Act, with its bipartisan cosponsors, is able to continue that tradition.

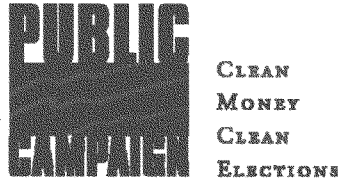
It is for these reasons that we support the DISCLOSE Act.

While we support the DISCLOSE act, and believe it should move forward, it should be further strengthened. The current legislation does not require the Federal Elections Commission to make corporate disclosure reports machine readable, searchable, sortable, and downloadable, but they should be. To fully benefit the American public and find out quickly who is paying for corporate political expenditures, there must be one central, well-publicized, and reliable storehouse of such information where people can search up-to-the minute and recent expenditures, instead of looking for a disclosure needle in an internet haystack.

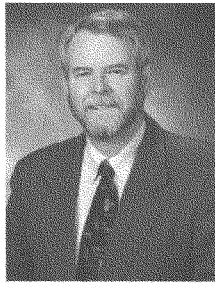
We're also in support of Rep. Mike Capuano's (D-Mass.) Shareholder Protection Act (H.R. 4537) that would require shareholder approval before any corporate treasury funds can be spent on political activity to influence an election.

Finally, and most important to us, is the Fair Elections Now Act (H.R. 1826), a bipartisan bill with nearly 150 co-sponsors. As House Caucus Chairman John Larson (D-Conn.) said last week, the Fair Elections Now Act would serve as a complement to the DISCLOSE Act allowing candidates for the House of Representatives to run competitive election campaigns without relying on increasing numbers of large checks and the well-heeled special interests behind them.

These pieces of legislation work well together. Without the passage of the DISCLOSE Act, a small donor-based public financing system such as Fair Elections would exist alongside a large netherworld of secret election maneuvering, inaccessible to all but very few wealthy Americans. And without enactment of the Fair Elections Now Act, ordinary Americans would know all about deep-pocket political expenditures, but have much less ability to impact the electoral process themselves. Public Campaign supports your approval of both these measures and their delivery to the House floor in timely fashion. Thank you for your time and I look forward to working with members of this committee to pass these important reforms.



Nick Nyhart
President and CEO, Public Campaign



Nick Nyhart is a co-founder and the President and CEO of Public Campaign.

A three decade veteran of social change politics, issue advocacy, grassroots organizing, and non-profit management, Nyhart brings a wealth of experience to the national reform movement. Following the 1992 elections, Nyhart became Director of the Northeast Action Money and Politics Project, a six-state venture that laid the groundwork for Maine's 1996 breakthrough full public financing victory. In January 1997, Nyhart joined scores of state and national money and politics activists to found Public

Campaign, where he served as National Field Director and Deputy Director before assuming the group's helm in 2000.

At Public Campaign, Nyhart has worked to win cutting edge state reform efforts across the country and has organized a number of innovative national collaborations to promote publicly financed elections at the federal level.

The CHAIRMAN. Thank you.
Mr. Olson.

STATEMENT OF THEODORE B. OLSON

Mr. OLSON. Mr. Chairman, Ranking Member Lungren, and members of this committee, I appreciate also the opportunity to speak today in connection with H.R. 5175, the DISCLOSE Act. I should say and I think your introduction—thank you, Mr. Chairman—suggested this. I have studied and litigated constitutional issues throughout my 45-year legal career both in private practice and in government. This has included nearly 8 years of service in the Office of Legal Counsel and the Solicitor General's Office in the Department of Justice, the two divisions of the Department of Justice most responsible for constitutional questions, and I have argued 56 cases in the United States Supreme Court, many of which had to do with constitutional questions, including seven cases involving the First Amendment, the right to free speech. I now represent and advise the United States Chamber of Commerce with respect to constitutional questions, including this act.

The First Amendment declares that Congress shall make no law abridging the freedom of speech. Justice Thurgood Marshall explained for a unanimous Supreme Court that this constitutional protection has its fullest and most urgent application to speech uttered during a campaign for political office. The reason is simple, the right to self-government is unattainable without vigorous and uninhibited public debate about the qualifications and positions of persons seeking elective office.

An essential component of the right to free speech is that government may not discriminate against speakers on the basis of their identity, their ideas, or their ability to speak. Political speech may not be stripped of its First Amendment protection on the basis of a speaker's wealth, point of view or special interest or because the Speaker's interests are represented by a trade association, an affinity group, a union or a corporation.

The Supreme Court's decision in *Citizens United* did not effect a revolution in First Amendment jurisprudence. In fact, it reaffirmed the central principle of the First Amendment, that free and unfettered political speech, whether we like it or not, whether it is popular or not, and whether it is supported by polls or not, is at the very core of our system of government.

I respectfully submit that the DISCLOSE Act shares many of the same unconstitutional characteristics as the legislation invalidated in *Citizens United*.

I will focus today during these oral remarks on only three: One, its far-reaching restrictions on the speech of companies offering services to our government; that is to say, government contractors; two, its discriminatory prohibitions on the speech of persons based upon their national origin or citizenship; and, number three, its onerous and discriminatory disclosure requirements for corporations or unions that wish to speak out on behalf of the interests of their members, their shareholders or their employees.

First, the bill would prohibit speech on matters of vital interest to those who invest in or work for tens of thousands of government contract corporations. This type of wholesale criminalization of

speech can only be tolerable in the narrowest possible context if there were documented evidence that speaking out about candidates for high public office was a serious source of quid pro quo corruption of Federal office holders.

There is no evidence before this body that this is or would be the case with government contractors' independent, uncoordinated commentary on office holders or candidates for election. Indeed, more than half of the States, including California, Florida, Maryland, Oregon, Virginia and Washington and many more impose no restrictions at all on corporations' independent expenditures. Yet there has been no showing that these States' political systems are awash in corporate corruption.

The constitutional flaws in making it a felony for government contractors to express opinions on who shall run our government are compounded by the provision's discriminatory application. The application operation of this prohibition exempts labor unions and media corporations. The First Amendment will not tolerate selective bans on public speech based upon the identity of the speaker. That is a certain path to tyranny. There is no limiting principle to such discrimination. Who are we to pick out to say who can speak and who cannot speak? Would we prohibit speech by those who accept Federal housing assistance or public benefits or other benefits that the Federal Government offers?

Second, this bill's restrictions on persons on the basis of their nationality or citizenship are prohibited by the Constitution and intention with scores of Federal statutes that explicitly prohibit such national origin discrimination.

It seems to me ironic that at the very time that so many political commentators are denouncing as discriminatory the effort by Arizona to enforce Federal prohibitions on illegal immigration, Congress might simultaneously adopt a measure that would abridge the freedom of speech of selected persons to express views on elections based solely on their national origin.

Third, the disclaimer and disclosure provisions of this proposed legislation have serious constitutional flaws. It is important to recall that speakers who are concerned about disclosure wrote many of the pamphlets and books such as the Federalist Papers that played an important role in our Nation's founding.

This is not to say, Mr. Chairman, that disclosure requirements are invariably impermissible, merely that they must be rigorously scrutinized to ensure that they are not being used to place onerous, disproportionate, or burdensome restrictions on speech or impose discriminatorily to chill disfavored speech or speech by disfavored speakers.

These concerns are undeniably present here. Statements by supporters of this legislation have already led many to infer that they will suffer adverse consequences for speaking out for or against office holders or office seekers. Indeed, some very public statements have openly acknowledged that this measure is targeted at specific corporate speakers. It has even been mentioned that it is targeted at the United States Chamber of Commerce.

These disclosure requirements are onerous, confusing, burdensome, costly, and discriminatorily written. They quite obviously have less to do with informing the electorate and more to do with

silencing speech that might be critical of office seekers or, most of all, incumbents. It is indisputable that the more we restrict speech, the more we help out those already in office and handicap those who wish to throw the rascals out. If we make it illegal, complicated, expensive or burdensome to speak, we favor entrenched positions and stifle unpopular views.

That is precisely why we have a First Amendment, and that is why all measures that make it a crime to speak or that impose a bureaucratic regulatory regime on public debate must be resisted and rejected.

Thank you, Mr. Chairman.

[The statement of Mr. Olson follows:]

Committee on House Administration

Hearing on “H.R. 5175, The DISCLOSE Act, Democracy is Strengthened by Casting Light on Spending in Elections”

May 6, 2010

**Testimony of Theodore B. Olson
Gibson, Dunn & Crutcher LLP**

Good morning, Chairman Brady, ranking Member Lungren, and Members of the Committee.

Thank you for the opportunity to appear before the Committee to testify regarding the constitutional implications of the DISCLOSE Act, H.R. 5175, 111th Cong. (2010), also known as the “Schumer – Van Hollen” bill. This topic is important to me not only in my role as a constitutional lawyer and advocate before the Supreme Court, but also as a citizen and participant in our democratic process. I have studied and litigated constitutional issues throughout my career, both in private practice and in government, including serving as Assistant Attorney General for the Office of Legal Counsel from 1981 to 1984, and as the Solicitor General of the United States from 2001 to 2004. I have personally argued fifty-six cases before the Supreme Court, including seven cases involving the freedom of speech under the First Amendment. Most recently, I represented Citizens United in challenging the provisions of the Bipartisan Campaign Reform Act of 2002 that criminalized political speech by individuals who choose to organize themselves as corporations or unions. I now advise the U.S. Chamber of Commerce and the Republican National Committee on campaign-finance issues.

The First Amendment declares that “Congress shall make *no* law . . . abridging the freedom of speech.” U.S. CONST. amend. I (emphasis added). As Justice Thurgood Marshall explained for a unanimous Supreme Court, this constitutional protection has its “fullest and most

urgent application to speech uttered during a campaign for political office.” *Eu v. San Francisco County Democratic Cent. Comm.*, 489 U.S. 214, 223 (1989). Political speech thus lies at the very core of the First Amendment. Indeed, “there is practically universal agreement”—among liberal and conservative judges, justices, and scholars—“that a *major purpose* of that Amendment was to protect the free discussion of governmental affairs.” *Mills v. Alabama*, 384 U.S. 214, 218 (1966) (Black, J.) (emphasis added). The reason is simple: The right to self-government is unimaginable and unattainable without the ability of citizens to engage in vigorous and uninhibited public debate about the qualifications and positions of persons seeking elective office. Laws regulating political speech “necessarily” limit “the quantity of expression by restricting the number of issues discussed, the depth of their exploration, and the size of the audience reached.” *Buckley v. Valeo*, 424 U.S. 1, 19 (1976) (per curiam).

The First Amendment thus protects even highly controversial, and widely condemned, political speech, such as cross burning and flag desecration (*R.A.V. v. City of St. Paul*, 505 U.S. 377 (1992); *Texas v. Johnson*, 491 U.S. 397 (1989))—not to mention equally controversial forms of nonpolitical expression, such as pornography and depictions of violence. *Miller v. California*, 413 U.S. 15 (1973); *United States v. Stevens*, No. 08-769 (U.S. Apr. 20, 2010). In our democracy, the appropriate response to speech that may be disfavored is *more speech*, not less, because it is “vitaly important” that “all channels of communication be open . . . that no point of view be restrained or barred, and that the people have access to the views of *every* group in the community.” *United States v. Int’l Union UAW*, 352 U.S. 567, 593 (1957) (Douglas, J., dissenting, joined by Warren, C.J., and Black, J.) (emphasis added).

An essential component of the right to free speech is that government may not discriminate against speakers on the basis of their identity, their ideas, or their ability to speak.

First Nat'l Bank v. Bellotti, 435 U.S. 765, 776-77 (1978). Accordingly, political speech may not be stripped of its First Amendment protection on the basis of a speaker's wealth, point of view, or "special interest," or because the speaker joins with others in the form of a trade association, affinity group, union, or corporation. In fact, the Supreme Court has recognized for decades that political speech is "indispensable to decisionmaking in a democracy, and this is no less true because the speech comes from a corporation rather than an individual." *Id.* at 777 (footnote omitted); see also *NAACP v. Button*, 371 U.S. 415, 428-29 (1963); *Grosjean v. Am. Press Co.*, 297 U.S. 233, 244 (1936). This fundamental constitutional truth has been stated repeatedly throughout our history by the Supreme Court and the Court's foremost advocates of civil liberties and individual rights, including Chief Justice Earl Warren and Justices William Brennan, William O. Douglas, and Hugo Black. See *FEC v. Mass. Citizens for Life*, 479 U.S. 238 (1986) (Brennan, J.); *Int'l Union UAW*, 352 U.S. at 593 (Douglas, J., dissenting, joined by Warren, C.J., and Black, J.) (arguing against the constitutionality of a law prohibiting corporate and union political activities); *United States v. Congress of Indus. Orgs.*, 335 U.S. 106, 143 (1948) (Rutledge, J., joined by Black, Douglas, and Murphy, JJ., concurring in result). The Court has applied the First Amendment to corporate speech literally dozens of times in decisions dating back at least *seven* decades. See, e.g., *Grosjean*, 297 U.S. at 244; see also *Citizens United v. FEC*, 130 S. Ct. 876, 899-900 (2010) (citing 23 cases).

The Supreme Court's decision in *Citizens United* did *not* effect a revolution in First Amendment jurisprudence. In fact, it reaffirmed the longstanding First Amendment principle that free and unfettered political speech—no matter the source—is integral to the democratic process.

The principal decision overturned in *Citizens United—Austin v. Michigan Chamber of Commerce*, 494 U.S. 652 (1990)—deviated from that well-settled constitutional tradition. Indeed, “[n]o case before *Austin* had held that Congress could prohibit independent expenditures for political speech based on the speaker’s corporate identity.” *Citizens United*, 130 S. Ct. at 903.

Austin was premised on the concept that restrictions on corporate political speech are necessary to equalize the weight of various voices in the political process and neutralize the advantage that some wealthy corporations might have. 494 U.S. at 660. But this so-called “equalization” rationale is simply meaningless when applied to the vast majority of corporations. While supporters of campaign finance regulation like to suggest that these measures are targeted at Wall Street Firms and Big Oil, they apply with equal force to nonprofit advocacy groups—such as the Sierra Club and National Rifle Association—and to for-profit businesses that generate only modest revenue, such as the corner grocery or a mom-and-pop hardware store. Indeed, the U.S. Chamber of Commerce is the world’s largest business federation representing the interests of more than 3 million businesses of all sizes, sectors, and regions; *more than 96%* of U.S. Chamber members are small businesses with 100 employees or fewer. Similarly, *more than 75%* of corporations whose income is taxed under federal law have less than \$1 million in annual receipts. *Citizens United*, 130 S. Ct. at 907. It should come as no surprise, then, that in its briefs and during oral argument in *Citizens United*, the government itself refused to defend *Austin*’s equalization rationale. *See* Oral Arg. Tr. 47-48 (Sept. 9, 2009).

The government nevertheless went so far in *Citizens United* as to argue that the First Amendment permits it to ban political books and pamphlets published by corporations. *See* Oral Arg. Tr. 27, 37-38 (Mar. 24, 2009); Oral Arg. Tr. 66 (Sept. 9, 2009). The Supreme Court

emphatically rejected that proposition. The Court reiterated that Congress can only prohibit political speech where it presents a realistic risk of corruption of officeholders. *Citizens United*, 130 S. Ct. at 910. Because there is no evidence that independent, uncoordinated corporate expenditures on political issues or candidate-related advertising pose a risk of corrupting officeholders, the Court overruled *Austin* and reaffirmed the unbroken line of First Amendment jurisprudence that had preceded that aberrational decision.

I respectfully submit that the DISCLOSE Act is misleadingly labeled and shares many of the same constitutional infirmities as the legislation invalidated in *Citizens United*. In various ways, this bill impermissibly burdens the right of individuals to band together in the corporate form to participate in the political process and discriminates significantly against that class of speakers—and it does so based upon their perceived viewpoints. Of particular concern are its far-reaching restrictions on the speech of companies offering their services to our government (§ 101), its discriminatory prohibitions on the speech of persons based on their national origin or citizenship (§ 102), and its onerous disclosure requirements for corporations that wish to speak out on behalf of the interests of their members, shareholders, or employees (*id.* §§ 211, 214, 301).¹

First, the bill would prohibit corporations that have government contracts valued at more than \$50,000 from making independent expenditures and funding electioneering communications. *See* § 101(a) (amending 2 U.S.C. § 441c). This measure—which would prevent *thousands* of contractors that perform services for our government from speaking out on matters vital to the interests of those who invest in and work for them—flies in the face of a long

¹ All citations to sections of the bill are to the House version.

line of decisions establishing that Congress cannot use the receipt of federal funds to “suppress[] ideas thought inimical to the Government’s own interest.” *Legal Servs. Corp. v. Velazquez*, 531 U.S. 533, 548-49 (2001); *see also Speiser v. Randall*, 357 U.S. 513 (1958).

This type of blanket speech prohibition could only be tolerable—in the narrowest possible context—if there were documented evidence that the communications in question are a source of *quid pro quo* corruption of federal officeholders. *Citizens United*, 130 S. Ct. at 910. There is no evidence that this is or would be the case with government contractors’ independent, uncoordinated political expenditures. In fact, it has been clear for at least three decades that “independent expenditure ceiling[s] . . . fail[] to serve *any* substantial governmental interest in stemming the reality or appearance of corruption in the electoral process.” *Buckley*, 424 U.S. at 47-48 (emphasis added). Tellingly, more than half the States—including California, Florida, Maryland, Oregon, Virginia, and Washington—impose *no restrictions at all* on corporations’ independent expenditures. *Citizens United*, 130 S. Ct. at 908-09. Yet, there is no indication that these States’ political systems are awash in corporate corruption. Indeed, where there is unlawful influence, bribery and other corruption laws are ample existing tools to deal with such abuses.

Schumer – Van Hollen barely purports to combat corruption at all. The bill’s “Findings Relating to Government Contractors” tellingly identify only in the most general of terms “apparent and actual ingratiation, access, influence, and quid pro quo arrangements” as problems the legislation would address (§ 2(b)(2)), but there is no actual evidence in the legislative record of *quid pro quo* arrangements between federal officeholders and the thousands of corporations that regularly contract with the government. The bill is thus a thinly veiled and utterly unwarranted attempt to resurrect the unconstitutional regime of speech suppression that *Citizens*

United emphatically struck down. Congress—which is bound to adhere to the Supreme Court’s interpretations of the Constitution (*see, e.g., City of Boerne v. Flores*, 521 U.S. 507 (1997))—should not take that path.

The constitutional shortcomings inherent in the prohibition on government contractors’ expressions concerning election-related issues are compounded by the provision’s selective and discriminatory application. Labor unions and media corporations are categorically exempted from the prohibition (*see* 2 U.S.C. §§ 431(9)(B)(i), 434(f)(3)(B)(i))—even though many unions and media organizations hold contracts with the federal government. *See, e.g.,* Contract No. HHSN272200700475P (July 14, 2008) (\$99,126 contract awarded to The Washington Post Company). With respect to media organizations, in particular, the Supreme Court has made clear that “[t]here is no precedent supporting laws that attempt to distinguish between corporations which are deemed to be exempt as media corporations and those which are not”; indeed, it is a “most doubtful proposition that a news organization has a right to speak when others do not.” *Citizens United*, 130 S. Ct. at 905-06. Accordingly, Congress cannot smother the First Amendment rights of corporations that contract with the government, while giving free license to unions and to corporations that hold media interests. The First Amendment protects the right of *all* individuals to associate together to engage in robust advocacy and expressions of opinion—whether through a union or a corporation, and regardless of whether the corporation with which they choose to associate happens to own a media outlet.

Second, Schumer – Van Hollen’s selective restrictions on persons on the basis of their nationality or citizenship violate numerous constitutional requirements. The bill would impose on domestic corporations the prohibitions on contributions and expenditures that now apply to foreign nationals when, for instance, a foreign national owns 20% or more of the corporation’s

voting shares. § 102(a) (amending 2 U.S.C. § 441e(b)). Discrimination based on national origin is prohibited by the Constitution and scores of federal statutes. *See Graham v. Richardson*, 403 U.S. 365, 372 (1971); 42 U.S.C. §§ 2000a, 2000d, 2000e. It is ironic indeed that at the very time that so many political figures and media opinion-makers are denouncing as discriminatory the effort by Arizona to enforce federal prohibitions on illegal immigration, Congress would consider a measure that would “abridg[e] the freedom of speech” of selected persons based on their national origin.

Moreover, the prohibition on the political speech of “foreign-controlled” corporations also suffers from the same constitutional deficiencies as the prohibition on political speech by corporations that contract with the government. There is no evidence of any appreciable risk of *quid pro quo* corruption when foreign investors own a stake in a domestic corporation. It could not even plausibly be asserted, for example, that the publication of political books by Random House—a subsidiary of a German company—presents a risk of corrupting the American political process. Schumer – Van Hollen’s restriction on core political speech is premised on nothing more than vague and generalized concerns about “foreign interference and intrusion.” § 2(c)(4). Such unsubstantiated congressional speculation is wholly inadequate to justify the obliteration of First Amendment freedoms.

Similar vagueness pervades other restrictions that Schumer – Van Hollen would impose on “foreign-controlled” domestic corporations. For example, the bill would prohibit political speech where “one or more foreign nationals . . . has the power to direct, dictate, or control the decision-making process of the corporation with respect to” political activities. § 102(a) (amending 2 U.S.C. § 441e(b)). That amorphous language would leave domestic corporations to guess about the types of foreign-wielded “power” sufficient to expose them to felony prosecution

for engaging in political speech. Where people “of common intelligence must necessarily guess at [a law’s] meaning and differ as to its application,” the law is unconstitutionally vague. *Connally v. General Constr. Co.*, 269 U.S. 385, 391 (1926). These principles apply with particular force to political speech, which must be given ample “breathing space to survive.” *Button*, 371 U.S. at 433.

Third, Schumer – Van Hollen’s disclaimer and disclosure provisions have serious constitutional flaws. Like other sections of the bill, the disclaimer and disclosure requirements discriminate against corporate political speech by imposing restrictions inapplicable to unions. For example, the House version of the bill requires organizations that engage in political speech to report donors who have given \$600 or more during the year to fund independent expenditures. This carefully calibrated figure will easily sweep in most corporations that give money to trade associations to represent the political views of their employees and shareholders, but will allow most individual union members to continue to speak anonymously through annual union dues.

Moreover, the disclaimer and disclosure provisions of Schumer – Van Hollen would violate the First Amendment even if they did not have an impermissible discriminatory impact on corporations. For example, the bill requires that a television advertisement’s top five funders generally be disclosed where the advertisement is an electioneering communication or independent expenditure paid for at least partly by a covered organization’s campaign-related-activity funds. § 214(b)(2) (amending 2 U.S.C. § 441d). It is important to recall, however, that speakers who did not wish to be identified wrote many of the leaflets, brochures, and books that have played an important role in our Nation’s history. See *McIntyre v. Ohio Elections Comm’n*, 514 U.S. 334, 342 (1995). To cite just one prominent example: The very arguments advocating the ratification of the Constitution advanced in the *Federalist Papers* were published under

fictitious names. This is not to say that disclosure requirements are invariably impermissible—merely that they must be rigorously scrutinized to ensure that they are not being used to place onerous, disproportionate, or burdensome restrictions on speech or imposed discriminatorily to chill disfavored speech or speech by disfavored speakers. See *NAACP v. Alabama ex rel. Patterson*, 357 U.S. 449, 462-63 (1958).

Those concerns are undeniably present here. The requirement that the top five donors of a corporate-funded political advertisement disclose their identities would, without question, “affect adversely” the ability of those donors and the corporate speakers they support “to pursue their collective effort to foster beliefs which they admittedly have the right to advocate.” *NAACP*, 357 U.S. at 462-63. This Nation’s history proves—from the time of the ratification debates between pseudonymous Federalists and Anti-Federalists—that many political speakers are understandably reluctant to reveal their identities. The circumstances of this legislation’s introduction will inevitably lead many to conclude that they will suffer political retribution for engaging in speech intended to advance the political interests of the shareholders and employees of corporations. Indeed, supporters of this legislation have openly acknowledged that this measure is targeted at specific speakers. See, e.g., Dan Eggen, *Democrats Suggest Ways to Curb Companies’ Campaign Spending*, Wash. Post, Feb. 11, 2010 (quoting a sponsor of this bill: “Any funneling of resources by a particular company to the Chamber of Commerce or a professional association will not avoid detection.”). Similarly, one of the legislation’s sponsors has expressly stated that the bill “will make [corporations] think twice” before attempting to influence election outcomes, and has emphasized that this “deterrent effect should not be underestimated.” Jess Bravin & Brody Mullins, *New Rules Proposed on Campaign Donors*, Wall Street J., Feb. 12, 2010.

Schumer – Van Hollen’s disclosure requirements thus have little to do with providing information to the electorate and a great deal to do with inconveniencing, burdening, and silencing groups that might be critical of office-seekers or, most of all, incumbents. The Supreme Court has never endorsed the use of disclosure requirements to promote such speech-suppressing ends. Indeed, corporations’ shareholders and employees are directly affected by the great majority of legislation Congress enacts. Often, the primary focus of a statute is a particular industry, whose business model, profitability, and viability may be threatened by the legislation. Corporations have a First Amendment right to speak out in such circumstances on behalf of their shareholders and employees, including the right to oppose the re-election of legislators who they believe are likely to favor unwarranted, burdensome requirements that threaten their shareholders’ assets and their workers’ jobs.

* * *

It is an unassailable fact that restrictions on election advocacy impose the greatest burden on challengers to elected officials. *See Randall v. Sorrell*, 548 U.S. 230, 248 (2006). Those who wish to “throw the rascals out” need whatever resources they can marshal to overturn entrenched positions, decisions, and occupants of high office. That is precisely why we have a First Amendment and that is why all measures that make it a crime to speak, or that burden or discourage participation in our democracy, must be resisted and rejected.

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Mr. Olson is one of the nation's premier appellate and United States Supreme Court advocates. He has argued 56 cases in the Supreme Court, including *Bush v. Palm Beach County Canvassing Board* and *Bush v. Gore*, stemming from the 2000 presidential election; prevailing in over 75% of those arguments. Mr. Olson's practice is concentrated on appellate and constitutional law, federal legislation, media and commercial disputes, and assisting clients with strategies for the containment, management and resolution of major legal crises occurring at the federal/state, criminal/civil and domestic/international levels. He has handled cases at all levels of state and federal court systems throughout the United States, and in international tribunals.

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As Solicitor General, during the presidency of George W. Bush, Mr. Olson was the Government's principal advocate in the United States Supreme Court, responsible for

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Mr. Olson is a Fellow of both the American College of Trial Lawyers and the American Academy of Appellate Lawyers. The *National Law Journal* has repeatedly listed him as one of America's Most Influential Lawyers. *The American Lawyer* and *Legal Times* have characterized Mr. Olson as one of America's leading advocates. In December of 2007, *Washingtonian* magazine listed him as number one on its list of the finest lawyers in the nation's capital. *The New York Times* columnist William Safire has described Mr. Olson as this generation's "most persuasive advocate" before the Supreme Court and "the most effective Solicitor General" in decades.

Mr. Olson received his law degree in 1965 from the University of California at Berkeley (Boalt Hall) where he was a member of the *California Law Review* and Order of the Coif. He received his bachelor's degree from the University of the Pacific, where he was recognized as the outstanding graduating student in both forensics and journalism. Mr. Olson has written and lectured extensively on appellate advocacy, oral communication in the courtroom, civil justice reform, punitive damages, and constitutional and administrative law.

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Selected Appellate Litigation

Supreme Court of The United States

Cases Briefed and Argued

1. ***Citizens United v. FEC* (2009). First Amendment.** Whether, for the proper disposition of Citizens United’s First Amendment challenge to the Bipartisan Campaign Reform Act of 2003 (“BCRA”), the Court should overrule either or both *Austin v. Michigan State Chamber of Commerce* or the part of *McConnell v. FEC* that upheld Section 203 of BCRA on its face.
2. ***Polar Tankers, Inc. v. City of Valdez*, 557 U.S. _ (2009). Tonnage Clause; Commerce Clause.** Whether the property tax that the City of Valdez, Alaska, imposes on oil tankers and other large vessels violates the Tonnage Clause or dormant Commerce Clause.
3. ***Citizens United v. FEC* (2009). First Amendment.** Whether the prohibition on corporate electioneering communications in the Bipartisan Campaign Reform Act of 2003 can constitutionally be applied to a feature-length documentary film about a political candidate distributed through Video on Demand.
4. ***Caperton v. A.T. Massey Coal Co.*, 556 U.S. _ (2009). Due Process.** Whether the Due Process Clause requires the recusal of an elected state supreme court justice who received \$3 million in campaign support from the CEO of a party challenging a multimillion-dollar verdict before his court.
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6. ***Carcieri v. Salazar*, 555 U.S. _ (2008). Indian Law.** Whether the Indian Reorganization Act of 1934 authorizes the Secretary of the Interior to take land into trust on behalf of an Indian tribe that was not federally recognized and under federal jurisdiction at the time the statute was enacted.
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26. *Grutter v. Bollinger*, 539 U.S. 306 (2003). **Equal Protection Clause; Racial Discrimination; University Admissions; Affirmative Action.** Constitutionality under Equal Protection Clause of University of Michigan Law School use of racial preferences in admissions program.
27. *Gratz v. Bollinger*, 539 U.S. 244 (2003). **Equal Protection Clause; Racial**

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28. *United States v. American Library Association, Inc.*, 539 U.S. 194 (2003). **First Amendment; Spending Clause; Internet; Sexually Explicit Material.** Constitutionality under the First Amendment of Children’s Internet Protection Act (CIPA), which conditions acceptance of federal funds by public libraries for internet connection on utilization of technology protection measures to screen access to visual depictions of sexually explicit material.
29. *Demore v. Kim*, 538 U.S. 510 (2003). **Immigration; Detention of Removable Aliens; Due Process.** Constitutionality of 8 U.S.C. §1226(c) (Section 236(c) of the Immigration and Nationality Act), which permits detention of removable aliens convicted of aggravated felonies.
30. *Scheidler v. NOW; Operation Rescue v. NOW*, 537 U.S. 393 (2003). **RICO; Hobbs Act; Extortion; Injunctions.** Scope of Hobbs Act; remedies available in civil actions under RICO.
31. *Smith v. Doe*, 538 U.S. 84 (2003). **Double Jeopardy; Sexual Offender Registry; Megan’s Law.** Constitutionality under Double Jeopardy Clause of Alaska’s registration and notification requirements for convicted sex offenders (Megan’s Law).
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44. *Vermont Agency of Natural Resources v. United States ex rel. Stevens*, 529 U.S. 765 (2002). **Eleventh Amendment; False claims Act; Actions against States; Qui Tam.** Whether a private individual may bring suit in federal court against a state on behalf of the United States under the False Claims Act. Federal False Claims Act *qui tam* action also raising the question whether a State is immune from such suits under the Eleventh Amendment.
45. *Rice v. Cayetano*, 528 U.S. 495 (2000). **Voting Rights; Equal Protection; Fourteenth and Fifteenth Amendments.** Constitutionality under Fourteenth and Fifteenth Amendment of Hawaiian legislation restricting voting in certain elections to citizens based on racial classifications.
46. *Gasperini v. Center for Humanities, Inc.*, 518 U.S. 418 (1996). **Seventh Amendment; Jury Trials; Excessive Damages; Appellate Review.** Whether the Seventh Amendment permits federal appellate courts in diversity cases to review jury verdicts for

excessiveness and whether state or federal standards govern the scope of excessiveness review of such verdicts.

47. ***Koon v. United States*, 518 U.S. 81 (1996). Sentencing Guidelines; District Court Discretion; Standard of Appellate Review.** Whether district court departure from sentencing range prescribed by U.S. Sentencing Guidelines is to be reviewed under abuse of discretion standard by federal appellate courts.
48. ***United States v. Commonwealth of Virginia*, 518 U.S. 515 (1996). Fourteenth Amendment; Equal Protection Clause; Single-Sex Education; Gender Discrimination.** Whether Virginia Military Institute male-only admissions policy violates the Equal Protection Clause of the Fourteenth Amendments to the Constitution of the United States.
49. ***Plaut v. Spendthrift Farms*, 514 U.S. 211 (1995). Due Process; Judgments; Finality.** Constitutionality of statute requiring federal courts to reopen final judgments in cases dismissed with prejudice pursuant to Supreme Court's decision in *Lampf, Pleva v. Gilbertson*, 501 U.S. 350 (1991).
50. ***Musick, Peeler & Garrett v. Employers Insurance of Wausau*, 508 U.S.286 (1993). Securities; Securities Exchange Act of 1934; Securities Fraud Contribution.** Contribution right of defendants in federal securities fraud cases under § 10(b) of the Securities Exchange Act of 1934.
51. ***Lampf, Pleva, Lipkind, Prupis & Petigrow v. Gilbertson*, 501 U.S. 350 (1991). Securities Act of 1934; Private Actions; Statute of Limitations.** Whether federal courts must apply federal securities law one year/three year statute of limitations rather than forum state statutes of limitations in cases arising under § 10(b) of the Securities Exchange Act of 1934.
52. ***State of California v. ARC Cement Corp.*, 490 U.S. 93 (1989). Antitrust; Federal Preemption.** Whether federal antitrust laws preempted state actions.
53. ***Bankers Life and Casualty Co. v. Crenshaw*, 486 U.S. 71 (1988). Eighth Amendment; Excessive Fines; Due Process; Punitive Damages.** Constitutionality under the Excessive Fines Clause of the Eighth Amendment and Due Process Clause of the Fourteenth Amendment of Mississippi punitive damage laws.
54. ***California Federal Savings & Loan Association v. Guerra*, 479 U.S. 272 (1987). Sex Discrimination; Pregnancy; Federal Preemption.** Whether California's pregnancy leave statute was preempted under the Supremacy Clause by Title VII of the Civil Rights Act of 1964, as amended by the Pregnancy Discrimination Act of 1978.
55. ***Aetna Life Insurance Co. v. Lavoie*, 475 U.S. 813 (1986). Due Process; Eighth Amendment; Excessive Fines; Contract Clause; Punitive Damages.** The

constitutionality under the Eighth Amendment Excessive Fines Clause, the Contracts Clause, and the Fourteenth Amendment Due Process Clause of \$3.5 million punitive damage award by Alabama courts.

56. ***Garcia v. San Antonio Metropolitan Transit Authority*, 469 U.S. 528 (1985). Tenth Amendment Federalism; Fair Labor Standards.** Constitutionality under the Tenth Amendment of the application of the minimum wage and other employment standards of the Federal Fair Labor Standards Act to wages paid by the City of San Antonio to municipal transit workers.

Supreme Court of The United States

Cases Briefed but not Argued

1. ***Immigration and Naturalization Service v. Chadha*, 462 U.S. 919 (1983). Separation of Powers; Presentment Clause.** Constitutionality of legislative veto devices by which Congress reserved to itself or some component of Congress the power to reverse or alter Executive Branch actions without enacting substantive legislation.
2. ***Metromedia, Inc. v. City of San Diego*, 453 U.S. 490 (1981). First Amendment; Freedom of Speech; Commercial Speech.** Constitutionality under the First Amendment the City of San Diego's ordinance prohibiting billboard advertising. *See also Metromedia, Inc. v. City San Diego*, 26 Cal. 3d 848 (1979).

Other — Federal and State

Appellate Court Cases

1. ***Allied Orthopedic Appliances, Inc. v. Tyco Health Care Group L.P.* (9th Cir. 2009).** Whether an alleged monopolist's improvement in product design can ever constitute a violation of Section 2 of the Sherman Act.
2. ***Aurelius Capital Partners, LP v. Republic of Argentina* (2d Cir. 2009).** Whether after the Argentine government nationalized its citizens' pension assets in 2008, the Foreign Sovereign Immunities Act permitted Argentina's creditors to seize pension assets held in New York bank accounts to satisfy claims arising out of Argentina's 2001 bond default.
3. ***Masimo Corp. v. Tyco Healthcare Group, LP* (9th Cir. 2008).** Whether Tyco Healthcare Group's sole-source agreements with Group Purchasing Organizations, bundled discounts, and/or market-share discounts constituted anticompetitive exclusive dealing arrangements in violation of Section 1 of the Sherman Act or Section 3 of the Clayton Act, and/or constituted an unlawful monopoly broth in violation of Section 2 of the Sherman Act.
4. ***Lebron v. Gottlieb Memorial Hospital* (Ill. 2008).** Whether the Illinois legislature

violated the state constitution when it adopted several medical malpractice reforms, including a cap on non-economic damages.

5. ***Kensington International Ltd. v. Itoua*, 505 F.3d 147 (2d Cir. 2007).** Whether a foreign state-run oil company is immune from suit under the Foreign Sovereign Immunities Act.
6. ***In re Sealed Case*, 310 F.3d 711 (U.S. Foreign Intelligence Surveillance Ct. of Rev. 2002).** Legality of restrictions imposed on law enforcement and intelligence officials under Foreign Intelligence Surveillance Act.
7. ***Nextwave Personal Communications, Inc. v. FCC*, 254 F.3d 130 (D.C. Cir. 2001).** Authority of the FCC to cancel licenses for non-payment of debts under United States Bankruptcy Code.
8. ***Jimenez v. Daimler-Chrysler*, 439 F.3d 439 (4th Cir. 2001).** Appeal of a \$259 million product liability personal injury verdict against the DaimlerChrysler Corporation.
9. ***California Federal Bank, FSB v. United States*, 245 F.3d 1263 (Fed. Cir. 2001).** Recoverability of contract damages in connection with the enactment by Congress of the Financial Institutions Reform, Recovery, and Enforcement Act of 1989 ("FIRREA"). Mr. Olson was lead counsel for California Federal Banks.
10. ***Touchston v. McDermott*, 234 F.3d 1133 (11th Cir. 2000) (en banc).** Constitutionality under Equal Protection Clause and Article II of the Constitution of Florida's procedures for recounting ballots cast in the 2000 presidential election.
11. ***Nippon Steel Corp. v. United States*, 219 F.3d 1348 (Fed. Cir. 2000).** Legality of U.S. Court of International Trade preliminary injunction prohibiting the Department of Commerce from conducting an antircumvention inquiry under the Trade Act of 1974, as amended.
12. ***United States Telecom Ass'n v. FCC*, 227 F.3d 450 (D.C. Cir. 2000).** This petition challenged an order of the Federal Communications Commission involving surveillance capabilities that telecommunications companies must provide to law enforcement agencies under the Communications Assistance for Law Enforcement Act. Mr. Olson was lead counsel for the Cellular Telecommunications Industry Association and the Center for Democracy and Technology.
13. ***MMAR Group, Inc. v. Dow Jones & Co., Inc.*, Civil No. 95-1261 (S.D. Tex., appeal to 5th Cir.).** Appeal from a \$220 million verdict against *The Wall Street Journal* and its publisher, Dow Jones, Inc., the largest libel verdict against a publisher in United States history. On April 8, 1999, the District Court, 987 F. Supp. 535, vacated the jury's verdict as obtained through misconduct and misrepresentations by the plaintiffs, and ordered a new trial. The case was subsequently settled with the defendants paying

nothing.

14. ***Hotel Employees & Restaurants Employee Internat'l Union v. Wilson*, 21 Cal. 4th 585 (1999)**. Challenge to the constitutionality of Proposition 5, California's Indian Gaming Initiative, adopted by California voters in November of 1998.
15. ***United States v. Dispoz-o-Plastics*, 172 F.3d 275 (3d Cir. 1999)**. Mr. Olson was lead counsel for appellants in this decision overturning a conviction for violation of federal antitrust (price-fixing) laws.
16. ***Berry v. Funk*, 146 F.3d 1003 (D.C. Cir. 1998)**. Mr. Olson represented the successful appellant in a ground breaking case concerning the availability of civil damages against government officials for violations of federal wiretapping laws (Title III of the Omnibus Crime Control and Safe Streets Act of 1968, 18 U.S.C. §§ 2510-2521).
17. ***Deloitte & Touche v. Weller*, 976 S.W.2d 22 (Tex. App.-Amarillo 1998, writ denied)**. Court of Appeals for the Fourteenth District of Texas No. 14-95-00581 CV. Appeal of judgment against Deloitte & Touche for \$78 million in compensatory and punitive damages for alleged negligence in preparing tax returns for tax shelter limited partnership. In April of 1998, the Texas appeals court awarded judgment for Deloitte & Touche. Mr. Olson was co-counsel for the successful appellant.
18. ***Gregory v. Beverly Enterprises, Inc., et al.*, Case No. 5376, California Superior Court, County of Siskiyou**. Post-trial motions and appeal of a \$95 million verdict against a health care provider in a California State Court case. The trial court granted various post trial motions and reduced the jury's verdict to \$3.2 million, a reduction of 97%.
19. ***Broussard v. Meineke Discount Muffler Shops, Inc.*, 155 F.3d 331 (4th Cir. 1998)**. Mr. Olson was counsel for amici curiae ATL International, Inc., Blimpie International, Burger King, McDonald's Corporation, Mobil Oil Corporation, and others in support of appellants, in an appeal of a \$390 million judgment in a case involving class action and franchising issues. The appeals court reversed the trial court and set aside the verdict.
20. ***Commonwealth of Virginia v. EPA*, 108 F.3d 1397 (D.C. Cir. 1997)**. Appeal by American Association of Automobile Manufacturers, the International Association of Automobile Manufacturers and the Commonwealth of Virginia of Environmental Protection Agency rulemaking concerning the regulation of vehicle emissions in 13 northeastern states.
21. ***Continental Trend Resources, Inc. v. OXY USA, Inc.*, 101 F.3d 634 (10th Cir. 1996)**. The Court of Appeals reduced a \$30 million punitive damage award to \$6 million after a petition for certiorari was granted by Supreme Court of the United States, an earlier Tenth Circuit decision was vacated and the case was remanded for further consideration. Mr. Olson was co-counsel for the prevailing appellant, OXY USA Inc. Petitions for

rehearing and for certiorari after reduction of the punitive damage judgment were denied.

22. ***Illinois Public Telecommunications Association v. FCC*, 117 F.2d 555 (D.C. 1997).** Challenge by the Personal Communications Industry Association (paging companies) of Federal Communications Commission's rule concerning payphones, which resulted in a decision vacating the FCC's rule.
23. ***Energy Association of New York State v. Public Service Commission of the State of New York*, 169 Misc. 2d 924, 653 N.Y.S.2d 502, Albany County 1996.** Litigation involving a multi-billion dollar challenge to administrative orders deregulating and restructuring the electric utility industry in New York.
24. ***Johnson v. Life Insurance Company of Georgia*, No. 1940357 (Ala. 1997).** Appeal of \$15 million punitive damage verdict against insurance company. Mr. Olson was co-counsel for appellant Life Insurance Company of Georgia. The Alabama Supreme Court initially reduced the punitive damage award to \$5 million. Petition for certiorari in the United States Supreme Court granted, judgment below vacated, and case remanded for further consideration by Alabama Supreme Court. On August 15, 1997, the Alabama Supreme Court reduced the punitive damage award to \$3 million.
25. ***Coalition for Economic Equity v. Wilson*, 110 F.3d 1431 (9th Cir. 1997).** Mr. Olson was counsel to *amicus curiae* Independent Women's Forum in that organization's support for the constitutionality of a state-wide initiative measure banning state-supported discrimination on the basis of race.
26. ***Hopwood v. Texas*, 78 F.3d 932 (5th Cir. 1996).** Petition for certiorari denied. Holding that University of Texas School of Law admissions policies violate Fourteenth Amendment to the Constitution of the United States. Mr. Olson was counsel of record for students denied admission under law school admission policy which discriminated on the basis of race and ethnicity.
27. ***In re Oliver L. North (Reagan Fee Application)*, 94 F.3d 685 (D.C. Cir. Spec. Div. 1996).** Attorney's fees awarded to former President Ronald Reagan in connection with Iran-Contra investigation. Mr. Olson represented former President Ronald Reagan in connection with all aspects of Iran-Contra investigation including fee application.
28. ***Wilson v. Eu*, 1 Cal. 4th 707, 4 Cal.Rptr.2d 379, 823 P.2d 545 (1992).** Upholding California's 1990 decennial reappointment and redistricting of its congressional and legislative districts. Mr. Olson was counsel to California Governor Pete Wilson in this successful original proceeding in the California Supreme Court.
29. ***Johnston v. CIGNA Corp.*, 14 F.3d 486 (10th Cir. 1993).** Section 27A of the Securities Exchange Act of 1934, enacted by Congress in 1991 to overrule in part the Supreme Court's decision in the *Lampf* case and to disrupt final, unappealed judgments in certain

cases, violates the constitutional separation of powers. Mr. Olson was co-counsel on the brief for the successful appellees.

30. ***Gray v. First Winthrop Corp.*, 989 F.2d 1564 (9th Cir. 1993).** Upholding the constitutionality of § 27A of the Securities Exchange Act of 1934. Mr. Olson represented Price Waterhouse, the prevailing party on summary judgment issues.
31. ***United States v. Pollard*, 959 F.2d 1011 (D.C. Cir. 1992).** Appeal of conviction and sentencing of Jonathan J. Pollard on grounds of government violation of plea agreement. Mr. Olson represented Mr. Pollard. The Court ruled 2-1 in favor of the government.
32. ***Robertson Oil Company, Inc. v. Phillips Petroleum Company*, 14 F.3d 373 (8th Cir. 1993).** Constitutionality of \$8 million punitive damage award and Arkansas punitive damage system.
33. ***Hopkins v. Price Waterhouse*, 920 F.2d 967 (D.C. Cir. 1990).** Whether title VII of the Civil Rights Act of 1964 authorizes a federal court to order an individual admitted to a partnership in an accounting firm as a remedy for alleged sex discrimination.
34. ***Bettius & Sanderson v. National Union Fire Insurance Co.*, 839 F.2d 1009 (4th Cir. 1988).** Challenge to \$5 million punitive damage award for alleged bad faith breach of a professional liability insurance contract.
35. ***Ticor Title Insurance Co. v. Federal Trade Commission*, 814 F.2d 731 (D.C. Cir. 1987).** Challenge to the constitutionality of the law enforcement powers of the Federal Trade Commission on constitutional separation of powers grounds.
36. ***Schlumberger Limited v. Superior Court*, 115 Cal. App. 3d 386 (1981).** Attorney-client and attorney work product privileges in legal malpractice claims against a client's former counsel.
37. ***Brown v. Petrolane*, 102 Cal. App. 3d 720 (1980).** Issues connected with the operations of liquefied petroleum gas facility.
38. ***Gibson, Dunn & Crutcher v. Superior Court*, 94 Cal. App. 3d 347 (1979).** Whether attorneys retained to prosecute a professional malpractice action against a client's former law firm may be sued for equitable indemnification.
39. ***In re the Commission on the Governorship of the State of California (Brown v. Curb)*, 26 Cal. 3d 110 (1979).** Constitutionality (under the California Constitution) of actions by the Lt. Governor of California during the absence from the State of the Governor. Mr. Olson represented Lt. Gov. Curb, who prevailed in this original proceeding in the California Supreme Court on the broad principles asserted in the case.
40. ***Church of Scientology of California v. Adams*, 584 F.2d 893 (9th Cir. 1978).** Defense of a libel suit against *St. Louis Post Dispatch* arising out of a series of newspaper articles

regarding a religious organization.

41. ***Chavez v. Citizens for a Fair Farm Labor Law*, 84 Cal. App. 3d 77 (1978)**. Defense of agriculture interests against claims for alleged fraud and election campaign misconduct arising out of opposition to a farm labor initiative. Mr. Olson represented the prevailing party.
42. ***California Newspaper Publishers Association, Inc. v. City of Burbank*, 51 Cal. App. 3d 50 (1975)**. This case challenged the constitutionality of an ordinance restricting the placement of newspaper racks in the City of Burbank. Mr. Olson represented the prevailing California Newspaper Publishers Association.
43. ***Warfield v. McGraw Hill*, 32 Cal. App. 3d 1041 (1973)**. Defense of McGraw Hill and *Aviation Week and Space Technology* magazine in a libel action. Mr. Olson represented the prevailing party.

The CHAIRMAN. I thank the gentleman.
Mr. Bossie.

STATEMENT OF DAVID BOSSIE

Mr. BOSSIE. Mr. Chairman, Ranking Member Lungren, members of the committee, I also appreciate the opportunity to be here. I am honored to be on the panel today.

My name is David Bossie, and I am President of Citizens United, a 501(c)(4) membership organization that among other things makes movies. We produced and marketed 14 popular and timely documentaries over the past several years with three more scheduled to be released in 2010.

Our 2008 film, *Hillary The Movie*, led to the recent Supreme Court decision in *Citizens United v. Federal Elections Commission*. The decision, the reason for this hearing and proposed legislation today, specifically recognized the importance of our First Amendment freedom of speech and, more importantly, political speech as a means to hold elected officials accountable to the people. Citizens should be free to question their government and its leaders. And indeed, that right is explicit in the words of the First Amendment.

Measures like McCain-Feingold and the proposed DISCLOSE Act restrict that freedom either by design or unintended consequence. Restrictions on that exercise of the First Amendment right to political speech by design or oversight set very dangerous precedents.

McCain-Feingold criminalized political speech. The Supreme Court justices correctly recognized that if Congress could criminalize political speech in film and advertising, they were heading down a dangerous path.

As I sat in the Supreme Court watching the oral arguments in our case, I was appalled to hear the government lawyer argue that the government had the ability to ban books. I would ask the members of this committee on both sides of the aisle to stop for a moment and consider that statement. The government of the United States admitted that the logical conclusion of the Federal election law was that government had the constitutional authority to ban books.

The First Amendment should be thoughtfully considered before rushing to enact this legislation. Despite the rhetoric from many on the left about corporations, this debate is about one thing and one thing only: The right of all Americans to speak out for or against their elected officials.

Senator Schumer at a press conference just last week stated he hoped this legislation would result in fewer people participating in the political process. Again, I would ask members of the committee to take another moment to think about that more a moment. One of the authors of this bill explicitly stated that the purpose of the legislation was to discourage Americans from becoming involved in the political process. If that is not the definition of chilling free speech, I don't know what is.

In the 3 months since our victory corporations have paid for exactly one ad that was run in a small town Texas newspaper. Moreover, at least 26 States have longstanding laws that permit the same corporate activity in State elections as are now permitted in Federal elections after our decision.

My point is that this legislation is a solution in search of a problem. Unfortunately the solution burdens small businesses and non-profit organizations, silencing the voices of average Americans rather than the big businesses it says it is targeting. While the proponents of this bill claim that they are acting so the people will not be drowned out, this bill would have precisely the opposite effect.

The bill would require groups like Citizens United to file an extensive report within 24 hours of making a regulated expenditure, including not only an itemized list of the amounts paid to produce and air an ad, but also an itemized list of each person who has donated only \$600 or more to Citizens United from the beginning of the calendar year up to the day in which the ad runs. As anyone who has filed reports with the FEC or the IRS can verify, this is an extremely burdensome task to accomplish within 24 hours.

Already almost a quarter of my staff are comprised of attorneys and accountants. This legislation would force my group and others like it to spend a small fortune in order to exercise our constitutionally guaranteed right to speak. Of course, considering the rhetoric, the irony is that for-profit corporations, which is what everybody is talking about, would not be affected by this provision at all because it applies only to donors of which, so far as I am aware, Goldman Sachs has none.

In today's media environment, it is easy to demonize corporations to score cheap political victories. I would encourage the members of the committee to look beyond the rhetoric and think about the essential First Amendment rights that are implicated by this bill. Thank you.

The CHAIRMAN. Thank you.

[The statement of Mr. Bossie follows:]

WRITTEN TESTIMONY OF DAVID N. BOSSIE, PRESIDENT OF CITIZENS UNITED

My name is David Bossie and I am the President of Citizens United. Citizens United is an IRC 501(c)(4) organization with 500,000 members and supporters. Our related organizations are Citizens United Foundation, a IRC Section 501(c)(3) organization, Citizens United Political Victory Fund, a separate segregated political fund under the Federal Elections Campaign Act, and The Presidential Coalition, an IRS Section 527 organization that works to elect conservative candidates to state and local offices.

Citizens United and its related organizations are dedicated to restoring our government to citizens' control. Through a combination of education, advocacy, and grass roots organization, Citizens United seeks to reassert the traditional American values of limited government, freedom of enterprise, strong families, and national sovereignty and security. Citizens United's goal is to restore the founding fathers' vision of a free nation, guided by the honesty, common sense, and good will of its citizens.

Citizens United also serves as a media entity having produced and marketed award winning, popular and timely documentaries including *Celsius 41.11*, *Broken Promises*, *Border War*, *ACLU at War with America*, *Rediscovering God in America*, *Hillary The Movie*, *Hype: The Obama Effect*, *Blocking "The Path to 9/11"*, *Ronald Reagan: Rendezvous with Destiny*, *We Have the Power*, *Perfect Valor*, *Rediscovering God in America II: Our Heritage*, *Nine Days that Changed the World*, and *Generation Zero*. Citizens United distributes its films through a variety of channels including limited theatrical releases, broadcast on television, broadcast via video-on-demand, retail sale in DVD format, direct mail, and through wholesale bulk orders of DVDs to other organizations and retail businesses. We routinely run television and broadcast advertisements to promote the sale of our

films, and sometimes these advertisements refer to elected officials and candidates for public office.

Our 2008 film *Hillary The Movie* led to the recent Supreme Court decision in *Citizens United v. FEC*. The decision, the impetus for this hearing and proposed legislation today, reaffirmed the First Amendment protection of political speech. The Court specifically recognized the importance of political speech as a hallmark of our representative democracy.

Speech is an essential mechanism of democracy, for it is the means to hold officials accountable to the people. See *Buckley, supra*, at 14–15 (“In a republic where the people are sovereign, the ability of the citizenry to make informed choices among candidates for office is essential”). The right of citizens to inquire, to hear, to speak, and to use information to reach consensus is a precondition to enlightened self-government and a necessary means to protect it. The First Amendment “‘has its fullest and most urgent application’ to speech uttered during a campaign for political office.” *Eu v. San Francisco County Democratic Central Comm.*, 489 U. S. 214, 223 (1989) (quoting *Monitor Patriot Co. v. Roy*, 401 U. S. 265, 272 (1971)); see *Buckley, supra*, at 14 (“Discussion of public issues and debate on the qualifications of candidates are integral to the operation of the system of government established by our Constitution”).

For these reasons, political speech must prevail against laws that would suppress it, whether by design or inadvertence.

The idea that citizens are free to question their government is a central tenet of both the freedom of speech and the freedom of the press. As Thomas Jefferson explained to George Washington:

No government ought to be without censors, and where the press is free, no one ever will. If virtuous, it need not fear the fair operation of attack and defence. Nature has given to man no other means of sifting out the truth whether in religion, law or politics. I think it as honorable to the government neither to know nor notice its sycophants or censors, as it would be undignified and criminal to pamper the former and persecute the latter.

The Supreme Court Justices correctly recognized that if Congress could criminalize political speech in film and advertising they were heading down a dangerous path where politicians could control citizens and all forms of speech. At oral argument the Deputy Solicitor General went so far as to advocate for the government's ability to ban books. Restrictions on the exercise of the First Amendment as found in the Federal Election Campaign Act and the Bipartisan Campaign Reform Act set very dangerous precedents. The DISCLOSE Act is yet another attempt to control political speech.

In striking down the ban on corporate expenditures in federal elections, the Supreme Court has allowed organizations like Citizens United to better represent our membership. However, this restoration of the First Amendment has been met with harsh rhetoric from the Left, whether in editorial boards, Congress, or the Executive Branch.

During the State of the Union address, President Barack Obama unfortunately took the unprecedented action of falsely accusing the Supreme Court Justices who were present of "revers[ing] a century of law to open the floodgates for special interests -- including foreign companies --to spend without limit in our elections."

Of course the decision did no such thing. As former FEC Chairman Brad Smith has noted “the Court held that 2 U.S.C. Section 441a, which prohibits all corporate political spending, is unconstitutional. Foreign nationals, specifically defined to include foreign corporations, are prohibited from making ‘a contribution or donation of money or another thing of value, or to make an express or implied promise to make a contribution or donation, in connection with a Federal, State or local election’ under 2 U.S.C. Section 441e, which was not at issue in the case. Foreign corporations are also prohibited, under 2 U.S.C. 441e, from making any contribution or donation to any committee of any political party, and they are prohibited from making any ‘expenditure, independent expenditure, or disbursement for an electioneering communication.’”

The DISCLOSE Act is a solution in search of a problem. Democratic legislators have been proclaiming that the decision in *Citizens United* will allow corporations to spend unlimited sums of money to “hijack” elections. Yet in the three months following the decision we have only seen one advertisement run. This advertisement was not run by ExxonMobil, AstraZeneca, or Citigroup, but rather a small business in Texas. The ad ran in local newspapers and its costs were modest.

The rhetoric does not match the reality. There is no documented need for the proposed legislation. Though the Supreme Court has only recently restored the First Amendment right to political speech of corporations including incorporated associations of individuals, 26 states have long standing laws that have permitted such activity. In those 26 states there is not a record of widespread corruption of the electoral process. As the Supreme Court observed:

The anticorruption interest is not sufficient to displace the speech here in question. Indeed, 26 States do not restrict independent expenditures by for profit corporations. The Government does not

claim that these expenditures have corrupted the political process in those States.

The list of 26 states includes both Illinois and Maryland; two states which also permit corporations to make financial contributions to candidates for office. Financial disclosure reports indicate that Representative Van Hollen accepted corporate contributions during his tenure in the Maryland legislature. Reports similarly reveal that President Obama received nearly two-thirds of his Illinois State Senate contributions from corporations, unions, and PACs. President Obama received contributions from large corporations including Citigroup and AstraZeneca. Neither Representative Van Hollen nor President Obama appears to have been corrupted by receipt of these corporate contributions.

If the perceived problem is the undue influence of large corporations a bill should be drafted narrowly to address that concern, not place additional burdens and barriers to entry on small businesses, non-profit advocacy groups, and documentary film makers such as Citizens United

Representative Van Hollen has argued that the Citizens United decision “will allow the biggest corporations of the United States to engage in the buying and selling of elections. If you look at the staggering figures of the Fortune 100 companies and the revenues they have and the profits that they can now unleash directly in these elections has the potential to totally upend our system and corrupt the process in a way that I think should alarm every American citizen.” If this is the perceived problem that the DISCLOSE Act is meant to remedy, it may be done in a narrower and more effective fashion. Unfortunately many of the burdens of the legislation will be shouldered by non-profit organizations and small businesses that lack the resources for compliance.

The legislation before us today was crafted by Representative Chris Van Hollen and Senator Charles Schumer. As Chairman of the Democratic Congressional Campaign Committee and the former Chairman of the Democratic Senatorial Campaign Committee, they are responsible for ensuring the re-election of incumbent Democrats and preserving Democratic majorities in both Houses of Congress. Despite populist rhetoric regarding transparency and accountability, this bill is nothing more than an incumbent protection measure. By Senator Schumer's own admission it will chill speech and result in less political advertising and less participation in our electoral process.

Schumer and Van Hollen allege that this legislation is necessary "to ensure that the American public has all the information necessary to exercise its free speech and voting rights." This bill will however stifle the speech of millions of Americans who choose to speak through non-profit advocacy groups like mine on both the left and the right. These groups will be required to hire a battery of attorneys and accountants before expressing their opinion regarding incumbent politicians and candidates for office.

My testimony will focus on three areas of concern: (1) the impact of the onerous proposed disclosure provisions on non-profit organizations; (2) the practical impact of the increased disclaimer provisions; and (3) the potential impact of the increased disclosure provisions on donors to non-profit organizations.

THE PROPOSED DISCLOSURE REGIME IS INCONSISTENT
WITH THE HOLDING IN *CITIZENS UNITED V. FEC*

While striking down prohibitions on corporate speech, the Supreme Court let stand disclaimer and disclosure provisions. In upholding disclosure provisions as they pertained to Citizens United, the Court also addressed the impact and constitutionality of overly burdensome regulation on political speech.

The Court specifically addressed whether the ability to establish and operate a political action committee (PAC) was a sufficient substitute for the exercise of First Amendment rights by corporations – the Court held that it was not.

In finding PACs to be an insufficient alternative to allowing corporate speech, the Court addressed the burdensome process of establishing a PAC and the reporting requirements that are imposed on PACs.

Section 441b is a ban on corporate speech notwithstanding the fact that a PAC created by a corporation can still speak. See *McConnell*, 540 U. S., at 330–333 (opinion of KENNEDY, J.). A PAC is a separate association from the corporation. So the PAC exemption from §441b's expenditure ban, §441b(b)(2), does not allow corporations to speak. Even if a PAC could somehow allow a corporation to speak—and it does not—the option to form PACs does not alleviate the First Amendment problems with §441b. PACs are burdensome alternatives; they are expensive to administer and subject to extensive regulations. For example, every PAC must appoint a treasurer, forward donations to the treasurer promptly, keep detailed records of the identities of the persons making donations, preserve receipts for three years, and file an organization statement and report changes to this information within 10 days. See *id.*, at 330–332 (quoting *MCFL*, 479 U. S., at 253–254).

And that is just the beginning. PACs must file detailed monthly reports with the FEC, which are due at different times depending on the type of election that is about to occur.

* * *

PACs have to comply with these regulations just to speak. This might explain why fewer than 2,000 of the millions of corporations in this country have PACs. See Brief for Seven Former Chairmen of FEC et al. as *Amici Curiae* 11 (citing FEC, Summary of PAC Activity 1990–2006, online at <http://www.fec.gov/press/press2007/20071009pac/sumhistory.pdf>); IRS, Statistics of Income: 2006, Corporation Income Tax Returns 2 (2009) (hereinafter Statistics of Income) (5.8 million for-profit corporations filed 2006 tax returns). PACs, furthermore, must exist before they can speak. Given the onerous restrictions, a corporation may not be able to establish a PAC in time to make its views known regarding candidates and issues in a current campaign.

In denouncing the PAC alternative, the Court specifically noted the burdensome nature of filing “detailed monthly reports with the FEC.”

The disclosure regime proposed in the DISCLOSE Act goes far beyond filing monthly disclosure statements. The Act provides two choices of reporting regime depending on whether an organization utilizes its general treasury funds or establishes a “campaign related activity” account.

In *Citizens United*, the Supreme Court held that an organization may utilize its general treasury funds to make independent expenditures and electioneering communications. It rejected the burden of creating an independent entity and soliciting independent funds as a sufficient substitute for exercising an entity’s First Amendment rights.

The proposed legislation however disregards the Supreme Court’s guidance. The bill goes so far as to penalize organizations that do not set up dedicated

“campaign related activity” accounts. It does so by forcing organizations that use general treasury funds for political communications to provide greater disclosure than organizations that go through the procedural hurdles of creating, soliciting funds for, and maintaining a “campaign related activity” account.

Organizations that utilize their general treasury funds must report all contributors over the reporting threshold, whereas an organization that utilizes a “campaign related activity” account need only report funds raised for that account. In addition to requiring a broader class of contributions to be reported, the draft legislation also places a lower reporting threshold on the use of general treasury funds than it does on the use of “campaign related activity” funds. For example, contributions used to further independent expenditures are subject to a \$600 reporting threshold if spent from general treasury funds, and a \$6000 reporting threshold if sent from a “campaign related activity” fund.

Regardless of the choice of form and reporting regime chosen, the DISCLOSE Act will expand current reporting obligations to an absurd degree. The expansion of reporting requirements is achieved by significantly broadening the definition of “electioneering communication” and requiring the reporting of donor information on independent expenditure reports.

For independent expenditures of as little as \$1,000 reports will be due to the FEC within 24 hours. The DISCLOSE Act would significantly expand the content of those reports in a manner that will unduly burden non-profit organizations.

Unlike the current reporting regime, the proposed reports will require the inclusion of information pertaining to our donors. Specifically, should Citizens United utilize general treasury funds to make the expenditure, it must report all donors who have made contributions totaling or exceeding \$600 or more from

the beginning of the calendar year through the date on which a regulated communication is publicly distributed.

As anyone who has had to file reports with the FEC or IRS can verify, having to gather a complete and accurate snapshot of contributions received by an organization over the course of the previous year is an extremely burdensome task to accomplish within 24 hours. For an organization like Citizens United, this would require hiring additional compliance staff which would incur additional costs and would impose an undue burden on the organization.

These burdensome reporting provisions of the DISCLOSE Act appear to apply to many of our films and promotional materials. This is due to the overbroad definition of electioneering communication. In order to bring informative and relevant commentary to the public, our films often feature interviews with policy commentators as well as policy makers. For example, in 2006, Citizens United released the film *Border War*. *Border War* examined the impact of illegal immigration by documenting the lives of individuals personally impacted by this continuing national problem.

Arizona Congressman J.D. Hayworth had previously released a book on the challenges of illegal immigration and the urgent need for immigration reform. Because of his expertise and study of the subject, Congressman Hayworth was invited to participate in the film *Border War*. Currently, J.D. Hayworth is seeking election to the United States Senate. Should Citizens United seek to broadcast our film *Border War*, we would be subject to reporting requirements under the DISCLOSE Act. The regulation of such films and promotional materials because they include individuals that have subsequently sought elected office is clearly beyond the scope of the alleged problems the legislative drafters seek to cure.

THE PROPOSED DISCLAIMER PROVISIONS WILL

REDUCE POLITICAL SPEECH AND PARTICIPATION

In seeking to promote the film *Hillary The Movie*, Citizens United sought to air one 30 second ad and two 10 second ads. At the time, as we maintain today, we believed that requiring a 4.5 second “stand by your ad” disclaimer provided little information or value to the viewing public while causing a significant detriment to a non-profit organization like ours by increasing the costs of airing an independent expenditure advertisement.

The proposed legislation could expand these disclaimers to a cost prohibitive length. The legislation could require a group like Citizens United to include an organizational “stand by your ad” disclaimer, a disclaimer from a “significant funder”, and display the organizations top five funders on screen for a 6 second period. This will at least double, if not triple, the length of required disclaimers on an advertisement and will significantly impact an organization’s ability to convey its message.

Non-profit organizations like Citizens United rely on the generosity of their donors. Funds raised must be appropriately and judiciously spent. Citizens United routinely produces industry standard length commercials in 30 second and 10 second lengths. By requiring an organization like ours to air at least 9 seconds of disclaimers this legislation will drastically reduce the content of our advertisements. This may force many speakers out of the public debate.

The extended disclaimer provisions will increase the cost of non-profit advocacy while providing little additional information to viewers. For example under the proposed legislation I would have to record a disclaimer stating: “I am David Bossie, the President, of Citizens United, and Citizens United approves this message.”

The message required to be recorded by a “significant funder” may be even more redundant, requiring the representative of an organizational funder to repeat the name of his or her organization three times: “I am _____, the _____, of _____ . _____ helped to pay for this message, and _____ approves it.”

THE DISCLOSE ACT IMPOSES SIGNIFICANT BURDENS ON DONORS TO NON-PROFIT ORGANIZATIONS

The *Citizens United* decision permitted small businesses, corporations, and labor unions to engage in political speech. It allowed a broad spectrum of organizations to make independent expenditures and electioneering communications.

The DISCLOSE Act seeks to limit this speech by placing additional burdens on organizational donors. Organizational donors will now be required to file independent expenditure reports if they make a transfer to or are deemed to have made a transfer to an organization for the purposes of making a public independent expenditure.

The draft categories in the DISCLOSE Act for determining whether an organization has been deemed to have made a public independent expenditure are far too broad. For example, an organization may be deemed to have made a public independent expenditure if “the person or the person to whom the amounts were transferred knew or should have known of the covered organization’s intent to make public independent expenditures.” In practice this standard will lead to absurd results.

It is also important to note that the independent expenditure reports are required to be filed with the FEC within 24 hours of making or contracting to make the expenditure. The DISCLOSE Act will also require organizations to post the

information on their website within 24 hours of reporting to the FEC. To expand the reporting requirements and the definition of public independent expenditure in this fashion will leave many organizational donors unaware of their duty to file reports with the FEC.

This expansion is in addition to the creation of new reporting requirements for organization donors that produce regular, periodic reports to shareholders, members, and donors. Such organizations will be required to include itemized information regarding the date, cost, and information regarding the candidate supported or opposed for any independent expenditure or electioneering communication in their periodic reports.

Organizational donors to non-profit groups may curtail donations as a result of the DISCLOSE Act. To the extent that organizations are aware that a new reporting regime exists, they may halt donations due to the increased costs of compliance. To the extent they are unaware that they are subject to a reporting duty, they will face significant penalties which will chill any future donations.

David N. Bossie Biography

David N. Bossie has served as president of Citizens United and Citizens United Foundation since 2001.

Bossie is the former Chief Investigator for the United States House of Representatives Committee on Government Reform and Oversight. During Bill Clinton's two terms as president, he led investigations ranging from the Whitewater land deal to the transfer of dual-use technology to China and to foreign fundraising in the 1996 Clinton re-election campaign. He has authored four books, including the best selling *Intelligence Failure: How Clinton's National Security Policy Set the Stage for 9/11*.

Most recently, Citizens United won a landmark First Amendment decision at the United States Supreme Court in *Citizens United v. Federal Election Commission*. The case, which saw the government assert during oral arguments that it had the Constitutional authority to ban political books, struck down two decades of unconstitutional restrictions on free speech.

As president of Citizens United Productions, Bossie has produced 14 documentaries since 2004, including the award winning *Ronald Reagan: Rendezvous With Destiny*, *Broken Promises: The United Nations at 60* with the late Ron Silver, and *Perfect Valor*, a documentary narrated by Senator Fred Thompson about the service and sacrifices of our troops in Iraq. In the spring of 2010, Citizens United Productions released two documentaries. The first, *Generation Zero*, is a probing look at the recent financial crisis which posits that the degradation of American cultural, social, and economic values that has taken place

since the 1960s, rather than a failure of capitalism, is responsible for the meltdown. *Generation Zero* has been the subject of a one-hour special on FOXNews' *Hannity*, and screened to rave reviews at the National Tea Party Convention and CPAC. The second, narrated by Newt and Callista Gingrich, is *Nine Days That Changed The World* which chronicles Pope John Paul II's historic 1979 pilgrimage to Poland at the height of the Cold War, his message of faith and freedom to those behind the Iron Curtain, and his role in the fall of Communism.

Born in Boston, Bossie attended the University of Maryland. He has proudly served for the last 20 years as a volunteer firefighter in Montgomery County, Maryland where he resides with his wife, Susan, and their three children; Isabella, Griffin and Lily Campbell.

Citizens United was founded in 1988, and is one of the leading conservative advocacy groups in the country with over 500,000 members and supporters. Through its films, op-eds, policy papers, newsletters, and grassroots organizing, Citizens United seeks to reassert the traditional American values of limited government, freedom of enterprise, strong families, and national sovereignty and security.

The CHAIRMAN. Ms. Gilbert.

STATEMENT OF LISA GILBERT

Ms. GILBERT. Chairman Brady, Ranking Member Lungren, committee members and distinguished panelists, good afternoon. My name is Lisa Gilbert, and I am the Democracy Advocate for the U.S. Public Interest Research Group.

U.S. PIRG is a federation of State PIRGs which are nonprofit, nonpartisan, public interest advocacy organizations. And we are pleased to be part of this critical conversation today.

I would like to take this time to make three points: first on the necessity for a legislative response to address the Supreme Court's dangerous Citizens United decision; second, on several important components in the DISCLOSE Act newly introduced by Representatives Brady, Jones, Castle and Van Hollen; and then, third, to briefly discuss why Representative Capuano's Shareholder Protection Act should move in tandem with the DISCLOSE Act.

The decision in the Citizens United case raises concerns that the newly enabled flood of corporate spending could skew participation and drown out the voices of independent voters. This decision has elevated the role of corporations in politics at the very moment when regular Americans already have a marked distrust for corporations and especially for Wall Street. This one-two punch has increased the unpopularity of this decision, and, as Ms. Lofgren stated earlier, there was a poll conducted recently by ABC and the Washington Post in which 8 of 10 Americans outright disagreed with this opinion.

In addition to being unpopular, it is also destructive. No matter what the final tally of election spending is in the 2010 elections, it will only take one or two races where industry giants like Exxon Mobil or Goldman Sachs bring their now unlimited dollars to bear and successfully influence an outcome to forever change the dynamic of American elections.

Every officeholder in the land will be keenly aware that their race could, in fact, be next.

There are several components which I would like to highlight in the DISCLOSE Act that we think are vital to mitigate the worst impacts of this decision: those that are designed specifically to increase transparency disclosure and disclaimer; those that are in place to limit the influence of foreign entities in American elections; and those that are in place to ensure that corporations with substantial government moneys are not intervening in politics.

After Citizens United, the voting public urgently needs enhanced disclosure. This is an incredibly basic step. Where the money comes from is one of the most important ways that voters can test the accuracy of campaign statements and is essential if the free and open marketplace of ideas is to function properly.

The DISCLOSE Act would begin to get behind the money shell games and would help voters find the sources of election funding by requiring corporations to disclose in numerous places, both when moving and spending their money for political purposes, as well as inform the public through disclaimers by their CEOs.

This bill has begun to receive the bipartisan support that it deserves, and the transparency and disclosure provisions specifically

should strike a cord with anyone who cares about open and accountable government.

The Court's decision in Citizens United also likely opens the door for independent expenditures by foreign corporations in American elections. Under existing law, foreign nationals cannot spend money in elections. However, the definition of foreign nationals does not currently include domestic U.S. corporations that are owned or controlled by foreign interests, and the Citizens United case has opened a sizable loophole for those corporations to participate.

The DISCLOSE Act expands the definition of a foreign national to include these types of foreign companies and appropriately ensure that they cannot make independent expenditures.

Corporations that receive substantial government funds should be barred from making independent election expenditures. Under current law, government contractors cannot make direct contributions to candidates, and the DISCLOSE Act simply applies similar pay-to-play restrictions to independent expenditures for companies who have over \$50,000 in government contracts or have received TARP funds and not yet repaid the money. This lessens the potential for direct corruption.

Finally, I will speak quickly on the importance of Representative Mike Capuano's bill, the Shareholder Protection Act. The bill requires an affirmative majority of shareholders to authorize future corporate political expenditures and requires disclosure of that spending. Currently, nearly one in two American households owns stocks. However, American shareholders lack both the ability to object or consent to political spending and the right to be told about it. It is particularly antithetical to the ideals of a participatory democracy to envision a company using shareholder profits to support a candidate that the shareholders might actually choose to oppose.

We urge Congress to move the Shareholder Protection Act in tandem with the DISCLOSE Act. To conclude, for those who cherish an active democracy, the Court's decision in the Citizens United case was fundamentally wrong and also just a tragic mistake. Congress needs to act now within the boundaries left by the Court and move and strengthen the DISCLOSE Act and the Shareholder Protection Act to protect the integrity of upcoming American elections. Only by first passing these types of responses can we hope to pass further legislation designed to tackle the underlying problem which is corrosive special interest money in American politics.

Thank you and I look forward to your questions.

The CHAIRMAN. I thank the lady.

[The statement of Ms. Gilbert follows:]

Testimony of the U.S. Public Interest Research Group

Lisa Gilbert, Democracy Advocate

H.R. 5175, The DISCLOSE ACT, Democracy is Strengthened by Casting Light
on Spending in Elections

May 6, 2010

Before the

The Committee on House Administration
U.S. House of Representatives

The Honorable Robert Brady, Chair

Chairman Brady, Ranking Member Lungren, Committee Members and distinguished panelists.

Good morning. My name is Lisa Gilbert and I am the Democracy Advocate for the U.S. Public Interest Research Group. U.S.PIRG serves as the federation of state PIRGs, which are non-profit, non-partisan public interest advocacy groups that protect our health, encourage a fair, sustainable economy, and foster responsive, democratic government.

We are pleased to be part of this critical conversation today, and look forward to the Committee and other interested parties working together to address the problems that arise from the Supreme Court's dangerous decision in the Citizens United case to empower corporations to make unlimited independent expenditures to influence federal elections.

Summary and Recommendations:

President Obama recently expressed his commitment to protecting the public from the egregious overreach made by the Supreme Court in *Citizens United v. FEC*. He commented that the bipartisan DISCLOSE Act introduced last week is critical because he has "long believed that sunlight is the best disinfectant, and this legislation will shine an unprecedented light on corporate spending in political campaigns... [and that] passing the legislation is a critical step in restoring our government to its rightful owners: the American people."¹ Now the burden falls to Congress to follow the administration's lead and act decisively to pass a legislative solution which will stop corporations from buying the next election.

It is clear that the courts have left us room to do so, and do so in time to protect the 2010 elections from the worst consequences of this decision.

The newly enabled² possible flood of corporate spending could skew participation and drown out the voice of regular citizens. This decision has elevated the role of corporations in politics at the very moment when regular Americans have a marked distrust for corporations, especially Wall Street banks.

Polls from the left, right and center³ show that few approve of the justices' ruling. In fact, a poll conducted by ABC and The Washington Post recently showed that eight out of ten Americans outright disagree with Court's opinion.⁴

Total spending on federal elections in 2008 was more than \$5.3 billion from political parties, outside groups, candidates, and PACs. While that is a lot of money, Exxon Corporation alone made over 45 Billion dollars in profit in 2008, which can now be directed at our federal candidates.

Even if the money spent in 2010 by corporate America is not as astronomical as projected, it will only take one or two races where industry giants like Exxon Mobil or Goldman Sachs bring their dollars to bear and successfully influence the

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outcome to forever change the ease with which politicians vote their conscience. Every officeholder in the land will be keenly aware that their race could be the next to have corporate dollars thrown against it.

A strong package of statutory reforms as a practical solution to this problem is imperative. Such responses are essential, and there are a wide variety of critical approaches, including public funding of elections. However, legislation to be adopted this year cannot address every possible issue. The reforms found in the DISCLOSE Act are an important step to protect the integrity of the 2010 elections.

The reforms in the DISCLOSE Act will increase disclosure information about advertising spending from corporate sources, and create stand-by-your ad requirements for CEOs. In addition, foreign corporations with domestic subsidiaries, federal contractors and TARP recipients who have not repaid their funds will be banned from spending their money on politics, and companies will not be able to coordinate their activities with candidates and parties.

This bill has begun to receive the bipartisan support it clearly deserves. The prospect of foreigners helping to elect our next Congress should be troubling to all ideological camps, and the transparency and disclosure provisions should strike a chord with anyone who cares about accountable and transparent government. This is highlighted by Mitch McConnell's 2000 statement to Tim Russert on "Meet the Press," "Republicans are in favor of disclosure," In fact, he said at the time, the more expanded the disclosure, the better.⁵

The Supreme Court's decision in this matter shows a deplorable lack of respect for precedent and represents a dark day for democracy in America. Once we have passed and strengthened the DISCLOSE Act and the Shareholder Protection Act to blunt the worst consequences of this decision, our attention must be turned to systemic reform, to creating a system for our elections which is wholly free of corporate money.

Highlighted Responses in DISCLOSE:

Disclosure and Disclaimers:

After *Citizens United*, the voting public urgently needs enhanced disclosure. This is the most basic step toward protecting the role of the voter in making decisions in elections. It now seems possible for corporations to secretly provide funds that another corporation uses to advertise in an election through independent expenditures. This is simply unacceptable. Voters need information about the sources of funding for election advertising. That knowledge is one of the most important ways that voters can test the accuracy of campaign statements and is essential if the "free and open marketplace of ideas" is to function properly. This is especially true in the case of huge expenditures which have the potential to drown out individual citizens voices.

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The Court pointed in the direction of enhanced disclosure when it said that disclosure is important to “providing the electorate with information.” It also supported disclaimer requirements “so that the people will be able to evaluate the arguments to which they are being subjected.”

The DISCLOSE Act contains some of the strongest proposals ever to shine a light on election spending, and would begin to get behind the money shell-game to help voters find the source of election funding.

Under this bill a trade association or other corporation that receives funds which could be used in politics will have to disclose the funds it is receiving if it makes or contributes to election expenditures. And all corporations that provide funds to the trade association or corporation will also have to disclose on their own behalf when they disburse money to be spent on public independent expenditures and electioneering communications.

This bill makes sure that corporations live up to their civic responsibility by providing disclosure to the public through disclaimers and the Internet, directly to their stockholders or members, and to the Federal Election Commission.

In the DISCLOSE Act the Chief Executive Officer of a company is also required to make disclaimers on public election communications. Similarly to the restrictions on politicians outlined in BCRA, the CEO must personally appear in an advertisement and explicitly state that they “approved the message,” on behalf of their organization. Additionally the legislation requires the top funder for the advertisement over \$100,000 to record a similar disclaimer and take responsibility. Also, in television advertisement, the corporations must list the top five funders to the advertising campaign. The Court clearly approved of disclaimers in *Citizens United* decision and remarked that “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;” the disclaimer components of the DISCLOSE Act are an important component of this accountability.

Foreign Corporations:

The Court's decision in *Citizens United* likely opens the door for independent expenditures by foreign corporations in American elections. Under current law, foreign nationals are prohibited from making expenditures or contributions to any federal, state, or local election. Foreign nationals include foreign countries, individuals, and corporations—those organized under the laws of a foreign nation, or with their principle place of business in a foreign country. However, foreign nationals do not currently include domestic U.S. corporations that are owned or controlled by foreign nationals. The Citizens United case has opened a sizeable loophole for these foreign company's domestic subsidiaries to participate in our elections. The DISCLOSE Act expands the definition of foreign national so as to ensure that such corporations cannot flood money into our election system. Under the bill, a company with either 20% ownership by a

foreign national, where foreign nationals constitute the majority of the board of directors, or where the decision making process is based in the hands of a foreign national cannot make contributions or independent expenditures.

Government Involvement:

Corporations that have substantial governmental involvement, particularly financial involvement, should be barred from making independent election expenditures. Under the Federal Election Campaign Act government contractors are already barred from making direct contributions to candidates. The DISCLOSE Act applies similar restrictions to companies who have over \$50,000 in government contracts or have received TARP funds and not yet repaid the monies, and prohibits them from making independent expenditures or engage in spending on electioneering communications. We believe that corporations receiving government contracts above a certain level raise issues of excessive government involvement or the potential for direct corruption.

Response in the Shareholder Protection Act, H.R. 4790:

Another policy solution that we want to highlight is shareholder approval of election expenditures by corporations. This bill, as well as other possible reforms to corporate governance in the campaign finance context, will be an important part of the short-term solution to the Citizens United decision as well as a long term strategy to challenge the influence of corporate power in democracy.

The Court recognized the importance of disclosure to corporate governance, thereby setting the stage for additional shareholder involvement. The Court said, "Shareholders can determine whether their corporation's political speech advances the corporation's interest in making profits..."

Representative Mike Capuano's bill, the Shareholder Protection Act, H.R. 4790 modifies securities laws to require an affirmative majority of shareholders to authorize future corporate political expenditures, corporations to report past political spending to shareholders on a periodic basis, and states that any unauthorized corporate political spending triggers liability.

We urge Congress to move this bill in tandem with the DISCLOSE Act, and it has received a hearing in the Financial Services Subcommittee on Capitol Markets.

Investing has expanded markedly over the past few decades, to the point where nearly one in two American households owns stocks, many through mutual funds or 401(k) retirement accounts.⁶ After the Supreme Court's decision in *Citizens United*, corporations will be able to spend the capital generated through such investments in federal and state elections for the first time in decades. American shareholders currently lack the ability to object or consent to political spending by American corporations. Indeed, because of gaps between corporate and campaign finance law, U.S. corporations can make political expenditures without giving shareholders any notice of the spending either before or after the fact. At

Testimony of Lisa Gilbert, U.S. PIRG, 6 May 2010
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U.S. PIRG we find it particularly antithetical to our ideals of a participatory democracy to envision a company using investor profits to support a candidate that any given shareholder might choose to oppose. Again, we urge Congress to move forward with Representative Capuano's Shareholder Protection Act in conjunction with the DISCLOSE Act.

Conclusion:

It is hard to overstate what a paradigm shift *Citizens United* has caused for both American democracy and American shareholders. *Citizens United* stuck down decades-old restrictions on the use of general treasury funds to directly support or oppose candidates. Now corporate managers are free to spend corporate treasury funds in Presidential, Congressional and over 20 additional state elections

For those that cherish an active and participatory democracy, the Court's decision in *Citizens United v. FEC* was fundamentally wrong and a tragic mistake. The majority mistakenly equated corporate free speech rights with those of natural persons and associations of individuals with corporations. Even though we believe this decision of the Court will be overturned eventually, both in the judgment of history and the law, Congress still needs to respond now within the boundaries left by this decision and move and strengthen the DISCLOSE Act and the Shareholder Protection Act.

We must act quickly to protect the integrity of upcoming American elections from the likelihood of corporate spending drowning out citizen voices in our democracy. For only by first passing these responses, can we hope to pass further legislation to tackle the pervasive long-term problem of special interest money as a corrosive factor in American politics.

¹ <http://www.whitehouse.gov/the-press-office/statement-president-disclose-act>, assessed on 5.1.10

² Until *Citizens United*, the Federal Elections Campaign Act (FECA) prohibited corporations (profit or nonprofit), labor organizations and incorporated membership organizations from making direct contributions or expenditures in connection with federal elections. 2 U.S.C. § 441b. The limits have a long vintage. For 63 years, since Taft-Hartley, corporation have been banned from spending corporate treasury money to expressively support or oppose a federal candidate and for 103 years, since the Tillman Act, corporations have been banned from giving contributions directly from corporate treasury funds to federal candidates. After *Citizens United*, corporations are still banned from direct contributions in federal elections.

³ <http://www.surveyyusa.com/client/PollPrint.aspx?q=05cabb5f-599f-47a8-98fb-e3e254e425e4&d=0>, assessed on 5.1.10

⁴ <http://www.washingtonpost.com/wp-dyn/content/article/2010/02/17/AR2010021701151.html>, assessed on 5.1.10

⁵ <http://thehill.com/homenews/house/93689-campaign-finance-bill-has-gop-wary>, assessed on 5.1.10

⁶ 2 See JOINT ECONOMIC COMMITTEE, 106TH CONG., THE ROOTS OF BROADENED STOCK OWNERSHIP 1 (2000), www.house.gov/jec/tax/stock/stock.pdf; Investment Company Institute, *U.S. Household Ownership of Mutual Funds in 2005*, 2 (2005), <http://www.ici.org/pdf/lm-v14n5.pdf>; THE INVESTMENT COMPANY INSTITUTE, 2009 INVESTMENT COMPANY FACT BOOK 8 (49th ed. 2009),

Lisa Gilbert works in Washington , D.C. as an advocate for government transparency and integrity, getting big money out of politics, and making elections more fair and accessible to all. She develops policy, lobbies and writes on an agenda of fair and honest government and participatory democracy. She is the author of *Greasing the Wheels* and *Saving Dollars, Saving Democracy*.

Ms. Gilbert has organized and spoken at numerous press conferences and legislative briefings with members of Congress. She has been quoted by the New York Times, Associated Press, Wall Street Journal, Washington Post and National Public Radio. She is also a featured contributor to the National Journal's expert blog on lobbying and ethics, and has written for Huffington Post and Think Progress.

The CHAIRMAN. Mr. Holman.

STATEMENT OF CRAIG HOLMAN

Mr. HOLMAN. Chairman Brady, Ranking Member Lungren, committee, thank you for letting me testify on this issue.

The DISCLOSE Act has been criticized here for criminalizing speech or in some some way chilling free speech. This act does nothing of the sort. This act is largely a disclosure measure which has gained—the type of concepts that have gained support across both parties in previous years, with some important measures to help preserve the integrity of the legislative process.

What is often overlooked in this whole debate is the impact of the Citizens United decision on the legislative process. The ranking member, in his introductory remarks, emphasized that we should be talking about the legislative process, so let's do that.

What we find that the DISCLOSE Act can do is, it is not just an impact on the campaign finance arena, it will have a dramatic impact on you and on this committee. The House Administration Committee helped lead the way a couple years ago in drafting and promoting the Honest Leadership and Open Government Act that tried reining in some of the worst abuses we have seen of lobbying here on Capitol Hill, and it was a sweeping, sweeping improvement in the whole legislative process.

Citizens United has the danger of reversing much of those achievements in allowing corporate lobbyists to walk into meetings with you and your staff, carrying this big club of a potential campaign expenditure for Members who are friendly and punishing those Members who may not be as friendly to the corporate interests that are being pursued.

This is something that should be discussed more. When we are talking about Citizens United, we are not just talking about money and politics. We are talking about the lobbyists who are going to represent these corporations.

What we need and what is achieved—what could be achieved in the DISCLOSE Act is critical disclosure provisions that allow you and other Members of Congress and the public realize that if any of these corporate lobbyists or corporations decide that they are going to use that big club, that the public is going to be aware of who is financing various campaign ads, who is behind the campaign ads, and what interest it is that they are attempting to achieve behind those campaign ads. That is an important means to fill in a huge loophole that currently exists in our regulatory regime.

Under the current transparency regime, contributions from major corporations to such groups as Americans for Job Security or the Chamber of Commerce do not get disclosed. As a result, we don't really know what corporations or what labor unions or what other entities are really seeking to do behind financing certain campaign ads.

The Bipartisan Campaign Reform Act tried to regulate that. It required disclosure of electioneering communications. In 2004 all electioneering communications revealed most of their donors, but quickly in 2008, many of these third-party groups, especially, realized that they did not have to disclose individual corporate donors

as long as those moneys were not specifically earmarked for that advertising campaign. That has become the norm at this point.

We just saw in the 2008 Massachusetts Senate election, Americans for Job Security reported spending about \$1 million in the campaign, but did not disclose any donors. Same with the Chamber of Commerce. This measure is primarily and importantly a disclosure measure that is going to close those loopholes so the public and lawmakers can know who is financing these types of campaign ads.

I also want to emphasize one important regulatory measure that is included in this, and that is the pay-to-play provision to government contractors. This is not a revolutionary idea, nor is this a campaign finance reform measure. When it comes to regulating campaign contributions or expenditures by government contractors, that legislation is not designed to curtail money flowing into politics; it is designed to enhance the integrity of the government contracting process, to make sure that government contracts are awarded to companies based upon merit and not based upon campaign contributions or company expenditures.

This measure helps extend the current pay-to-play law to include independent expenditures and electioneering communications that are financed by these government contractors, a narrow class of corporations.

It should be improved to make sure it captures also any corporate contributions to groups like Americans for Job Security that are used for political expenditures, and then we would have a full, strong disclosure regime, along with some important improvements in making sure that the integrity of government is preserved. Thank you.

The CHAIRMAN. I thank the gentleman.

[The statement of Mr. Holman follows:]



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May 6, 2010

The Hon. Robert Brady, Chairman,
The Hon. Daniel Lungren, Ranking Member,
Committee on House Administration
House of Representatives
Washington, D.C. 20515

Testimony of Craig Holman' Public Citizen

**Before the Committee on House Administration
On the Subject of the DISCLOSE Act (H.R. 5175)**

Dear Chairman and Ranking Member:

I thank you for the opportunity to testify today on behalf of Public Citizen and our more than 100,000 members.

The DISCLOSE Act (H.R. 5175) is an important legislative response to the gravely unfortunate *Citizens United* decision by five justices of the U.S. Supreme Court. The Court's decision to roll back a century of American political tradition banning corporate money in politics poses severe dangers to our democracy. In the electoral arena, this decision will bring a flood of new money into elections, ratcheting up the cost of campaigns and increasing the time and resources needed for fundraising. In the legislative arena, the mere threat of corporate political spending gives corporate lobbyists a large new club to wield when negotiating with lawmakers. In corporate governance, there are no rules or procedures established in the United States to ensure that shareholders – those who actually own the wealth of corporations – are informed of decisions to spend their money on politics.

The DISCLOSE Act is a first step to repair some of the damage caused by *Citizens United*. As drafted, H.R. 5175 can provide voters with the means to decipher campaign messages by casting light on the true funding sources behind those messages. The legislative proposal closes major loopholes in the current disclosure laws – loopholes that will become all the more problematic as corporations seek ways to influence elections and pressure lawmakers by funneling money into innocuous-sounding outside groups to handle their advertising campaigns secretly on their behalf. The Act also restricts expenditures by foreign subsidiaries. It aims to restrict independent expenditures by government contractors and in so doing, with small but vital changes, could meaningfully alleviate – though certainly not solve – the harm caused by *Citizens United*.

¹ Craig Holman, Ph.D., Government Affairs lobbyist, Public Citizen.

Public Citizen has called for and will continue to advocate additional strong regulatory measures to address *Citizens United*, such as a Shareholder Protection Act and the Fair Elections Now Act. But the DISCLOSE Act provides a good, solid base of transparency in elections that is desperately needed and, at the same time, it strengthens some of the anti-corruption regulatory measures currently in federal law.

The 2010 elections are just around the corner. Congress needs to pass the DISCLOSE Act swiftly to lift the veil of secrecy over who is funding the campaigns for or against candidates. This information is perhaps the most valuable tool voters can use in evaluating the merits of the campaign messages that are about to besiege them.

Citizens United v. FEC

On January 21, 2010, the U.S. Supreme Court struck at the heart of a century of American political tradition when it ruled in *Citizens United v. Federal Election Commission*, contrary to long-standing precedents, that corporations have a constitutional right to spend unlimited amounts of money to promote or attack candidates.

The Court explicitly overruled two existing Supreme Court decisions. In *Austin v. Michigan Chamber of Commerce*, the Court held that the government can require for-profit corporations to use political action committees funded by individual contributions when engaging in express electoral advocacy. *McConnell v. Federal Election Commission* applied that principle to uphold BCRA's restrictions on "electioneering communications," that is, corporate funding of election-eve broadcasts that mention candidates and convey unmistakable electoral messages.

Citizens United overrules *Austin* and *McConnell*. The *Citizens United* decision also effectively negates part of the Roberts Court's own 2007 ruling in *Wisconsin Right to Life v. Federal Election Commission*, which had stated that corporate financing of express advocacy and its "functional equivalent" could be prohibited.

By overruling these decisions, the Court has opened the door to unlimited corporate spending in candidate campaigns, breaking a sixty-year policy of prohibiting such direct corporate expenditures, established in the 1947 Taft-Hartley Act. The decision also endangers repeated congressional deliberations restricting corporate money in politics – beginning with the 1907 Tillman Act, followed by the 1925 Federal Corrupt Practices Act, the 1943 War Labor Disputes Act, the 1971 Federal Election Campaign Act (FECA) and the 2002 Bipartisan Campaign Reform Act (BCRA).

Reversing well-established laws and judicial precedents barring direct corporate financing of elections marks a sea-change in American political culture and poses grave dangers to the integrity of our democracy.

A Massive Influx of New Corporate Money in Elections

It is impossible to predict how much corporate money will flood into our elections in a virtually

unregulated system; the country has never faced a similar situation. Nevertheless, it is reasonable to assume that the amount will be very substantial indeed – and possibly overwhelming in races of particular interest to corporations.

Special interest groups funded primarily by corporate money spent, by conservative estimates, about \$50 million on TV ads promoting or attacking federal candidates in the last two months of the 2000 election, up from \$11 million just two years earlier.² Corporations and unions chipped in another \$500 million in “soft money” contributions in each of the 2000 and 2002 election cycles, due to a loophole in federal election law.³

These loopholes were largely closed in 2002 with passage of BCRA, which added two powerful provisions to the campaign finance laws: First, broadcast ads that mention a candidate, target the candidate’s voting constituency and air within 60 days of a general election could not be paid for by corporate or union funds. Second, soft money contributions to parties and federal candidates are prohibited.

Although the Rehnquist Court upheld BCRA almost in its entirety in 2003, the Roberts Court began to whittle away at the law in its 2007 decision in *Wisconsin Right to Life*. That decision resulted in another \$100 million in corporate spending on TV electioneering ads in the last two months of the 2008 election.⁴

Though some corporations may not shy away from running their own independent expenditure campaigns, especially in selected races as a tool to enhance their lobbying effectiveness with specific committee chairpersons, most corporations are likely to funnel their political expenditures through third parties – namely, 501(c) nonprofit groups and section 527s with the same electoral agenda. Fueled by unlimited “soft money” donations, these outside groups spent about \$400 million in the 2008 elections.⁵ The 501(c) nonprofit groups tended to favor Republican candidates while the section 527s favored Democratic candidates. BCRA attempted to curtail the use of soft money through these groups to pay for electioneering communications within 30 days of a primary and 60 days of a general election, but all such constraints on corporate money have now been lifted under *Citizens United*.

The disruptive potential of unlimited corporate spending in candidate elections can easily be seen in judicial campaigns in states where restrictions on corporate spending in elections either do not exist or have been easily sidestepped. Campaign spending in state supreme court races approached \$60 million in 2008, and a very large portion of that money had “clear links” to the corporate sector.⁶ In the 2008 Wisconsin Supreme Court race, special interest groups outspent candidates four-to-one. In one race, an organization called Wisconsin Manufacturers &

² See, for example, Craig Holman and Luke McLoughlin, *BUYING TIME 2000: TELEVISION ADVERTISING IN THE 2000 FEDERAL ELECTIONS* (2001) at 29

³ David Magleby, Anthony Corrado and Kelly Patterson, eds. *FINANCING THE 2004 ELECTION* (2006) at 186.

⁴ Supplemental Reply Brief for the Appellee, *Citizens United v. Federal Election Commission* (August 2009) at 12.

⁵ Steve Weissman and Suraj Sazawal, “Soft Money Political Spending by 501(c) Nonprofits Tripled in 2008 Election,” Campaign Finance Institute (Feb. 25, 2009).

⁶ Eliza Newlin Carney, “Big Money Already Flowing into judicial Elections,” *National Journal* (April 12, 2010).

Commerce (WMC) targeted an incumbent justice, Justice Louis Butler, because of his pro-consumer positions on the court. But instead of criticizing Butler on the issues, WMC ran an expensive TV ad campaign attacking him as “Loophole Louie” for setting criminals free. Justice Butler was defeated and replaced by a pro-business justice of WMC’s liking. As Justice Butler warned his colleagues after the election, the message is clear: “Do not vote against business interests.”⁷

The Chamber of Commerce is already gearing up for a massive spending campaign in state judicial contests as well as federal congressional races in 2010. In the Massachusetts special election in January 2010, the Chamber of Commerce spent about \$1 million in corporate funds on so-called issue ads in the final days of the senate campaign to help elect Scott Brown. “Washington politicians continue to fail us. More spending and fewer jobs,” pronounced one Chamber-sponsored TV ad. “Scott Brown ... supports measures that hold spending and cut taxes.... Call Scott Brown. Thank him.”⁸

The Chamber has pledged to take advantage of the new absence of constraints on corporate money in elections and further bolster its corporate revenues for political activity. Tax records for 2008 show that just 19 corporations paid for about a third of the Chamber’s political budget (due to lack of disclosure laws, these corporations remain anonymous).⁹ Under the new landscape of *Citizens United*, the Chamber believes it can amass and spend much more from now on. The trade association boasts that it will spend about \$200 million on politics this year – double what it spent last year – with about \$50 million of that money funneled into state judicial and federal congressional elections. The Chamber is planning to campaign in at least 22 states, targeting vulnerable Democrats like Sens. Michael Bennett in Colorado and Blanche Lincoln in Arkansas. But because incumbents win at least 90 percent of the time, the Chamber is most focused on open seats. “What we’re now seeing is these corporations are able to give money to the Chamber of Commerce and they’re able to do it anonymously,” Fox News contributor Kirsten Powers said.¹⁰

The Chamber is not alone. Corporations have long shown a willingness to spend and contribute hundreds of millions of dollars each election through loopholes in the law. Now that the Court has invalidated restrictions on corporate political spending, expect a flood of new money into the 2010 congressional campaigns, state candidate campaigns, state judicial elections, and the 2012 presidential election.

Failure of Current Disclosure Regime to Address *Citizens United*

Though the disclosure requirements for candidates and party committees are quite extensive under FECA, the weakest element of the transparency regime involves campaign expenditures by outside groups. Yet, outside group spending is precisely where the flood of new political

⁷ David Ziemer, “Loss Attributed to Pro-Business Group,” *Wisconsin Law Journal* (Aug. 5, 2008)

⁸ Tom Hamburger, “U.S. Chamber of Commerce Grows into a Political Force,” *Los Angeles Times* (March 8, 2010).

⁹ *Id.*

¹⁰ James Rosen, “Chamber of Commerce to Spend Big Bucks Targeting Vulnerable Democrats,” FOX News (March 11, 2010).

spending will flow under *Citizens United*. The three most obvious problems when it comes to disclosure of the campaign financial activity of outside groups are:

- Lack of disclosure of the specific sources of funds used by non-profit groups and political organizations to pay for electioneering communications and even independent expenditures for express advocacy.
- No requirement that corporate CEOs inform shareholders or the public of corporate political expenditures on a timely basis.
- Absence of immediate accountability for outside groups as to who is sponsoring campaign broadcast advertisements.

Under the current transparency regime for outside groups, any entity – including a corporation or labor union – that directly spends money on electioneering communications or independent expenditure campaigns must report those expenditures to the Federal Election Commission (FEC), which discloses them to the public. But when that spending is done by an outside group, such as a trade association or political organization, the outside group in many instances is not required to report the sources of its funds, and effectively may end up only disclosing, for example, “paid for by the Chamber of Commerce.”

BCRA originally intended that the sources of funds used for electioneering communications, even when made by a nonprofit group, be reported to the FEC and fully disclosed to the public. However, FEC implementation rules softened this disclosure requirement, limiting disclosure only to those sources that specifically earmarked their funds for the campaign ad. As a result, of the \$98.7 million in electioneering communications reported in the 2004 election cycle immediately after adoption of BCRA, the sponsoring groups identified most of their major donors. In the 2008 election cycle, however, more than a third of the \$116.5 million reported electioneering communications was not accompanied by donor information.¹¹ In the most recent Massachusetts senate special election in January 2010, seven outside organizations spent nearly \$2.7 million to help Brown, and five others spent more than \$1.8 million on Coakley’s behalf. But the non-profit groups (as opposed to the section 527s), such as the Chamber of Commerce, Americans for Job Security, and American Future Fund, failed to report where their money came from to pay for these ads.¹² It has now become the norm for the Chamber and other non-profit groups to conceal the sources of funds used to pay for electioneering communications. The same weaknesses exist with respect to requirements to report sources of funding for other independent expenditures.

Just as problematic for corporate governance, there are no built-in rules that require a corporate CEO or company board of directors to inform shareholders of decisions to spend corporate treasury money on elections. Unlike Britain, which requires company executives to inform shareholders of political spending decisions and receive approval for the company’s political budget, no such constraints exist in American corporate governance. Corporate political spending decisions may be made simply at the whim of a CEO or a lower level executive, or the board of directors, and most often such decisions in fact will be made without further

¹¹ Griff Palmer, “Decision Could Allow Anonymous Political Contributions by Businesses,” *New York Times* (Feb. 27, 2010).

¹² Brian Mooney, “Late Spending Frenzy Fueled Senate Race,” *Boston Globe* (Jan. 24, 2010).

consultation with shareholders. Since the *Citizens United* ruling, many corporate executives already are planning their corporate political budgets without the approval — or even knowledge — of the shareholders they are supposed to serve. Immediately following the Court’s decision, K Street lobbyist Tony Podesta reported to the *National Journal* that he had spent much of the day talking with a corporate client about a political advertising budget.

Broadcast advertisements for or against candidates by outside groups are also subject to very lax disclosure requirements in the names and identities of the groups as well as in the ads themselves. This problem is particularly acute for non-profit entities that need not file any disclosure reports of contributors (as opposed to section 527s, which must disclose their contributors on the IRS web page). Many groups will hide behind benign-sounding names that describe little as to which interests the groups represent or, worse yet, misleading names. Groups such as “Americans for the Republic” and the “Freedom and Democracy Fund” offer nothing in their names that would suggest they are largely funded by corporate interests.

When a benign-sounding group called “Americans for Job Security” sponsored the following television ad right before the 2000 presidential election, there was no suggestion in the name of the sponsor that it was funded by corporate interests:

“Are you taxed enough already? Not according to Al Gore. Gore plans to squeeze more money out of middle class families at the gasoline pump. Gore cast the tie-breaking vote to raise gas taxes 4.3 cents a gallon. He admits he’ll add more taxes on gasoline with what he calls a CO2 tax. Gore supported a call to raise taxes so much that gas would cost \$3 a gallon. And Gore’s ideas are so extreme, if they ever came to pass, Americans would truly be Gored at the pump.”¹³

In 2007, the Lobbying Disclosure Act of 1995 (LDA) was amended to require disclosure of the funding sources of similar “stealth lobbying coalitions,” a disclosure provision that survived court scrutiny and is in effect today.¹⁴

The DISCLOSE Act Helps Lift the Veil of Secrecy

H.R. 5175 is designed to enhance transparency for the public as to who is financing independent campaign ads. It fills in many of the holes of the existing transparency regime, especially when it comes to funneling campaign money through outside groups – holes that are made all the more pronounced by the expected onslaught of unlimited corporate financing. The enhancement of transparency alone makes this measure a valuable response to the *Citizens United* decision that Congress should approve without delay.

Among the improvements in disclosure of political expenditures are: a 24-hour reporting requirement for independent expenditures of \$10,000 or more that are made more than 20 days before an election, and for expenditures of \$1,000 or more that are made within 20 days of an

¹³ Public Citizen, Complaint to the Internal Revenue Service, Regarding Americans for Job Security (April 11, 2007), available at: http://www.citizen.org/congress/article_redirect.cfm?ID=16414

¹⁴ National Association of Manufacturers v. Taylor, D.C. Cir. (Sep. 12, 2009)

election; extending the “electioneering communications” period for disclosure purposes to 90 days before a primary election through the general election; requiring lobbyists and lobbying organizations registered under LDA to report the date and amount of each independent expenditure and electioneering communication in excess of \$1,000; and, once and for all, requiring Senators to join the 21st century with the rest of congressional and presidential candidates and file their campaign finance reports electronically.

By far the most important enhancement to campaign finance disclosure offered by H.R. 5175 is the requirement that corporations, labor unions, non-profit groups and political organizations report all donors who have given \$1,000 or more to the entity’s political budget, if that entity spends more than \$10,000 on electioneering activities. An entity that meets the threshold can either disclose all of its donors of \$1,000 or more (and who have not specified that the donation cannot be used for election-related activity) or, alternatively, establish a “Campaign-Related Activity” account in which the entity receives and from which it disburses political expenditures. Donors who have not given money for campaign purposes – specifically, independent expenditures or electioneering communications – are exempt from the disclosure requirement. Transfers of funds into a political account shall be deemed campaign expenditures and the sources of the funds fully disclosed. Thus, the ability of front groups to hide the identities of donors to their political campaign budgets would be ended, all the while maintaining the protection of anonymity to those donors who do not intend their money to be used for campaign purposes. These reports would be posted on the FEC’s campaign finance disclosure web page.

Furthermore, broadcast campaign ads sponsored by an outside group would be required to include a “stand by your ad” disclaimer in which the CEO or highest ranking official of the organization must appear in the ad saying that he or she “approves of this message.” If the message is sponsored by a front group, the top funder of that group must also record a stand-by-your-ad disclaimer. Finally, the top five donors of the group must be listed on the screen at the end of the advertisement in the same fashion that is currently practiced in the State of Washington.

All campaign-related expenditures by a corporation, labor union, non-profit group or political organization must also be posted on the organization’s web page within 24 hours of reporting such expenditures to the FEC, and all members or shareholders of the organizations must be informed of the expenditures on a periodic basis.

These are all good, solid disclosure requirements that close existing loopholes, provide timely information to voters, and empower shareholders or members with knowledge of the political expenditures of the corporation or association. No longer will pharmaceutical companies be able to secretly launder money into a front group, such as the United Seniors Association, which received 80 percent of its funds from a single undisclosed corporate source but pretended to be a mass organization of concerned citizens opposed to health care reform in its television ads promoting or attacking candidates.¹⁵

¹⁵ Public Citizen, *The New Stealth PACs* (2004), available at: <http://www.stealthpacs.org/>. United Seniors Association (USA) burst onto the soft money scene in 2002, when it spent \$18.6 million on advertising, according to its filing with the IRS.² Some of its expenditures paid for issue advocacy communications in the summer of that year while Congress was debating a Medicare prescription drug bill. But USA reserved the majority of its advertising

Of all the campaign finance laws, none stand on firmer constitutional ground than disclosure. With very few exceptions, state and federal courts have upheld a wide array of disclosure requirements, beginning in recent history with the 1976 landmark decision, *Buckley v. Valeo*.¹⁶ The Supreme Court held that three compelling governmental interests justified reporting requirements: (i) enhancing the knowledge of voters about a candidate's possible allegiances; (ii) deterring actual and apparent corruption; and (iii) enforcing contribution limits. Even the current Roberts Court, extremely hostile to many campaign finance restrictions, has upheld disclosure requirements. In the 2007 *Wisconsin Right to Life* decision, the Roberts Court poked a gaping loophole in the ban on corporate funding of electioneering communications, but left the reporting requirement untouched. The same Court in *Citizens United* voted 8-1 to uphold the disclosure requirements of BCRA. In the controversial *Doe v. Reed* case now being argued before the Court (involving disclosure of petition signatories on an initiative petition defining the institution of marriage), reports of the oral argument suggest a majority of the Court siding with disclosure.

The DISCLOSE Act Helps Check Undue Influence-Peddling

Though H.R. 5175 is primarily a disclosure measure, it also contains some significant regulatory measures. The DISCLOSE Act curtails the ability of government contractors to curry favor with candidates and the public officials who issue the contracts. It dramatically reduces the chances for foreign principals to finance campaign ads in American elections. The Act also attempts to strengthen the coordination rules between outside groups and candidates, and extends the lowest unit charge rule to party committees as well as candidates.

The most robust regulatory measure of the DISCLOSE Act is a pay-to-play restriction on major government contractors. The federal government, nine states, the Securities Exchange Commission and several local jurisdictions currently restrict government contractors from making campaign contributions to those responsible for issuing government contracts, known as "pay-to-play" restrictions.¹⁷ The objective of pay-to-play policies is to reduce corruption and favoritism in the awarding of government contracts and thereby enhance fair and competitive bidding for taxpayer-funded projects. Since pay-to-play restrictions are narrowly tailored to apply to a specific class of persons (government contractors), this anti-corruption policy should be viewed as government contracting reform rather than campaign finance reform.

A longstanding federal law already broadly bans political contributions by federal contractors. [2 U.S.C. § 441c] Since *Citizens United* now allows any corporation to make unlimited expenditures on behalf of candidates and parties, the DISCLOSE Act adds independent expenditures and electioneering communications to the current pay-to-play contribution ban for major government contractors (as well as TARP recipients). This provision primarily reestablishes the status quo for government contractors, bringing the law back to where it was

budget for the two months before Election Day. USA ran advertisements supporting 19 House candidates and six U.S. Senate candidates during those two months. USA, which had 2001 revenue of \$8.6 million, posted \$25.4 million in revenue in 2002; of that \$20.1 million came from a single donor, according USA's filing with the IRS.

¹⁶ *Buckley v. Valeo*, 424 U.S. 1 (1976).

¹⁷ View Public Citizen's chart on pay-to-play laws at: <http://www.cleanupwashington.org/documents/paytoplay2009.pdf>

prior to *Citizens United* – with one important addition: full disclosure of corporate contributions to outside groups. Campaign contributions could continue to be made directly to candidates and parties through PACs and bundling activity by the managers of government contractors, and independent expenditures and electioneering communications would once again be prohibited for this specific class of corporations. But the public would be fully informed of contributions by contractors to outside groups for political activities.

This pay-to-play provision is not as far reaching as many in the states – which also prohibit PAC contributions and bundling activity by executives of government contractors – but it does prevent political expenditures by contractors that are intended to curry favor with those who award the contracts.

The pay-to-play provision is constructive but must be strengthened by borrowing from experiences in the states:

- Specify that contractor contributions to trade associations and outside groups shall not be used for independent expenditures or electioneering communications.
- Expand the scope of the existing contribution prohibition to include contributions from PACs controlled by the government contractor as well as bundled contributions from senior executives employed by the contractor.

A second substantial regulatory measure of the DISCLOSE Act is designed to prevent foreign influence in American elections. The five justices of the Roberts Court did not invalidate the ban on foreign interests financing campaigns (2 USC 441e), but they did make it extraordinarily simple for foreign interests to launder money into American elections through foreign-owned U.S. corporate subsidiaries.

Partly in an effort to implement the foreign ban of 441e in states that allow corporate expenditures in state elections, the FEC promulgated rules prohibiting the solicitation, receipt or expenditure of funds from a foreign national, including foreign corporations.¹⁸ Under the rules, however, a U.S. subsidiary of a foreign company is not a foreign national. A U.S. subsidiary may make contributions or expenditures if it can demonstrate that it has sufficient funds from its American business operations, and that no foreign national controlled the decision to make a campaign contribution or expenditure.

But with the floodgates open to corporate expenditures in federal elections, the opportunity for infusion of foreign funds into American elections, serving the interests of foreign principals, is at an all-time high – and safeguards against foreign influence at an all-time low. Both foreign and domestic corporations have a great deal at stake in contracting and other policy decisions made by governmental officials. It is nearly impossible to segregate foreign money from American money in the treasury of any major foreign company, such as Sony. Moreover, the American managers of the U.S. subsidiary of Sony understand very well the interests of their foreign bosses and which American politicians could best suit those interests. Invariably, if *Citizens*

¹⁸ 11 CFR 110.4(a) {CRAIG: This cite is no good. 110.4 is about contributions in the name of another. The Rule on foreign nationals is 110.20.]

United is left unchecked, foreign money will flow into elections and foreign principals will exercise direct or indirect influence over how that money is spent.

The DISCLOSE Act closes this loophole by banning campaign expenditures from a corporation whose voting shares are 20 percent or more owned by foreign principals; a majority of the board of directors are foreign nationals; or one of more foreign nationals is involved in such spending decisions.

In a demonstration of just how much foreign interests want to participate in American elections, the head lobbyist of a foreign subsidiaries trade group lashed out at this effort to restrict foreign influence, claiming current rules are adequate safeguards.¹⁹ It is much more likely that major foreign companies, which compete toe-to-toe with American companies in the lobbying arena, would not be willing to concede the powerful influence-peddling tool of campaign spending solely to the advantage of their competitors.

Finally, the DISCLOSE Act moderately strengthens the coordination rules. In light of *Citizens United*, it is imperative that coordination between the vast new source of corporate political money and candidates and party officials be constrained to (1) preserve the integrity of existing contribution limits and (2) reduce apparent and actual corruption.

The new state of affairs under *Citizens United* will give candidates and putatively independent groups an overwhelming incentive to coordinate expenditures, with potentially devastating effects on the campaign finance laws. Massive coordinated corporate election spending would undermine campaign contribution limits and fuel a public belief that the political process is corrupt. Indeed, it will create conditions ripe for actual corruption.

Unrestricted coordination between corporations and candidates will breed problems for all parties involved. Many corporations and interest groups that make significant campaign expenditures have a strong incentive to coordinate with lawmakers. Coordinating provides them additional access to lawmakers and gives corporations greater opportunity to demonstrate their power to mete out rewards and punishments to lawmakers.

Often overlooked in the debate over unlimited corporate spending in elections is the likelihood that lawmakers will “shake down” corporate entities, making them feel compelled to finance coordinated communications. The record in *McConnell v. FEC* is rife with testimony from corporate CEOs claiming that they felt unable to say “no” to requests from party officials for soft money campaign contributions. As Gerald Greenwald, chairman emeritus of United Airlines, said:

Business and labor leaders believe, based on their experience, that disappointed members and their party colleagues may shun or disfavor them because they have not contributed. Equally, these leaders fear that if they refuse to contribute (enough), competing interests that contribute generously will have an advantage in

¹⁹ Billy House, “Foreign Subsidiaries Bash Dem Push to Limit Donations,” *CongressDaily* (Jan. 27, 2010).

*gaining access to and influencing key congressional leaders on matters of importance to the company or union.*²⁰

With major new sources of campaign funds now available to support lawmakers and oppose their challengers, there is every reason to believe that some lawmakers will exert their power and enlist these entities to finance coordinated communications if permitted to do so.

The DISCLOSE Act would rein in the most egregious abuses of coordinated activity between outside groups and candidates. It would ban coordination between outside groups and congressional candidates in the time period beginning 90 days before a primary election through the general election; and between outside groups and presidential candidates in the time period beginning 120 days before the first primary through the general election. This is a vast improvement over the inadequate and as yet unsettled coordination rules promulgated by the FEC.

The problem of coordinated activity with corporate sources of unlimited wealth is so great, however, that the coordination rule should be further strengthened. The DISCLOSE Act imposes no coordination restriction prior to the specified time periods. It would be appropriate to clearly state that the definition of prohibited coordination should apply to all express advocacy communications aired at any time in an election cycle that were produced, distributed or financed by an outside group at the suggestion or direction of a candidate.

Conclusion: The DISCLOSE Act Should Be Approved in Time for the 2010 Elections

The DISCLOSE Act provides the most extensive transparency regime to date, designed specifically to fill in the loopholes of the current campaign finance law. The measure provides some additional and narrow regulations to FECA, such as restricting foreign influence in American elections and strengthening the federal pay-to-play law, the latter of which should be slightly amended in order to be made much stronger.

The DISCLOSE Act does not remedy all of these problems, but it does provide voters with the knowledge and information needed to make informed choices and, it is to be hoped, not to be misled by the expected onslaught of corporate-funded campaign ads.

Public Citizen firmly supports swift ratification of a strengthened DISCLOSE Act, so an effective transparency regime can be in place for the 2010 elections and beyond. Upon a solid floor of disclosure, we can begin mitigating the damage done to our political system by the *Citizens United* decision.

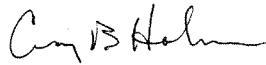
But Public Citizen will also continue our work encouraging Congress to move ahead with bolder measures to:

- Provide candidates with substantial public financing for their campaigns to help offset new corporate spending in elections (H.R. 1826 and S. 751).

²⁰ Anthony Corrado, Thomas Mann & Trevor Potter, eds., *INSIDE THE CAMPAIGN FINANCE BATTLE* at 300-301.

- Require that any significant corporate expenditure in politics be approved by a majority of outstanding shareholders (H.R. 4790, also known as the “Shareholder Protection Act”).
- Promote a constitutional amendment that clarifies that First Amendment protections do not apply to for-profit corporations, except for legitimate media organizations, and that corporations therefore do not have the right to spend unlimited amounts of money to influence election outcomes.

Respectfully Submitted,

A handwritten signature in black ink, appearing to read "Craig Holman". The signature is fluid and cursive, with a large initial "C" and "H".

Craig Holman, Ph.D.
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CRAIG BYRON HOLMAN, PH.D.

Dr. Craig Holman is currently Government Affairs Lobbyist for Public Citizen. He serves as the organization's lobbyist on campaign finance and governmental ethics. Previously, Holman was Senior Policy Analyst at the Brennan Center for Justice, New York University School of Law.

Dr. Holman worked closely with reform organizations and the leadership of the 110th Congress in drafting and promoting the "Honest Leadership and Open Government Act," the federal lobbying and ethics reform legislation signed into law on September 14, 2007. As a consequence of this legislation, Holman is currently consulting with European nongovernmental organizations and members of the European Commission and Parliament in developing a lobbyist registration system for the European Union.

Holman has assisted in drafting campaign finance reform legislation, including pay-to-play legislation, and has conducted numerous research projects on the initiative process and the impact of money in politics. He has been called upon to assist as a researcher and/or expert witness defending in court the Bipartisan Campaign Reform Act of 2002 (BCRA) as well as the campaign finance reform laws of Alaska, Arkansas, California and Colorado. He has also testified on several occasions about government reform before committees of the U.S. Congress, the European Commission and the European Parliament.

Some of his publications include: "Promoting Integrity of Lobbying by Self-Regulation," (co-authored with Thomas Susman) in Janos Bertok (OECD), ed. *LOBBYISTS, GOVERNMENT AND THE PUBLIC TRUST* (Paris, 2010); "The Structure and Organization of Congress and the Practice of Lobbying," in Thomas Susman and William Luneburg (ABA), eds. *THE LOBBYING MANUAL* (Washington D.C., 2009); "Close the 527 Loophole" in Matt Kerbel, ed. *GET THIS PARTY STARTED: HOW PROGRESSIVES CAN FIGHT BACK AND WIN* (Boston, 2006); "The Bipartisan Campaign Reform Act: Limits and Opportunities for Non-Profit Groups in Federal Elections," *Northern Kentucky Law Review* (2004); "The Nuts and Bolts of Public Financing of State Candidate Campaigns," *National Civic Review* (2003); and *THE NEW POLITICS OF JUDICIAL ELECTIONS* (New York, 2002).

The CHAIRMAN. And I thank the panel. We will open it up with questions. I have just a couple.

I guess, Mr. Holman, because you touched on this, if Congress does not pass this act, where can shareholders and where can investors of a corporation find that information of the corporate spending with their—how would they find out—I am a shareholder, how do I find out where my corporation—I am a shareholder, how do I find out where they are spending their money on political ads?

Mr. HOLMAN. There is no built-in system in the United States for that type of information to be given to shareholders. There is a system in the United Kingdom in which corporations are, in fact, required to inform shareholders of any political expenditures, but we don't have that system here in the U.S.

Now, corporations will include general categories in their annual reports to shareholders, but not to the public. And even in those types of annual reports, it is not detailed to the point in which a specific political expenditure would be identified. There is no such disclosure here in the U.S.

The CHAIRMAN. So if I am not an investor or shareholder, I am just a citizen, and I like Deer Park, and I buy Deer Park water, and if this bill doesn't pass and if Deer Park puts out a whole lot of commercials against me, I won't know that, and I will continue to buy Deer Park and I will continue to contribute financially to an organization or corporation that is putting commercials or putting—spending money against me.

Mr. HOLMAN. That is correct. You won't know that, the shareholders won't know that, and the public won't know how these political spending decisions are being made, how much is being spent, or who is being promoted or attacked.

The CHAIRMAN. One other thing, and this is a comment. I am a member of two unions, still carry a card for both unions. And my unions and other unions that I know of, before they make a political expenditure, it has to be ratified, it has to be agreed by the executive board and then ratified by its full membership. So that is pretty much the disclosure that they do, existing right now, that corporations don't do. I want to be clear in the difference between unions and corporations.

Now I will turn to my ranking member, Mr. Lungren.

Mr. LUNGREN. Thank you very much, Mr. Chairman.

Mr. Holman, can you tell me the five largest donors to your organization?

Mr. HOLMAN. We don't have any government sponsors to Public Citizen.

Mr. LUNGREN. No, no, no, no, no. The five largest donors.

Mr. HOLMAN. Oh, the five largest donors. I don't deal with the financial arrangements.

Mr. LUNGREN. Are you required to do that by law?

Mr. HOLMAN. We report on our IRS Form 990s the amounts of money that we get. All our money comes from individuals and foundations. But I am not involved in the fundraising activity.

Mr. LUNGREN. Ms. Gilbert.

Ms. GILBERT. I don't know the top five donors off the top of my head. But, similarly, all our funding comes in small amounts from individual citizens.

Mr. LUNGREN. So it is reported publicly?

Ms. GILBERT. But it could be publicly accessed.

Mr. NYHART. We comply with all the reporting requirements. We report to the IRS our 990s.

Mr. LUNGREN. I don't know what the reporting requirements are.

Mr. NYHART. We have to report to the IRS. Our largest contributor is a nonprofit.

Mr. LUNGREN. Let me ask you this. Mr. Nyhart, you mentioned BP, and you talked about the Big Oil and so forth, and you talked about the corrosive influence. According to Politico's article, during the time in the Senate while running for President, President Obama received a total of over \$77,000 from BP and is the top recipient of their PAC and individual money over the past 20 years, according to financial disclosure records.

Are you suggesting that the reason why his administration didn't support legislation to extend the liability for BP and other people similarly situated was because he got those moneys?

Mr. NYHART. I am suggesting it raises the questions of conflict of interest when large amounts of money are given to politicians. And I think it raises that even more—

Mr. LUNGREN. So my question is, are you—I just want to know—you brought up BP and you brought up this oil spill.

Mr. NYHART. That is right, and I think their contributions raised that question every time.

Mr. LUNGREN. With the President?

Mr. NYHART. I would include the President and Members of Congress, yes.

Mr. LUNGREN. The major question I have got here is the difference, Mr. Olson, between direct political contributions to a candidate and the use of funds to express a political point of view. Here it almost sounds like we are confusing the two or we are overlapping the two as if there is no distinction.

Let me try and put it this way. There seems to be some confusion as to whether the Citizens United decision allows foreigners to be directly involved in our campaigns.

And so I would posit this question, as I understand Random House now, one of the most important publishers of books in this country, is no longer owned by a U.S. entity. I think it is German or something. I am not sure what it is.

Under this bill, if a professor at Harvard or Stanford or some university were to publish a book, were to write a book, it was published by Random House, in this fall or during this fall, before the election, and let's say it is 950 pages, but three of those pages in there specifically were critical of a Senator up for election—specifically, it made very clear that anybody reading it would say this is critical of this Senator who is up for election—if I had this information before me, I would be less likely to vote for that person. Would Random House, because it is owned more than 20 percent by foreign interest, run afoul of this law?

Mr. OLSON. I think it would, Congressman Lungren. That very question was asked during the arguments in the Supreme Court under the previous law in the Citizens United case, and the government said this—Mr. Bossie mentioned this—that the theory

that the government was advancing to support the constitutionality of what that law did would support the suppression of books.

Now, you raise a separate question because that was addressed to the question about corporations.

Mr. LUNGREN. Right.

Mr. OLSON. And the Supreme Court, contrary to what the President said in the State of the Union address, did not in any way address the foreign corporation or foreign citizen involvement in elections issue. In fact, the Supreme Court said we are not addressing that question.

Mr. LUNGREN. That is a distinction between a direct contribution of a candidate versus political speech.

Mr. OLSON. That is an additional distinction the Court made for the first time in *Buckley v. Valeo* in 1976. The Supreme Court said that contributions raised potentially a concern about corruption, actual corruption. The Supreme Court said that actual corruption, quid pro quo corruption, is the only justification for inhibiting political speech.

The Supreme Court said that limits on contribution might be acceptable because the money is going right from the donor to a Member of Congress or a candidate; whereas independent, uncoordinated expenditures, where the entity spending the money to express a point of view, does not raise the concern of corruption that a contribution would. So there is a distinction there.

And then the final point is that this legislation, in a very ambiguous way, selects out people who are foreign nationals or foreign corporations. And corporate structure these days is a very, very complicated situation for particular discrimination, and to impose particular burdens and I think that that—oh, one more point. Random House is a so-called media corporation. And the proposed legislation would make a distinction for a media corporation. And the Supreme Court said there isn't any justification in the Constitution for selecting out someone because they are in the business of a media, or as opposed to a different type of business, or if they own a television station or a book publisher. So that also raises constitutional questions because it discriminates on the basis of the identity of the speaker.

Mr. LUNGREN. Thank you.

The CHAIRMAN. Mr. Capuano.

Mr. CAPUANO. Thank you, Mr. Chairman.

Ladies and gentlemen, I want to be very clear. I am for public financing of campaigns, because I just went through a campaign that raised \$3 million in 2 months, and I hated every minute of that. I don't like the perception it leaves with people. I don't like it, period. Can't get it, so we are stuck with the situation we have.

I am for shareholder empowerment and shareholder protection. My guess is if I want to donate to somebody, I should be the one who makes that decision. If it is my money, you shouldn't make that decision for me. I feel that shareholders own corporations. They should be the ones making that decision.

At the same time, I really don't have too much of a problem with this general decision. And some of the detailed aspects of this proposal concern me as well. And I think those are fair questions. Is 20 percent a right number? I don't know. Those are fair questions.

The concept, however, of simply letting voters know who is saying what is unassailable to me. And the concept of a chilling effect? Well, one of the people I just ran against was the attorney general of the Commonwealth of Massachusetts, a fine person. You don't think the people who donated to me might have been a little concerned that the attorney general might abuse that power?

Now, in Massachusetts, and this particular candidate, there is no concern with that. But others may not feel that way; or district attorneys or judges that are not elected. They are not elected in Massachusetts, but they are elected other places. So the chilling effect is there. Yet no one, to my knowledge, has yet publicly suggested that we should have secret donations to candidates for office.

Does anybody here think we should have secret donations for campaigns, candidates?

Mr. OLSON. That goes back to the distinction that Congressman Lungren made: contributions versus expenditure.

Mr. CAPUANO. I understand that. But does anybody here think that we should have secret donations to candidates?

Mr. OLSON. Well, we haven't; and the Supreme Court has upheld the constitutionality.

Mr. CAPUANO. I understand that. I am asking does anyone here think so? I didn't think so, but I wanted to hear it.

Mrs. DAVIS of California. I was curious to hear are you against that or for it?

Mr. OLSON. I am neither against it or for it, but the legislation that was upheld in *Buckley v. Valeo*, and legislation for a long time has prohibited anonymous contributions or contributions—

Mr. CAPUANO. Excuse me, this is my time. And I will tell you that this is not the Supreme Court of the United States. And I am a lawyer, too, and I understand that is why we have courts, so lawyers can go make arguments and judges make their decisions. And to my knowledge, there is no lawyer that I have ever met that has not lost a case in a court. Now maybe there is one, but I haven't met that person yet. That is what we do.

That being the case, a chilling effect in and of itself is a concern, and a legitimate one, and the Court will make that decision whether a specific law does that.

At the same time, the whole concept of making something public can't, in and of itself, be a chilling effect. The very fact that Mr. Lungren knew that President Obama took X amount of dollars from BP is a good thing. I am glad you know that. I am glad anybody here can go find out who my top five donors are and draw any conclusions you want from it.

All I want is when people go on TV or take out an ad and say Mike Capuano is a good guy or a bad guy, people know who is saying it. That is all, in the final analysis.

Now the details. There are questions, some points, I am happy to work with people on some of these details. But the concept of it—and by the way, when it comes to foreign corporations, I understand the definition of one is a fair question.

Does anybody here think that ADIA Corporation should be able to donate and be involved in American politics?

ADIA Corporation is the largest sovereign wealth fund in the world, worth almost \$1 trillion, run by the United Arab Emirates.

Does anybody here think that they should participate in our election process?

Mr. OLSON. I think that a point was made at the beginning by Congressman Lungren, is are we going to say that it is against the law—

Mr. CAPUANO. I am asking a very simple question.

Do you think that ADIA Corporation should be able to participate in our election process? And it is okay if you do.

Mr. OLSON. I think what you are saying is that we should make it a felony—

Mr. CAPUANO. I am not saying that. I am asking a question.

Mr. OLSON. I am trying to answer your question.

Mr. CAPUANO. The answer is yes or no.

Mr. OLSON. The answer is no if it means you are going to make it a crime by Congress to pass a law that says someone can't speak.

Mr. CAPUANO. I agree with you. They should not be allowed.

Now, the question of what is a foreign corporation is a fair question. This is a wholly owned subsidiary of a foreign government. It is a corporation. And I happen to agree with you. Now we are in the definition of what is a foreign-owned corporation. Fair question, always gray areas no matter where we come up, and I am happy to work with trying to redistinguish the lines.

I have concerns about 20 percent. I am not so sure I have any concerns whatsoever about 100 percent. And by the way, foreign individuals are already prohibited from participating in our elections. So we have a history of doing that.

Some of the issues that have been raised, the broad issues, are all specious. The specific comments, fair point. But first of all, we are happy, I am happy to work with making this law better. There are some things here I don't like. And when we are finally done, I have no doubt, no matter what we come up with, Mr. Bossie, you will be in court. God bless you. And I also suspect you will win some points. God bless you. That is what we are here for.

But the prospect of one or two or ten or 100 people telling me this is what I feel is constitutional and unconstitutional should not stop us if we feel that it is constitutional. That is what the Court is for. And they will decide and whatever they decide—depends who is on the Court when you get there—you will probably win a few, and when you do, we will come back and we will try to amend it then.

But the concept of simply publicizing who is participating in our electoral process cannot be assailed in any rational, reasonable way, in my district, or, I think, in this country. The lines—we will have debate, and we will have, hopefully, some agreements. But not the concept.

Thank you. Mr. Chairman, I think I yield back the time I have already gone over.

The CHAIRMAN. Mr. Harper.

Mr. HARPER. Thank you Mr. Chairman. I think that a lot of things are circling here as we discuss this. And of course I am one of those who is strongly opposed to the Fair Elections Now Act and having taxpayer-funded elections. I was certainly one who doesn't like to raise money. It is no fun for any of us, but I think it is part of the process.

And you know, it is interesting that there was a study done in the last—the 2008 elections; 41 out of 50 self-funders lost. So I think that it is important for people to be involved in the process, and if that means, like in my election, having a police officer who gave me \$25 a month for 4 months as a contribution, more power to him and God bless him for being involved as a citizen. And those things matter, and I think we need to maintain that.

And one of the great things about being a freshman, besides the fact that we don't get blamed for a lot yet—

Mr. CAPUANO. Yet.

Mr. HARPER. Yet. The emphasis on the word “yet,”—is that you are kind of a—it is humorous the way we name things here, a bill. We can call it the Disclosure Act. I think I see this more as a restrict act. And certainly we have heard—I think three people so far have referred to polling. And of course, as you know, 67 percent of all statistics are made up on the spot, or is that—maybe it is 58 percent. It is all how you ask the question and what you do.

But, look, here is another poll that was done on this very issue. And it is how you phrase the question that will determine what your results are. Victory Enterprises polled on March 1 and 2 of 2010. The question was: Do you believe that the government should have been able to prevent Citizens United, an incorporated non-profit advocacy group, from airing ads promoting its movie? Only 18 percent said yes; 51 said no; and 27 percent said not sure.

The next question was: Do you think the government should have the power to limit how much some people speak about politics in order to enhance the voices of others? Only 18 percent said yes; 63 percent said no.

Another question in that poll: And do you support or oppose allowing the Federal Government to impose criminal or civil penalties against individual citizens or corporations for spending money to engage in political speech? Only 28 percent supported that; 50 percent were opposed to the government imposing criminal or civil penalties in that situation.

And so you can find a lot of different approaches to these.

But since we are here about disclosure, I would be interested to know if any of the witnesses here today, if you played any role in drafting or providing any input in the writing of this bill.

Mr. SIMON. Congressman, I did work with the staffs of Representative Van Hollen and Senator Schumer.

Mr. HARPER. Thank you, sir. Anybody else?

Mr. HOLMAN. I kept trying to influence it to include Capuano's Shareholder Protection Act in it, but I was not successful.

Mr. HARPER. Well then I would ask—if I could ask any of the other witnesses if you saw the bill before it was filed?

Mr. BOSSIE. No, sir.

Mr. HARPER. And if I could ask you, since you did have some input in it—did you get to see the final version before it was filed?

Mr. SIMON. I don't believe so, no.

Mr. HARPER. Were you instructed by anybody to not discuss what you were talking to them about?

Mr. SIMON. No.

Mr. HARPER. One of the questions I have for you, Mr. Olson, if I could, and if I am wrong on my understanding here, please cor-

rect me. But it appears that our Democratic leadership has said that it has to act quickly on this legislation so it can influence the fall elections.

And the way it wants to influence those elections seems to be by silencing certain speakers. So they are saying we have to silence this political speech so that we are not criticized too much and can hold on to our seats perhaps in Congress this fall.

Based upon your expertise and experience with constitutional issues, how does this bill square with your understanding of the First Amendment? And then, do you recall legislation ever being proposed for this reason in the past?

Mr. OLSON. Well, I mentioned in my statement that I think that there are several deficiencies in this legislation under the Constitution. One, it assumes that all corporations—that speech by all corporations is suspect, not just big corporations, but little corporations, the owner of the neighborhood hardware store. Incidentally, I checked; every single spokesperson here today represents a corporation.

But this legislation assumes that all speech by corporations is suspect, all speech by government contractors is suspect, all speech by someone who might be of a different nationality than us is suspect; whereas the First Amendment says Congress may make no law abridging the freedom of speech.

There is an inconsistency there. There is an inconsistency because the legislation discriminates on the basis of types of speakers—contractors, corporations, labor unions, media corporations. And one might be very much in favor of the concept generally of disclosure, but if the disclosure is so burdensome, so oppressive, that it discourages speech, as some of the sponsors of this legislation say we want the Chamber of Commerce to butt out of having a point of view on behalf of its members with respect to who will get elected and who will run this country, that is a violation of the Constitution. And I am not aware of other laws that have selected types of speakers based upon this basis.

We come from a culture in our constitutional culture that more speech is better. And I hear testimony here today that certain speech is dangerous. Lobbyists are dangerous. By the way, the First Amendment protects what? The right to petition one's government. That is what a lobbyist helps one to do. The concept here is that the people get to decide. And they get to decide based upon as much information as possible.

And for those various reasons, and several more, I think that this is a very dangerous piece of legislation.

Mr. HARPER. I would like to thank each of the witnesses Mr. Chair.

The CHAIRMAN. Mrs. Davis. Thank you.

Mrs. DAVIS of California. Thank you Mr. Chairman. I want to apologize to my colleague. I just got a little excited because I thought I was hearing something different and I just wanted to be certain that the witnesses were being upfront about that if they had some concerns.

I wanted to ask you, Mr. Bossie, could you please describe the context in which the quote that you gave of Senator Schumer occurred?

Mr. BOSSIE. He was standing on the steps of the Supreme Court announcing this legislation.

Mrs. DAVIS of California. What was the context? What was he saying? What led you to—you quoted him. And you quoted him, and I am just wondering if you could describe the context—

Mr. BOSSIE. Somebody asked him what the purpose of the legislation was, and he gave a very candid and frank answer.

Mrs. DAVIS of California. Do you know anything more about that?

Mr. BOSSIE. Congresswoman, I am happy to get that transcript from the steps of the Supreme Court that he gave, and I will be happy to send it to you.

Mrs. DAVIS of California. It is my understanding and just in the quick time that we have had here, that part of what he was saying is that he thought that CEOs now having to—if they had to disclose any information about the ads in which they were participating, that they would actually choose to participate less, because they didn't want to disclose.

So when he was saying that he thought there might be less involvement, he was actually saying a supposition of what he thought, how companies might respond. Which is a little different I think, if you know that context, to what you said.

I think it occurred to me as you were speaking that perhaps it was that citizens would want to be less involved, and that that was the role of the Senator.

Mr. BOSSIE. But I think that the onerous and burdensome regulations that are included in this legislation could have that same effect on people as well.

Mrs. DAVIS of California. That may be a supposition, but I think that is not the supposition that was being referred to directly. And I just wanted to see if you had any idea about that.

Could we talk just a little bit about coordination? And if you could just share with me, and perhaps Mr. Simon, what do you think is likely to happen? If you are looking out a few years from now, and others might want to respond, what do you think the impact is going to be really on voters, number one?

And secondly, when we talk about coordination with campaigns, the fact that an actual discussion occurs is one thing, but there is also something if it doesn't occur. And what does that mean in the political context of the feeling that somebody might have about something that was going to happen?

Mr. SIMON. Well, there is a lot of debate and speculation about what the impact of the Citizens United decision is going to be. And the speculation ranges from it will have minimal effect to, on the other side of the spectrum, that it will have quite significant effect; that there will be major infusion of corporate wealth brought directly to bear on Federal campaigns.

In terms of coordination, that is a very important point because coordination is the line between the spending, which, under the Citizens United case, is permitted and the spending which is not permitted. Corporations, unions, other spenders, although they can make expenditures out of the treasury funds now, those expenditures have to be independent of a candidate or a party. There can-

not be coordination. If there is coordination, then those coordinated expenditures are treated like contributions and remain prohibited.

So the definition of coordination is the line between permissible and impermissible corporate and union spending. And it is in the reasoning of the Court, it is also the key hedge against corrupt quid pro quo arrangements. Where there is coordination on an expenditure, that raises the threat and the danger of corrupt arrangements.

So that definition, what constitutes coordination, is a very, very important issue. The Federal Election Commission has been struggling for years with that issue. We have been in court with the Commission on that issue, and it is still unresolved.

The legislation addresses that question in a relatively modest way by codifying some existing FEC regulations and in a modest way extending existing FEC rules. But it still remains an important issue, and it really is fundamental to how damaging Citizens United is; because if, in fact, although technically and as a legal matter, expenditures by corporations are considered independent and therefore permissible, but as a practical matter they are coordinated, the impact of Citizens United on the legislative process will even be more damaging.

Mrs. DAVIS of California. Does anybody disagree with that statement? I just want to give you an opportunity to respond. Sure.

Mr. OLSON. I would like to make just one point.

Mr. Simon said that the Federal Election Commission has been struggling for years with respect to where the line is drawn. If you miss it, and you don't know, and the Federal agency that regulates elections doesn't know what the line is, if you miss it, it is a felony. So we are saying that you have to guess what the law is because the government can't even tell you what the law is. And if you guess wrong, you may be sent to jail or you may be prosecuted.

When someone is told that, they will say, I am not going to speak. So if we don't make laws that are clear, we discourage people from speaking. And the Supreme Court said in the Citizens United case, if we burden speech with the threat of litigation or the threat of prosecution, or you make it too hard to find out what the law is, people won't speak. That is not what the First Amendment was intended to accomplish.

Mr. HOLMAN. Could I briefly add to this? With the Citizens United decision, we now have this huge, huge new source of revenues for lawmakers, for campaigns, for politicians. And that huge new source of money is going to be very tempting both ways. If corporations can work closely and intimately with a campaign, what better way to endear themselves with the lawmakers in a close, coordinated fashion?

Also, conversely, there are many lawmakers who can be so powerful as committee chairmen, or even heads of political parties, that they can basically shake down some of these corporations that have this huge new source of wealth to work in coordinated campaigns. That is why it is so important that this legislation clearly define what is coordinated activity versus independent activity.

Mrs. DAVIS of California. Thank you.

And, Mr. Chairman, I am certainly concerned about the absence of not running an ad as much as running an ad in terms of that coordination. Thank you.

The CHAIRMAN. Thank you.

First, I would like to ask unanimous consent that the following materials be made a part of the official hearing record: Letter of support from Common Cause; three articles related to members of corporations objecting to trade associations of political spending.

Without objection, so ordered.

[The information follows:]



Written Testimony of Bob Edgar
President, Common Cause

on H.R. 5175, the DISCLOSE Act,
Democracy is Strengthened by Casting Light on Spending in Elections

May 6, 2010

The urgency of fundamental reform.

The Supreme Court's decision in *Citizens United v. FEC* served as a wake-up call to elected officials and average citizens alike. Members of Congress look out on the prospect of elections marked by an onslaught of special interest money that is now truly unlimited. Average citizens look out onto a country that seems even more thoroughly dominated by corporations, labor unions and Wall Street. The pessimism the decision created is by itself enough to spur us into action. The Court's holding, however, compels us to answer an even more fundamental question: "Who was our government established to protect?"

The DISCLOSE Act is a clear statement that it is the individual, and the individual's right to participate in democracy, that must be protected. This legislation is needed not only to safeguard the democratic process in the 2010 elections but to blunt the aggregate impact of dangerous and ideological decisions. The Roberts Court's rapid succession of activist decisions has effectively dismantled a generation of post-Watergate campaign reforms and removed the prohibition on political spending from corporate and union treasuries in place since 1947.¹

¹ See, e.g., *Citizens United v. FEC*, ___ U.S. ___, 130 S. Ct. 876 (2010); *Davis v. FEC*, 128 S. Ct. 2759 (2008); *Wisconsin Right to Life v. FEC*, 551 U.S. 449 (2007).

Indeed, the impact is not limited to federal law. Countless state laws have been either directly or indirectly nullified by these same decisions.²

There is no question action must be taken. On behalf of Common Cause and our 36 state chapters, I look forward to working with this committee on the refinement and passage of the DISCLOSE Act.

The *Citizens United* opinion has turned a longstanding problem into a crisis. In truth, the way we fund elections has been broken and unsustainable for many years. As president of Common Cause, I have had a front row seat to the outrage of the American public in the wake of the *Citizens United* decision. Average citizens have been reaching out to my office and our state chapters to express their anger and to ask what they can do. No doubt a majority of the members of this Committee and the constituents you represent share their frustration. The American people expect this body to enact real, effective and comprehensive reform.

DISCLOSE Act provisions and improvements.

The DISCLOSE Act partially fulfills this reform expectation by taking strong steps to shine a light on independent expenditures, strengthen coordination rules and prohibit political spending by foreign-owned corporations, large government contractors and TARP recipients in time for this year's elections. Specifically, Common Cause supports the bill's provisions to:

- **Enhance ad disclaimers.** The DISCLOSE Act would promote transparency by requiring the CEO of an organization running an independent political ad to appear in the ad and "approve it," just like candidates do now, and the disclosure of the organization's top five contributors as part of the ad. The American people deserve

² National Conference of State Legislatures, *Life After Citizens United* (Apr. 28, 2010), available at <http://www.ncsl.org/default.aspx?tabid=19607>.

to know who is paying for political messages in order to evaluate the messages' objectivity or underlying interest.

- **Increase disclosure.** In this era of Supreme Court deregulation of campaign finance, disclosure becomes all the more important as a tool to expose the efforts of powerful interests to influence elections and to subject those efforts to vigorous public debate. Under the DISCLOSE Act, corporations and unions will have to disclose their donors and transfers, as well as direct expenditures.
- **Prevent foreign influence over elections.** I think most of us can agree that allowing foreign-controlled corporations to funnel unlimited amounts of money into America's elections will create fertile ground for corruption and only further undermine public confidence in our democracy. The Act tackles the loophole created by the *Citizens United* decision with sensible regulations.
- **Expand shareholders' right to know.** The DISCLOSE Act would protect shareholders' right to know what their corporation is spending to influence elections through on-line reporting and corporate annual and periodic reports.
- **Protect taxpayers from pay-to-play conflicts.** The Act would prohibit large government contractors and TARP recipients from spending money to influence elections while at the same time benefiting from government largesse. This is one of the most important provisions of the bill and is essential to preventing a new era of pay-to-play corruption in Washington, DC.
- **Ensure affordable air time for candidates and parties.** Broadcasters will reap new benefits from the Roberts Court's deregulation of political spending and, in return, should be expected to shoulder some of the burden of making the airwaves affordable

for candidates and parties targeted by corporate and union ads. The DISCLOSE Act would ensure that candidates are not shut out of the market and that advertising rates are reasonable.

- **Strengthen coordination rules.** The Act closes loopholes in current rules in order to prevent coordination between candidates and outside groups that would otherwise allow special interests to effectively skirt contribution limits.

However, Common Cause believes that the party coordination provision of the Act needs improvement. As currently drafted, the bill authorizes political parties to make unlimited expenditures in coordination with their candidates, as long as the candidates do not direct or control the messages' contents. While this provision would allow parties to respond to independent expenditures, it also creates a backdoor way of avoiding contribution limits to candidates. Common Cause strongly supports an alternative proposal developed by the Campaign Finance Institute, the Brookings Institution and others that would allow unlimited *coordinated* spending, but only from small-donor accounts, funded by contributions of \$200 or less.³

Real reform must include public campaign financing.

Even if the DISCLOSE Act passes – and it should – the current sorry state of affairs in the world of money and politics is only going to get worse. Effective reform requires fundamentally changing the way America pays for campaigns, and reducing the role and power of political contributions in our politics. Only one current piece of legislation, the Fair Elections Now Act (H.R. 1826, S. 752), takes this step, and it needs to be part of any legislative response to the judicial activism of the Roberts Court.

³ See Anthony J. Corrado et al., *Reform in an Age of Networked Campaigns: How to Foster Citizen Participation through Small Donors and Volunteers* (2010), available at http://www.cfinst.org/books_reports/Reform-in-an-Age-of-Networked-Campaigns.pdf.

Common Cause unequivocally supports enactment of the DISCLOSE Act in conjunction with the Fair Elections Now Act this year. Despite its strengths, passage of the DISCLOSE Act will *not* end reliance on campaign cash from the Wall Street firms, lobbyists and entrenched special interests. Washington's dependence on big money has been growing at the expense of every-day Americans having a voice in their democracy. The packed call rooms of both parties' campaign committees serve as a constant reminder that the focus of Members of Congress is too often on how to replenish their campaign's war chest and not on how to respond to constituent needs. As Members of Congress, you work hard to meet the needs of your constituents, but every one of you no doubt experiences the same problem that I experienced when I served in Congress (and which has only become worse) – the constant need to raise campaign cash.

Nor will the DISCLOSE Act combat the new “fear factor” created by the Roberts Court's ruling in *Citizens United*. The prospect of a threat – whether spoken or unspoken, made behind closed doors or in the media – of a massive cash infusion into a district as punishment for not doing an interest's bidding is enough to make any rational Member think twice before voting. As a former Member of Congress, I can attest that this threat is not uncommon. No amount of disclosure will cure this form of “persuasion.”

Conclusion

The DISCLOSE Act is an important piece of legislation and should be enacted as soon as possible. Coupled with the Fair Elections Now Act, Congress has the opportunity to lay the foundation of a new generation of elections and to address the public's crisis of faith in the integrity of our government. I urge you to take bold action and seize that opportunity.

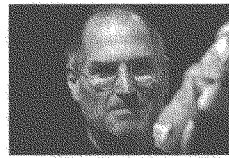
Thank you for your consideration and prompt action on this urgent issue.

Apple to Chamber of Commerce after global warming spat: We're outta here

By ALEX SALKEVER

Posted 7:00 PM 10/05/09 | Energy, Technology, Economy, Apple

When Apple (AAPL) said Monday it would be leaving the U.S. Chamber of Commerce, the computer company joined a growing list of large corporations that have dumped the country's most prestigious business advocacy group over global warming issues. *The New York Times* reported Apple's departure and the the Cupertino, Calif.-based company distributed a statement from Catherine Novelli, the company's vice president of worldwide government affairs.



WireImage

Apple CEO Steven P. Jobs' decision should send a clear message to chamber CEO and President Thomas Donohue: The chamber no longer represents a key segment of its most powerful members on what may be the most important business and social issue of our era. With the most influential consumer electronics company in the world lining up against Donohue and his policies, it's no longer just about alienating a few poorly recognized utilities. Instead, Donohue risks making the chamber a posterchild for U.S. intransigence and indifference on an issue of critical importance to the entire planet.

No doubt, the chamber is facing a serious challenge to its authority. Apple joins a growing list of high-powered companies that have left the august chamber over global warming issues and related positions. It has been against carbon taxes and cap-and-trade legislation, which allows cleaner companies to sell pollution credits to dirtier companies. The chamber has broadly opposed such steps, arguing that charging for emissions is too expensive and will significantly retard the recovery and future economic development.

But many U.S. businesses have acknowledged that some sort of carbon tax is inevitable. They would prefer clarity on the topic to be able to plan and develop new cost structures to take into account the changes. Those businesses are not all as clean and green as Apple.

Large utilities Exelon (EXC) and PG&E (PGC) have expressed public displeasure with the chamber's climate change policies. Both left the chamber earlier this year, according to the San Jose Mercury News. Footwear and athletic apparel giant Nike (NKE) resigned from the chamber's board of directors this year, as well, although it decided not to exit the chamber entirely.

Apple has been burnishing its own green cred of late. The company recently released extensive information detailing its carbon footprint (as DailyFinance reported), a move to counter environmentalists claims that Apple lagged its competitors. The move to leave the chamber furthers Apple's standing as a green company, a reputation it has done much to deserve. It was the first company to eliminate PVC from packaging and to stop making lead-laden monitors using an old type of technology called cathode-ray tubes.

Now that Apple has elected to break free from the chamber, a stampede of marquee companies could follow suit, spurred on by green investment activists who have played a key role in the moves by the utilities and Nike. Such a stampede could put the already reeling chamber on weaker footing with its traditional constituency.

Beyond the chamber, the schism in American industry reveals just how deep the divide is over the seriousness of global warming. Major industries such as coal and steel have been vehemently opposed to cap-and-trade measures proposed by the Obama Administration.

Meanwhile, polar ice caps continue to melt and temperatures around the world continue to rise. While climatologists warn that low-lying coastal areas of the U.S. could start to suffer the effects of rising oceans within a few decades, the first real casualty of global warming could well be the old business establishment.

Tagged: Apple, carbon, carbon footprint, chamber of commerce, climate change, global warming, green, nike

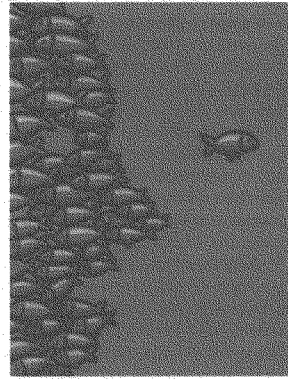
THE NEW YORKER

THE FINANCIAL PAGE

EXIT THROUGH LOBBY

by James Surowiecki

OCTOBER 19, 2009



Resigning in protest is not in the American grain. Robert McNamara stuck around as Secretary of Defense even after he decided that the Vietnam War was a disaster; Colin Powell did the same during the Bush Administration's push for war with Iraq; and in the lead-up to the financial crisis, few high-profile executives stepped down over disagreements in philosophy or tactics. But resigning in protest has gained popularity of late among an unlikely group: big corporations. Last Monday, Apple announced that it would be quitting the U.S. Chamber of Commerce because of the Chamber's opposition to global-warming legislation. And that was just the latest in a series of defections: in the past few weeks, the public-utility companies Pacific Gas & Electric, PNM Resources, and Exelon all announced that they'd be leaving the Chamber, while Nike quit the organization's board of directors. Historically speaking, this is a positive exodus.

The Chamber of Commerce won't be going out of business anytime soon, of course: it still has three million members, mostly small businesses, and a gargantuan lobbying budget. Still, the decidedly public nature of these corporate departures—the companies made statements attacking the Chamber for obstructionism—complicates its claim to be representing the collective interests of American business. One of the great strengths of business lobbies in recent decades has been their ability to maintain a united front. Global warming has revealed fractures in that façade.

It's no surprise that the climate-change debate has become a flashpoint for the Chamber, since it encompasses everything that the organization routinely opposes: regulation, taxation, and a bigger role for government. The Chamber was once considered more moderate than harder-line cousins like the National Association of Manufacturers. But that's changed. Back in 1971, the future Supreme Court Justice Lewis Powell wrote a famous

memo to the Chamber, arguing that the organization needed to become the center of an aggressive defense of the free-enterprise system, which Powell felt was under broad attack. How influential the memo was is still debated, but, over the years, the Chamber became the organization Powell wanted it to be, becoming more ideologically cohesive and playing a key role in blocking consumer-protection legislation, labor-law reform, and financial regulation. Its opposition to regulation now seems reflexive; at the moment, its legislative priorities include opposing a consumer financial-protection agency, opposing a shareholder bill of rights, and opposing “flawed health care proposals,” which seems to mean any health-care proposal made by a Democrat. And, while the Chamber does acknowledge that the threat of global warming is real, it has been unbending in its opposition to the current cap-and-trade proposal, and a senior official has called for a “Scopes monkey trial” to debate the science of climate change.

These stands may make most members of the Chamber happy: small business is the backbone of American conservatism, after all. But the hard line on global warming may also reflect dynamics that typically shape group behavior. In any large group, a few people do most of the work—usually those who are most ideologically committed or who have a direct stake in a particular outcome. So decisions often end up reflecting not the wishes of the group as a whole but those of its most engaged members. In the case of climate-change legislation like cap-and-trade, many of the companies on the Chamber’s board of directors actually support it. But among the few that publicly oppose it are coal companies, which have a huge stake in stopping any carbon-pricing system. So it’s not surprising that the Chamber’s general approach is closer to Massey Energy’s than to Nike’s.

These dynamics are familiar. But major companies’ leaving the Chamber rather than accept its policies is new. During the debate over health-care reform in the early nineties, for instance, the Chamber ended up coming out against the Clinton health plan without losing the support of companies like Ford—even though reform would have benefitted automakers, hobbled as they are by health-care costs. The recent resignations, and public dissent from companies that are still members, like Johnson & Johnson and G.E., suggest that, when it comes to global warming, companies are unwilling to sit quietly by.

Why the difference? Partly, it may be a matter of self-interest; Exelon, for instance, has big investments in renewable energy. But it may reflect a calculation that global warming is simply too big an issue to get wrong, both economically—few companies are really going to benefit from the melting of the polar ice caps—and from a public-relations point of view. It’s also probably no coincidence that these resignations have come at a time when the Chamber’s anti-regulatory zeal looks not just outmoded but self-defeating. Had the Chamber supported tougher regulation of financial and housing markets, after all, the myriad small businesses it represents would undoubtedly be better off today. And it’s far from clear that across-the-board hostility to regulation is really in the best interests of the free-enterprise system. We assume that lobbies always recognize what’s best for their members. But they don’t, and, in the case of climate change, they may very well be missing what the companies that have resigned in protest have seen: global warming isn’t just bad for the planet; it’s bad for business. ♦

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POLITICO

Chamber under fire on warming

By: Lisa Lerer
May 5, 2009 04:18 AM EDT

The U.S. Chamber of Commerce is taking heat from Johnson & Johnson, Nike and other corporate members over its opposition to global warming legislation pending in the House.

In a letter to the Chamber, Johnson & Johnson has asked the Chamber to refrain from making comments on climate change unless they "reflect the full range of views, especially those of Chamber members advocating for congressional action."

Nike spokeswoman Anne Meyers said her company has also been "vocal" with the Chamber's leaders "about wanting them to take a more progressive stance on the issue of climate change."

While the Chamber's opposition to cap-and-trade legislation introduced by House Democrats mirrors the views of some in industry, particularly energy producers, Meyer said Nike "didn't feel that consumer companies had a particularly strong or vocal voice around the issue of climate change."

Lobbyists at business coalitions that support federal climate change legislation say other companies are discussing the possibility of sending their own letters to the Chamber — or of threatening to withhold dues from the Chamber in protest.

But William Kovacs, the Chamber's vice president for the environment, technology and regulatory affairs, downplayed the divide within the nation's most powerful lobbying group.

"We deal with 300 to 400 issues a year, and there are times when members would disagree," he said. "But on 95 percent of

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the issues, we have 95 percent of the support."

While some energy producers and manufacturers oppose any federal action to cap carbon dioxide emissions, at least 35 major corporations — including Johnson & Johnson and Nike — have joined coalitions designed to push federal climate change legislation.

The Chamber has not taken an explicit position against all federal climate change regulation, but it has opposed the most significant proposals introduced in Congress.

The business lobby has come out strongly against a draft bill in the House that would create a cap-and-trade system to cut greenhouse gases and promote the development of renewable energy technology.

In the House Energy and Commerce committee last month, Kovacs said the legislation would "result in energy shortages and high energy prices, which in turn means higher prices for just about everything else."

And last week, the Chamber released a study showing that the bill could result in more than 3 million jobs lost by 2030 and a cost of more than \$2,100 per household.

The Chamber also opposed a cap-and-trade proposal introduced by former Sen. John Warner (R-Va.) and Sen. Joe Lieberman (I-Conn.) during the past session of Congress.

Environmental advocates say the positions the Chamber has taken put it out of sync with many of its members.

"Based on the public statements from the other members of the Chamber, Johnson & Johnson is certainly not alone in having a different position from the Chamber," said

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Peter Altman, climate campaign director for the Natural Resources Defense Council.

According to Altman's analysis, 99 of the 122 companies represented on the Chamber's board have taken no public position on global warming. Nineteen support regulation, while four oppose regulation or disagree with the science behind it.

"The U.S. Chamber is representing the views of a small minority of its board members," said Altman.

Chamber lobbyists say that the group's positions are determined by its members, which are organized into 16 policy groups and five taskforces.

Kovacs said the Johnson & Johnson letter came the day the Chamber's environment and energy committee was meeting. The group of more than 100 members debated cap and trade, the carbon tax and the use of technology for nearly three hours, he said.

"At the end of the debate, there were no members asking to change our policy," he said.

The draft version of the House climate change legislation incorporated proposals suggested by the United States Climate Action Partnership, a coalition of business and environmental groups that supports capping emissions. The Business for Innovative Climate and Energy Policy, a group of consumer companies, also backs the House bill.

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The CHAIRMAN. We are going to go another round, I understand. We are going to go another round.

I just have one thing. I am not an attorney, thank God. But I keep hearing Congress shall make no law limiting free speech. I don't think we are doing that with this bill. All we want to know is who is saying it and who is paying for it. In my mind, that is what I think we are doing here.

And again, Mr. Lungren.

Mr. LUNGREN. Thank you very much, Mr. Chairman. I don't have the transcript of what Senator Schumer said on the steps of the United States Supreme Court. I, do however, have a reference to a statement he made in February of this year, as reported by the Wall Street Journal, where he said he hoped the proposed legislation will discourage companies and unions from spending freely on political advertisements. The disclosure requirements "will make them think twice" before attempting to influence election outcomes.

He then added this: The deterrent effect should not be underestimated.

Mr. Olson, if you were arguing this case before the Supreme Court, would that be relevant?

Mr. OLSON. Yes. The Court would be very much concerned with what motivated this legislation, and particularly because the legislation focuses on the identity of the speaker and allows some speakers to disclose—requires some speakers to disclose, at great expense and with great burdens, if one-fourth of the staff of Citizens United is focused on compliance with regulations having to do with the things that they do, which are First Amendment things; and certain other speakers, individuals, certain media corporations, whatever those are, labor unions, so forth, don't have to do that. That is consistent with selecting speakers and discriminating and wishing to discourage some kind of speech.

Mr. LUNGREN. And if I were laying a premise for an argument before the Supreme Court, I would love to have my opponent on the other side, referencing free speech, to say the deterrent effect should not be underestimated.

It appears to me it is a very direct statement of the wish of legislation to abridge free speech. At least that is the way I would look at it.

Let me ask you this. Does anybody here, has anybody tested the amount of time that it would take to comply with the new stand by your ad requirements in section 214?

Mr. SIMON. I think it was accepted by the Court in the McConnell case that the prior stand by your ad requirement took 4 seconds. That is what the Court said in the McConnell opinion, so this adds an additional disclaimer. It adds an additional disclaimer.

Mr. LUNGREN. Would it surprise you to know that my staff tried it with the names of those of you here and your organizations, just with the numbers that would be required, and realized it took about an average of 13 seconds? Would that be troubling if, in fact, that were true; that in a 30-second ad it would require, under the law, that 13 seconds be disclosure? Would that be troubling?

Mr. SIMON. Well, I guess I am very surprised by the number. I also note that—

Mr. LUNGREN. I am saying if you accept that. You may disagree with it. I am just saying my staff made a good-faith effort using your names and your organizations; with two, as required, that is what it took. If in fact that were the case, would that be troubling or would that not be troubling?

Mr. SIMON. I don't know. I guess it would be troubling. But the legislation does provide the Commission with the ability to create regulations that provide a hardship exemption if it is a burden on the speech.

Mr. LUNGREN. That would be a hardship exemption, I would think.

Mr. Simon, let me ask you this, because you talked specifically about a very important thing, and I do think it is important, the coordinated communications language, because that essentially is the demarcation between directly involving yourself with a campaign and this other area or category of political speech that I think the Supreme Court was talking about.

As I understand it, however, current FEC regulations really use a two-pronged test. One is content and then you go to conduct. That is, is there evidence of coordination, in essence some conduct that would give rise to that suggestion? This bill, section 103, removes the conduct side and only confines it to content.

Mr. SIMON. That is absolutely a misreading of the bill.

Mr. LUNGREN. Well, it is section 103. It seems to me pretty clear. It makes no reference to conduct that I can find. If I am wrong, I would appreciate it because that bothers me a great deal.

Mr. SIMON. Let me if see if I can find the language quickly. Okay, if you start on page 17 of the bill, let's—I will walk through this. It says what it is doing—

Mr. LUNGREN. I would just ask you, because of the limited amount of time, if you could just point out the conduct section.

Mr. SIMON. It is on page 18, lines 1 through 5. The covered communication which is made in cooperation, consultation, or concert with or at the request and suggestion of a candidate. That is the existing statutory conduct test which is unchanged.

Mr. LUNGREN. But the next word says "or."

Mr. SIMON. "Or" a communication that republishes. If somebody goes out and takes the candidate's campaign literature and republishes, that under current law—

Mr. LUNGREN. It says publishes, disseminates or distributes in whole or in part any broadcast or any written graphic or any form—

Mr. SIMON [continued]. Performed by the candidate.

Mr. LUNGREN. Okay, I am the candidate, and I make a statement which I—I make a statement on the floor of the House. All right? But I repeat that statement in my campaign material. That is all I do. Can someone then not, in talking either for me or against me, repeat the statement?

Mr. SIMON. No. No. This is a restatement of existing law. This does not change existing law at all. If somebody takes your campaign brochures—

Mr. LUNGREN. I understand that.

Mr. SIMON. This is not intended and does not currently do what you said.

Mr. LUNGREN. But today, is the “or” in that regulation? I thought it required both conduct and content, an examination of both under current regulation.

Mr. SIMON. It does. But this provision here says a covered communication which is made in cooperation with a candidate. And covered communication is then defined to be the content test. So lines 1 through 5 include both the conduct and the content standards.

And, again, this mirrors existing law.

Mr. LUNGREN. That is confusing to me because you have the “or” there. At least statutory language would suggest “or” means either or; that is, one or the other. You don’t have to have both.

Mr. SIMON. Well, the second part after the “or” again restates existing law, which is that if an outside spender takes a candidate’s campaign literature and just—

Mr. LUNGREN. I just want to make sure your understanding would not be if you repeated a phrase that is in there but, rather, you actually would adopt the form of the public—

Mr. SIMON. If you went and paid for a candidate’s brochures, you just took the candidate’s brochure, walked to a publishing house, said, “Here, make 10,000 copies of this brochure.”

Mr. LUNGREN. It says in part or in whole. I just want to make sure if—and, again, look, I would rather have us approach this by allowing greater coordination between parties and candidates. It seems to me that is one of the solutions.

Mr. SIMON. Which the bill does.

Mr. LUNGREN. It is very obtuse in the way it does that. I will be happy to work with you on that, because I don’t think it helps us on that. But if we could agree on that, that would be very helpful.

My concern here is this, and I am really trying to get to a point. If, in fact, a candidate were to say, I support the health-care bill because it is the best approach to solving our problem and that is why I am a leader on that, could someone use that statement, republish that statement in the context of explaining why they would either be for me or against me, or would that run afoul of this law as you see it written?

Mr. SIMON. I believe that this law, what is in this bill, is not in any way intended to change existing and longstanding law with regard to the republication standard. And my reading—my reading, if you go to the existing statute, you will find the republication standard and I think this just—

Mr. LUNGREN. So your position is that we ought to support that; it merely restates what the current regulations are.

Mr. SIMON. Yes. Exactly.

Mr. LUNGREN. Mr. Olson.

Mr. OLSON. When I read it, I read it the way your initial questions suggested that you read it; that if you rearticulated or restated what a candidate had said, that was going to be presumed under this statute, as it was being proposed here, as coordination. That is the way I read it. Something like conscious parallelism or something, to adapt a concept from the antitrust laws, that that would be a violation if there is confusion about it, unless it is fixed. And if I were asked by a client what to do, I would say, Don’t do it, or get an advisory opinion.

If you seek an advisory opinion, you better hire some lawyers to get you an advisory opinion and expect to wait 6, 8, 10 months or a couple of years before you get a response from the Federal Election Commission, which means don't do it.

Mr. LUNGREN. It takes that long?

Mr. OLSON. Well, it takes various different periods of time. We talked before about the fact—you mentioned that it took—well, there was a period of time, by the way, that the Federal Election Commission couldn't do anything because it didn't have a majority. So you had the regulatory agency not existing and people not knowing whether they could speak or not.

As you pointed out, Citizens United, from the time they wanted to find out whether they could do their movie until they found out that the Supreme Court said that they could, it was virtually 2 years. That started in the 2008 election. We got an answer in 2010.

Mr. LUNGREN. Don't you have an expedited procedure to go to the courts?

Mr. BOSSIE. That is the expedited procedure.

Mr. SIMON. Congressman, again, we need to—

The CHAIRMAN. We need to impose a couple of our expedited procedures. Again, as I said, lawyers will be here forever.

Mr. BOSSIE. Mr. Chairman, could I just make one point?

The CHAIRMAN. After Mr. Simon. Then you can make one point, and then we will move on.

Mr. SIMON. Again, I just want to focus on this is talking about the republication of campaign material, not just a statement made by a candidate.

Mr. LUNGREN. But it says in whole or in part. That is what bothers me.

Mr. SIMON. Well, but again, it is campaign material.

Mr. LUNGREN. Again, could you put something in there—I mean, we can put something in defining it, not merely—well, something that would suggest if you merely repeat what someone says or something like that. Do you know what I am trying to say?

Mr. SIMON. I do.

Mr. SIMON. And let me just refer you or your staff to existing 441a(a)(7)(b)(iii), which is where this republication language is derived from. And I think you will see it is the same as existing law.

The CHAIRMAN. Mr. Bossie.

Mr. BOSSIE. Mr. Chairman, thank you very much. I just want to point out two things.

One is, to Congressman Lungren's point about the disclaimer provision, we were messing with the timing, as well, and it is about 13 or 14 seconds. Two of the ads that we submitted to the Supreme Court that we produced—because it used to be 60-second ads, as everybody remembers, and now it is that 30-second ads is kind of the standard. But, for us, the 10-second ad is a standard. And so, if you have a 13-second disclaimer, you literally can't send your message.

And that is an important element, because you may—obviously, if the assumption is it is a 30-second ad, some could argue 13 seconds is overly burdensome. I would. But if it is a 10-second ad, even if you cut that back, even if the FEC said, "Oh, you can have a 6- or 7-second," that still doesn't allow you—you are still having

to pay for the 10 seconds and you are not able to send your message.

Mr. SIMON. Could I just interject one point quickly on that? Because I don't know the——

The CHAIRMAN. One more point quickly.

Mr. SIMON [continuing]. Experiment you ran, but I just want to point out, the top-five-funder disclaimer is not an audio disclaimer. It is just a scroll, a list. So it doesn't take any time.

Mr. LUNGREN. So that doubles, at least, what we have to do now. Thank you.

The CHAIRMAN. That is right. And that is what that word "or" did, right?

Mr. Capuano.

Mr. CAPUANO. Thank you, Mr. Chairman.

First of all, I am not Senator Schumer. So whatever he may have said, so be it.

Mr. LUNGREN. You are much better looking.

Mr. CAPUANO. That is a low standard, but thank you.

Don't worry. Chuck would give it to me too.

Mr. LUNGREN. We will vote on that.

Mr. CAPUANO. Chuck is going to have the last word on that one, I know.

At the same time, though that may be interesting, that is not what the Court is going to look to, one or two quotes of somebody in public life. They are going to look to the intent of the legislation.

I, for one, have no intention, that is not my intention in this law, is to give anybody a chilling effect or to stop anybody's free-speech rights, no matter whether I agree or disagree with the Court's decision. I agree with Ms. Lofgren, it is. I am over it. Well, not quite, but I am pretty much over it.

At the same time, what I am trying to do is carve some legislation that does disclosure. And I think that some of these questions—if it is a 13-second thing, first of all, maybe if you came from Boston, you might speak faster, but, you know, you don't know that.

Mr. LUNGREN. Thirty seconds in Mississippi.

Mr. CAPUANO. If there are certain specific issues, I am happy to talk about them. I am not looking to take a 30-second ad and turn it into a 10-second ad. I agree, that wouldn't be a fair result. There are ways around that. I am happy to talk about those things.

If it is a 30-second ad, I do think that there are ways to do it. And we can come up with exceptions and specifics. And 30 seconds is usually the standard. If you come up with a 10-second ad, you can't really say too much bad about me in 10 seconds. So I am not too worried about that.

But, for instance, one of the new ads that is out there right now, it is a bank in Boston. They do, like, a 10-second clip, then they go to another commercial, and they come right back with another 10. I think it is kind of neat, but, you know, it works.

So there is all kinds of ways to do this, and I am happy to try to parse it out.

If, in the final analysis, the average voter is allowed to know who is saying what—if Exxon Corporation wants to come up and say, "Mike Capuano is a terrible guy," fine. My voters know who Exxon

Corporation is, and they can make that decision on the basis of it. What I don't think is fair is for the Citizens for Good Government to come up and say, "Mike Capuano is a bad guy," or a good guy, if it is fully funded by Exxon. I don't mean to pick on Exxon, but what the heck, it is oil company week.

So all I am asking is, as opposed to simply saying, "Nothing is good," help us—I am happy to work with anybody to try to make this better and to try to make it as constitutional as possible, number one. And that means clarification. If the idea is to clarify it to the point of killing it, fine, I have it. I am a politician, too. You know, you can try, and I will be nice to you, but I won't say yes.

I am also personally very interested in keeping foreign corporations out of the American political system. Yes, I am. Whether it is constitutional or not, Mr. Olson, you may well be right, and you may win, but that doesn't mean I am not going to try. And I think there is very good reason that. And I have no idea about poll numbers. I guess I could make them up, but, you know, my expectation is the average American would not want a foreign corporation to participate in the American system. But that is beside the point. Whether they do or they don't, it is still wrong, in my estimation.

So all I am trying to do is—I am not trying to stifle anybody, I am not trying to limit anybody. I am simply trying to provide reasonable, thoughtful ways of disclosure. And I do think that it is fair to say that if disclosure requirements are so burdensome as to make them—I understand that standard. Again, where you draw the line is a matter of judgment. If you think there is something specifically overly burdensome, fine. No burden—I am sorry, you know, everybody pays taxes; it is a pain in the neck to fill out the forms. I would love to see a tax system where we all put it on index cards. Now, don't get me wrong, it would still be a progressive tax. But it could be done.

And all I am saying is, so far we are focused on the details of this bill that some people don't like, and I respect that. Reasonable people would disagree. What I don't think is right is to say, because of our detailed differences, we should kill the bill, or at least the whole concept of the bill.

And just as a final point, just as a point of information, because it is surprising to me that somehow the length of the bill is now an issue all the time, or whether you read the bill. I have told everybody at home, I read the House health bill, I read the Senate health bill, I read the conference committee health bill. I have also read the Bible and "Moby Dick" and, you know, "War and Peace" and on and on and on, and I don't understand all of those books. I am not going to necessarily understand—and, therefore, the length of a bill, interesting, but who cares. Except, of course, if anybody wants to make a motion that the United States Congress actually uses smaller print and single spacing, I am happy to go for it, because the decision, though shorter, has more words in it, a lot more words.

Now, I only say that because it was raised twice in the opening statement, and I actually did some math here. And, like, first of all, who cares? And, second of all, if you care about it, you better know what you are talking about. The decision, especially adding

the two concurring, is actually 7,400 words longer, which is almost 60 percent. Now, I didn't make that up, but you can figure it out.

I ask and invite anybody who wants to work to try to address the most serious concerns you might have. We may not be able to find common ground, but I am happy to do so, and hopefully do it quickly.

Mr. LUNGREN. Would the gentleman yield?

Mr. CAPUANO. Sure.

Mr. LUNGREN. I would just say in response to something you said earlier, is there any attorney in this room who has never lost a case, I will tell you what I told my children: I never lost a case I shouldn't have.

Mr. CAPUANO. Good answer.

The CHAIRMAN. Mr. Harper.

Mr. HARPER. I guess I am going to have to give some speech lessons here, Mr. Chairman. Just remember when you come to Mississippi, it is "Miss-sippi." It will make it easier for you when you come. And you are welcome to come.

I really have to say, one of the greatest concerns I have—and we sit here and we say this doesn't have a chilling effect or it is maybe not intended to impact the November elections. If you look on page 21 on the bill, you know, it is clear what this section says, that this goes into effect 30 days after the enactment of the bill. And they add the language, "without regard to whether or not the Federal Election Commission has promulgated regulations to carry out such amendments."

Why would you put that language in there unless you know that there is no way on Earth that the Federal Election Commission can complete the regulations during that time? And if you are making the decision on whether or not you want to participate in any type of political advertising on your interpretation of those rules, you are probably going to opt not to do it.

So what would be the problem—and anybody who wants to respond—what would be the problem with saying, we are going to make this effective 30 days after the regulations have been done, promulgated? What is the problem?

Mr. SIMON. Well, if I could respond to that, I think the intent of the sponsors is that this legislation be effective in time for this year's election. It is not to chill speech, it is not to deter spending. It is to provide disclosure of the spending in time for this year's election campaign.

I think the FEC—the reason the language is the way it is is that they don't want the FEC to, as an effective matter, mean the legislation won't go into effect because the FEC delays regulations. But I think the FEC can issue regulations in 30 days. They did under McCain-Feingold.

Mr. HARPER. How long would you say that it would take—and I will let you come back and answer. How long do you think it would take to write the regs?

Mr. SIMON. I think it can be done within 30 days. And, as I said, there is a track record of the FEC acting that expeditiously after McCain-Feingold was passed.

Mr. HARPER. I mean, the Supreme Court decision was in January.

Mr. BOSSIE. We still have no rulemaking, 3½ months.

Mr. HARPER. And here we are. So, as far as I know, the FEC has not done anything in regard to the Supreme Court decision. If they have, I apologize. I haven't seen any publication of that.

So, Mr. Bossie, I think you had a response.

Mr. BOSSIE. That was exactly what I was going to say. We have been waiting since January 21st for the Federal Election Commission to come down with their rulemaking. And I believe now we are being told it is going to be sometime in June or July. But it can take a very, very long time. And it is not like this was—they have been working on our case for a year before that. So I think that there is a lot of validity to what you are saying.

Mr. HARPER. What would be the problem to say that we are going to wait until the regulations are done or we are going to say this won't be effective in this election cycle? What harm would there be in that, until that point was made?

Mr. OLSON, any comment that you have on it?

Mr. OLSON. When we are going to restrict the ability of individuals in this country to speak and make it a crime if they get it wrong, we have a very solemn obligation to make it very, very clear.

And to answer your question, if there is to be a regulatory process to explain some of these things, it is fundamental to its constitutionality that everyone, you and me and everyone else, be—and not including lawyers, because people need to run for office without having to hire a lawyer and an accountant and a bookkeeper. We need to know in this country what the law prohibits us from saying.

I heard Mr. Simon refer to subsection—he said a(a)(7)(b), subsection X, of something. And I was thinking, what a nightmare that is if you are trying to speak about someone running for office. You have to figure out what that means.

And I, in preparation for my argument in the Supreme Court on the Citizens United case and the other cases I have argued having to do with election law, I spend hours trying to figure out what the definitions are and how they relate. And it is a very, very big thick-et. We have regulatory free speech—regulated free speech, which is an oxymoron if there ever was one. It is almost as complicated to run for office in this country as it is to go through the Internal Revenue Code and all those regulations.

So it is important, if nothing else—and I agree with the sentiment that there should be working together, and the concept of disclosure is good if it is not discriminatory and it is not burdensome and it doesn't pick out certain people. And people should work together for this.

But one thing that I think we should all agree upon is that those of us who are running for office or supporting people running for office or want to speak about people running for office, we should know what the law permits and what it doesn't permit.

Mr. HARPER. Thank you, Mr. Chairman.

Mr. HOLMAN. Could I briefly add to this, very briefly?

The CHAIRMAN. Why not?

Mr. HOLMAN. If this law is not passed—or this bill is not passed and signed into law by this summer, we are not going to know

what is happening in the 2010 elections. That is why it is so critical. This is the very first election cycle following the Citizens United decision.

Right now we are already monitoring a fourfold increase in outside group spending, and we have no idea where that money is coming from. If this law is not passed quickly, we are going to go through our first election cycle and not have a clue what hit us.

Mr. HARPER. Why hasn't the FEC already done their updated regs based upon the Citizens United decision back in January? Then we would know what was in effect for the November elections.

Mr. HOLMAN. The Federal Election Commission has a serious problem right now, and that is it is sharply divided along partisan lines. Their partisan deadlock votes have increased from 2 percent to 14 percent—2 percent all through its history, by the way—and then last year alone has jumped a 600 percent increase, which is why I would not expect the FEC to come out promptly with regulations.

Mr. HARPER. On this bill also?

Mr. HOLMAN. On this bill, yes.

Mr. HARPER. Okay. So we can't really depend on the FEC to come up with regs based on Citizens United or this before the November elections to where we can make these decisions that have to be made. Would that be a fair assessment?

Mr. HOLMAN. I would expect the FEC would not develop regulations by the 2010 election.

Mr. HARPER. Well, then, all the more reason that we don't need to have this bill take effect until the regs have been written.

With that, I will yield back.

The CHAIRMAN. I thank the gentleman.

Ms. Davis.

Mrs. DAVIS of California. Thank you, Mr. Chairman.

Perhaps I can try and ask a simple question. What do you think people should know when they are watching TV about the ad that they are watching? What should they know about who has contributed to that ad? Today, perhaps, I guess, and under the DISCLOSE Act, what should they know? How far down should it go, in terms of what is behind it?

Mr. SIMON. Well, I think they should know who is sponsoring the ad, and they should know the real funder behind the ad, which is what the legislation proposes, precisely because of the problem of the innocuously named, the generically named front group, which provides the voter and the viewer with virtually no useful information about the interest behind the ad.

Mr. NYHART. I would just add, if a Goldman Sachs or a BP or any deep-pocket interest wants to have a major impact, having voters know that when the ad comes out is a right of the voters.

Mr. OLSON. With respect to that statement that was just made, that presupposes that certain people who participate in the political process should have disclosure obligation, if it is BP or Goldman Sachs. But what about a person putting up a yard sign, what do they have to disclose? What if a person writes a pamphlet, what do they have to disclose?

My point was that it should be equal. If everybody participating in the political process is subjected to the same obligations and the same disclosure requirements, then government is not selecting who can speak based upon who the speaker is. And those requirements should not be burdensome or oppressive such that they inhibit people, and they should be understandable.

Mr. BOSSIE. Congresswoman, speaking for Citizens United, from our standpoint, we make and we submitted, as I said, to the Supreme Court, as well as other movies we make, TV commercials for them. We don't feel there should be any disclosure because we are saying, go to a local movie theater or buy a DVD. So we have a completely different type of problem when it comes to the disclosure issue, because right now the Federal Election Commission is saying that we need to have a disclaimer on there. And, as you know, we are all trying to answer the questions the best we can, but the problem is we have a different type of problem here.

Mrs. DAVIS of California. A yard sign shouldn't say that they are paid for by the—

Mr. BOSSIE. No, I was speaking from what we are trying to do and what our case was about. And so I agree with Mr. Olson.

Mrs. DAVIS of California. Okay.

Ms. GILBERT. From our perspective as a public interest organization, it is all about where the money comes from and making sure that citizens know that and can make educated decisions based upon that. So, certainly regardless of who the speaker is, people should know.

Mrs. DAVIS of California. And if there is a company or a subsidiary of that company, it should be the subsidiary rather than the company?

Ms. GILBERT. I mean, it should drill down. And that is exactly—

Mrs. DAVIS of California. Drill down all the way.

Ms. GILBERT [continuing]. What the legislation does.

Mrs. DAVIS of California. Okay.

Mr. HOLMAN. And getting back to the integrity of the legislative process, voters need to know if there is a link between who is funding a particular campaign ad for or against a lawmaker and whether or not that funder has business pending before this chamber.

Mrs. DAVIS of California. Okay. I appreciate that. I think that we probably, in some ways, have more possibly that we agree with. I am certainly with my colleague, I think there is enough interest here to try and have something that we can look to.

But what worries, I think, all of us is that it will be very difficult for a voter to discern fairly quickly where those dollars are coming from. And some people may say that that is not that important to the voter, that they should be able to find that information and take the time to get it. But I think that that is really going to be a difficult thing to do.

But I think we can get around it, frankly. I mean, I think there is a way, even in a short snippet, to let people know that so-and-so brought you this ad. And I hope that we can do that.

Thank you.

The CHAIRMAN. I thank the lady.

Without objection, the record will remain open for 5 days for Members to submit and witnesses to respond to any additional questions submitted for the record.

I thank the panel for your participation. And I am sure we will be hearing a whole lot more of you, you will be hearing a whole lot more of us. Thank you.

And this committee will convene Tuesday, May 11th, at 5:00 p.m. For an additional hearing on the DISCLOSE Act.

The hearing now stands adjourned.

[The statement of Mr. Edgar follows:]



**Written Testimony of Bob Edgar
President, Common Cause**
**on H.R. 5175, the DISCLOSE Act,
Democracy is Strengthened by Casting Light on Spending in Elections**

May 6, 2010

The urgency of fundamental reform.

The Supreme Court's decision in *Citizens United v. FEC* served as a wake-up call to elected officials and average citizens alike. Members of Congress look out on the prospect of elections marked by an onslaught of special interest money that is now truly unlimited. Average citizens look out onto a country that seems even more thoroughly dominated by corporations, labor unions and Wall Street. The pessimism the decision created is by itself enough to spur us into action. The Court's holding, however, compels us to answer an even more fundamental question: "Who was our government established to protect?"

The DISCLOSE Act is a clear statement that it is the individual, and the individual's right to participate in democracy, that must be protected. This legislation is needed not only to safeguard the democratic process in the 2010 elections but to blunt the aggregate impact of dangerous and ideological decisions. The Roberts Court's rapid succession of activist decisions has effectively dismantled a generation of post-Watergate campaign reforms and removed the prohibition on political spending from corporate and union treasuries in place since 1947.¹

¹ See, e.g., *Citizens United v. FEC*, __ U.S. __, 130 S. Ct. 876 (2010); *Davis v. FEC*, 128 S. Ct. 2759 (2008); *Wisconsin Right to Life v. FEC*, 551 U.S. 449 (2007).

Indeed, the impact is not limited to federal law. Countless state laws have been either directly or indirectly nullified by these same decisions.²

There is no question action must be taken. On behalf of Common Cause and our 36 state chapters, I look forward to working with this committee on the refinement and passage of the DISCLOSE Act.

The *Citizens United* opinion has turned a longstanding problem into a crisis. In truth, the way we fund elections has been broken and unsustainable for many years. As president of Common Cause, I have had a front row seat to the outrage of the American public in the wake of the *Citizens United* decision. Average citizens have been reaching out to my office and our state chapters to express their anger and to ask what they can do. No doubt a majority of the members of this Committee and the constituents you represent share their frustration. The American people expect this body to enact real, effective and comprehensive reform.

DISCLOSE Act provisions and improvements.

The DISCLOSE Act partially fulfills this reform expectation by taking strong steps to shine a light on independent expenditures, strengthen coordination rules and prohibit political spending by foreign-owned corporations, large government contractors and TARP recipients in time for this year's elections. Specifically, Common Cause supports the bill's provisions to:

- **Enhance ad disclaimers.** The DISCLOSE Act would promote transparency by requiring the CEO of an organization running an independent political ad to appear in the ad and "approve it," just like candidates do now, and the disclosure of the organization's top five contributors as part of the ad. The American people deserve

² National Conference of State Legislatures, *Life After Citizens United* (Apr. 28, 2010), available at <http://www.ncsl.org/default.aspx?tabid=19607>.

to know who is paying for political messages in order to evaluate the messages' objectivity or underlying interest.

- **Increase disclosure.** In this era of Supreme Court deregulation of campaign finance, disclosure becomes all the more important as a tool to expose the efforts of powerful interests to influence elections and to subject those efforts to vigorous public debate. Under the DISCLOSE Act, corporations and unions will have to disclose their donors and transfers, as well as direct expenditures.
- **Prevent foreign influence over elections.** I think most of us can agree that allowing foreign-controlled corporations to funnel unlimited amounts of money into America's elections will create fertile ground for corruption and only further undermine public confidence in our democracy. The Act tackles the loophole created by the *Citizens United* decision with sensible regulations.
- **Expand shareholders' right to know.** The DISCLOSE Act would protect shareholders' right to know what their corporation is spending to influence elections through on-line reporting and corporate annual and periodic reports.
- **Protect taxpayers from pay-to-play conflicts.** The Act would prohibit large government contractors and TARP recipients from spending money to influence elections while at the same time benefiting from government largesse. This is one of the most important provisions of the bill and is essential to preventing a new era of pay-to-play corruption in Washington, DC.
- **Ensure affordable air time for candidates and parties.** Broadcasters will reap new benefits from the Roberts Court's deregulation of political spending and, in return, should be expected to shoulder some of the burden of making the airwaves affordable

for candidates and parties targeted by corporate and union ads. The DISCLOSE Act would ensure that candidates are not shut out of the market and that advertising rates are reasonable.

- **Strengthen coordination rules.** The Act closes loopholes in current rules in order to prevent coordination between candidates and outside groups that would otherwise allow special interests to effectively skirt contribution limits.

However, Common Cause believes that the party coordination provision of the Act needs improvement. As currently drafted, the bill authorizes political parties to make unlimited expenditures in coordination with their candidates, as long as the candidates do not direct or control the messages' contents. While this provision would allow parties to respond to independent expenditures, it also creates a backdoor way of avoiding contribution limits to candidates. Common Cause strongly supports an alternative proposal developed by the Campaign Finance Institute, the Brookings Institution and others that would allow unlimited *coordinated* spending, but only from small-donor accounts, funded by contributions of \$200 or less.³

Real reform must include public campaign financing.

Even if the DISCLOSE Act passes – and it should – the current sorry state of affairs in the world of money and politics is only going to get worse. Effective reform requires fundamentally changing the way America pays for campaigns, and reducing the role and power of political contributions in our politics. Only one current piece of legislation, the Fair Elections Now Act (H.R. 1826, S. 752), takes this step, and it needs to be part of any legislative response to the judicial activism of the Roberts Court.

³ See Anthony J. Corrado et al., *Reform in an Age of Networked Campaigns: How to Foster Citizen Participation through Small Donors and Volunteers* (2010), available at http://www.cfinst.org/books_reports/Reform-in-an-Age-of-Networked-Campaigns.pdf.

Common Cause unequivocally supports enactment of the DISCLOSE Act in conjunction with the Fair Elections Now Act this year. Despite its strengths, passage of the DISCLOSE Act will *not* end reliance on campaign cash from the Wall Street firms, lobbyists and entrenched special interests. Washington's dependence on big money has been growing at the expense of every-day Americans having a voice in their democracy. The packed call rooms of both parties' campaign committees serve as a constant reminder that the focus of Members of Congress is too often on how to replenish their campaign's war chest and not on how to respond to constituent needs. As Members of Congress, you work hard to meet the needs of your constituents, but every one of you no doubt experiences the same problem that I experienced when I served in Congress (and which has only become worse) – the constant need to raise campaign cash.

Nor will the DISCLOSE Act combat the new “fear factor” created by the Roberts Court's ruling in *Citizens United*. The prospect of a threat – whether spoken or unspoken, made behind closed doors or in the media – of a massive cash infusion into a district as punishment for not doing an interest's bidding is enough to make any rational Member think twice before voting. As a former Member of Congress, I can attest that this threat is not uncommon. No amount of disclosure will cure this form of “persuasion.”

Conclusion

The DISCLOSE Act is an important piece of legislation and should be enacted as soon as possible. Coupled with the Fair Elections Now Act, Congress has the opportunity to lay the foundation of a new generation of elections and to address the public's crisis of faith in the integrity of our government. I urge you to take bold action and seize that opportunity.

Thank you for your consideration and prompt action on this urgent issue.

[The information follows:]

Apple to Chamber of Commerce after global warming spat: We're outta here

By ALEX SALKEVER

Posted 7:00 PM 10/05/09 | Energy, Technology, Economy, Apple

When Apple (AAPL) said Monday it would be leaving the U.S. Chamber of Commerce, the computer company joined a growing list of large corporations that have dumped the country's most prestigious business advocacy group over global warming issues. *The New York Times* reported Apple's departure and the the Cupertino, Calif.-based company distributed a statement from Catherine Novelli, the company's vice president of worldwide government affairs.



WireImage

Apple CEO Steven P. Jobs' decision should send a clear message to chamber CEO and President Thomas Donohue: The chamber no longer represents a key segment of its most powerful members on what may be the most important business and social issue of our era. With the most influential consumer electronics company in the world lining up against Donohue and his policies, it's no longer just about alienating a few poorly recognized utilities. Instead, Donohue risks making the chamber a posterchild for U.S. intransigence and indifference on an issue of critical importance to the entire planet.

No doubt, the chamber is facing a serious challenge to its authority. Apple joins a growing list of high-powered companies that have left the august chamber over global warming issues and related positions. It has been against carbon taxes and cap-and-trade legislation, which allows cleaner companies to sell pollution credits to dirtier companies. The chamber has broadly opposed such steps, arguing that charging for emissions is too expensive and will significantly retard the recovery and future economic development.

But many U.S. businesses have acknowledged that some sort of carbon tax is inevitable. They would prefer clarity on the topic to be able to plan and develop new cost structures to take into account the changes. Those businesses are not all as clean and green as Apple.

Large utilities Exelon (EXC) and PG&E (PGC) have expressed public displeasure with the chamber's climate change policies. Both left the chamber earlier this year, according to the San Jose Mercury News. Footwear and athletic apparel giant Nike (NKE) resigned from the chamber's board of directors this year, as well, although it decided not to exit the chamber entirely.

Apple has been burnishing its own green cred of late. The company recently released extensive information detailing its carbon footprint (as DailyFinance reported), a move to counter environmentalists claims that Apple lagged its competitors. The move to leave the chamber furthers Apple's standing as a green company, a reputation it has done much to deserve. It was the first company to eliminate PVC from packaging and to stop making lead-laden monitors using an old type of technology called cathode-ray tubes.

Now that Apple has elected to break free from the chamber, a stampede of marquee companies could follow suit, spurred on by green investment activists who have played a key role in the moves by the utilities and Nike. Such a stampede could put the already reeling chamber on weaker footing with its traditional constituency.

Beyond the chamber, the schism in American industry reveals just how deep the divide is over the seriousness of global warming. Major industries such as coal and steel have been vehemently opposed to cap-and-trade measures proposed by the Obama Administration.

Meanwhile, polar ice caps continue to melt and temperatures around the world continue to rise. While climatologists warn that low-lying coastal areas of the U.S. could start to suffer the effects of rising oceans within a few decades, the first real casualty of global warming could well be the old business establishment.

Tagged: Apple, carbon, carbon footprint, chamber of commerce, climate change, global warming, green, nike

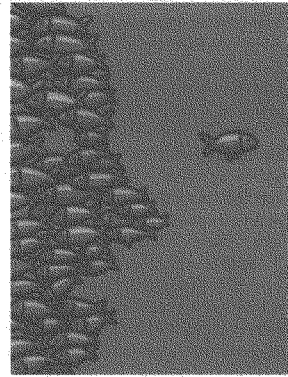
THE NEW YORKER

THE FINANCIAL PAGE

EXIT THROUGH LOBBY

by James Surowiecki

OCTOBER 19, 2009



Resigning in protest is not in the American grain. Robert McNamara stuck around as Secretary of Defense even after he decided that the Vietnam War was a disaster; Colin Powell did the same during the Bush Administration's push for war with Iraq; and in the lead-up to the financial crisis, few high-profile executives stepped down over disagreements in philosophy or tactics. But resigning in protest has gained popularity of late among an unlikely group: big corporations. Last Monday, Apple announced that it would be quitting the U.S. Chamber of Commerce because of the Chamber's opposition to global-warming legislation. And that was just the latest in a series of defections: in the past few weeks, the public-utility companies Pacific Gas & Electric, PNM Resources, and Exelon all announced that they'd be leaving the Chamber, while Nike quit the organization's board of directors. Historically speaking, this is a positive exodus.

The Chamber of Commerce won't be going out of business anytime soon, of course: it still has three million members, mostly small businesses, and a gargantuan lobbying budget. Still, the decidedly public nature of these corporate departures—the companies made statements attacking the Chamber for obstructionism—complicates its claim to be representing the collective interests of American business. One of the great strengths of business lobbies in recent decades has been their ability to maintain a united front. Global warming has revealed fractures in that façade.

It's no surprise that the climate-change debate has become a flashpoint for the Chamber, since it encompasses everything that the organization routinely opposes: regulation, taxation, and a bigger role for government. The Chamber was once considered more moderate than harder-line cousins like the National Association of Manufacturers. But that's changed. Back in 1971, the future Supreme Court Justice Lewis Powell wrote a famous

memo to the Chamber, arguing that the organization needed to become the center of an aggressive defense of the free-enterprise system, which Powell felt was under broad attack. How influential the memo was is still debated, but over the years, the Chamber became the organization Powell wanted it to be, becoming more ideologically cohesive and playing a key role in blocking consumer-protection legislation, labor-law reform, and financial regulation. Its opposition to regulation now seems reflexive; at the moment, its legislative priorities include opposing a consumer financial-protection agency, opposing a shareholder bill of rights, and opposing “flawed health care proposals,” which seems to mean any health-care proposal made by a Democrat. And, while the Chamber does acknowledge that the threat of global warming is real, it has been unbending in its opposition to the current cap-and-trade proposal, and a senior official has called for a “Scopes monkey trial” to debate the science of climate change.

These stands may make most members of the Chamber happy: small business is the backbone of American conservatism, after all. But the hard line on global warming may also reflect dynamics that typically shape group behavior. In any large group, a few people do most of the work—usually those who are most ideologically committed or who have a direct stake in a particular outcome. So decisions often end up reflecting not the wishes of the group as a whole but those of its most engaged members. In the case of climate-change legislation like cap-and-trade, many of the companies on the Chamber’s board of directors actually support it. But among the few that publicly oppose it are coal companies, which have a huge stake in stopping any carbon-pricing system. So it’s not surprising that the Chamber’s general approach is closer to Massey Energy’s than to Nike’s.

These dynamics are familiar. But major companies’ leaving the Chamber rather than accept its policies is new. During the debate over health-care reform in the early nineties, for instance, the Chamber ended up coming out against the Clinton health plan without losing the support of companies like Ford—even though reform would have benefitted automakers, hobbled as they are by health-care costs. The recent resignations, and public dissent from companies that are still members, like Johnson & Johnson and G.E., suggest that, when it comes to global warming, companies are unwilling to sit quietly by.

Why the difference? Partly, it may be a matter of self-interest; Exelon, for instance, has big investments in renewable energy. But it may reflect a calculation that global warming is simply too big an issue to get wrong, both economically—few companies are really going to benefit from the melting of the polar ice caps—and from a public-relations point of view. It’s also probably no coincidence that these resignations have come at a time when the Chamber’s anti-regulatory zeal looks not just outmoded but self-defeating. Had the Chamber supported tougher regulation of financial and housing markets, after all, the myriad small businesses it represents would undoubtedly be better off today. And it’s far from clear that across-the-board hostility to regulation is really in the best interests of the free-enterprise system. We assume that lobbies always recognize what’s best for their members. But they don’t, and, in the case of climate change, they may very well be missing what the companies that have resigned in protest have seen: global warming isn’t just bad for the planet; it’s bad for business. ♦

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POLITICO

Chamber under fire on warming

By: Lisa Lerer
May 5, 2009 04:18 AM EDT

The U.S. Chamber of Commerce is taking heat from Johnson & Johnson, Nike and other corporate members over its opposition to global warming legislation pending in the House.

In a letter to the Chamber, Johnson & Johnson has asked the Chamber to refrain from making comments on climate change unless they "reflect the full range of views, especially those of Chamber members advocating for congressional action."

Nike spokeswoman Anne Meyers said her company has also been "vocal" with the Chamber's leaders "about wanting them to take a more progressive stance on the issue of climate change."

While the Chamber's opposition to cap-and-trade legislation introduced by House Democrats mirrors the views of some in industry, particularly energy producers, Meyer said Nike "didn't feel that consumer companies had a particularly strong or vocal voice around the issue of climate change."

Lobbyists at business coalitions that support federal climate change legislation say other companies are discussing the possibility of sending their own letters to the Chamber — or of threatening to withhold dues from the Chamber in protest.

But William Kovacs, the Chamber's vice president for the environment, technology and regulatory affairs, downplayed the divide within the nation's most powerful lobbying group.

"We deal with 300 to 400 issues a year, and there are times when members would disagree," he said. "But on 95 percent of

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the issues, we have 95 percent of the support."

While some energy producers and manufacturers oppose any federal action to cap carbon dioxide emissions, at least 35 major corporations — including Johnson & Johnson and Nike — have joined coalitions designed to push federal climate change legislation.

The Chamber has not taken an explicit position against all federal climate change regulation, but it has opposed the most significant proposals introduced in Congress.

The business lobby has come out strongly against a draft bill in the House that would create a cap-and-trade system to cut greenhouse gases and promote the development of renewable energy technology.

In the House Energy and Commerce committee last month, Kovacs said the legislation would "result in energy shortages and high energy prices, which in turn means higher prices for just about everything else."

And last week, the Chamber released a study showing that the bill could result in more than 3 million jobs lost by 2030 and a cost of more than \$2,100 per household.

The Chamber also opposed a cap-and-trade proposal introduced by former Sen. John Warner (R-Va.) and Sen. Joe Lieberman (I-Conn.) during the past session of Congress.

Environmental advocates say the positions the Chamber has taken put it out of sync with many of its members.

"Based on the public statements from the other members of the Chamber, Johnson & Johnson is certainly not alone in having a different position from the Chamber," said

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Peter Altman, climate campaign director for the Natural Resources Defense Council.

According to Altman's analysis, 99 of the 122 companies represented on the Chamber's board have taken no public position on global warming. Nineteen support regulation, while four oppose regulation or disagree with the science behind it.

"The U.S. Chamber is representing the views of a small minority of its board members," said Altman.

Chamber lobbyists say that the group's positions are determined by its members, which are organized into 16 policy groups and five taskforces.

Kovacs said the Johnson & Johnson letter came the day the Chamber's environment and energy committee was meeting. The group of more than 100 members debated cap and trade, the carbon tax and the use of technology for nearly three hours, he said.

"At the end of the debate, there were no members asking to change our policy," he said.

The draft version of the House climate change legislation incorporated proposals suggested by the United States Climate Action Partnership, a coalition of business and environmental groups that supports capping emissions. The Business for Innovative Climate and Energy Policy, a group of consumer companies, also backs the House bill.

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Big Three Auto
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Annual Union Dues per Employee

	A	B	C	D	E	F
	GM ¹	Ford ¹	Chrysler ¹	Toyota ²	Honda ²	US Natl. Avg. (2004) ³
Annual Union Dues per Employee	\$952.32	\$693.12	\$699.60	Nonunion	Nonunion	\$377

Read [commentary on these numbers](#) from the Associated Press and the United Auto Workers (UAW)

Sources and Notes

1. The United Auto Workers (UAW) union wrote the following on a page titled "Dues" on their website at www.uaw.org/about/works/dues.html (accessed Jan. 12, 2009):

"UAW members pay monthly dues equal to two hours pay or, for salaried workers, 1.15% of their monthly salary. Public employees who are prohibited by law from striking are not required to pay into the UAW Strike Fund, so they could pay proportionally lower dues.

The UAW's current dues structure was established by the delegates to the 1967 Special Convention. In restructuring the UAW's dues program, the delegates had two basic objectives. First, they wanted a dues structure that would be fair to all UAW members regardless of their annual incomes. Second, they were determined to provide for the long-term financial health of UAW locals and the International Union with a dues structure that wouldn't have to be changed every few years. Their solution--linking dues to earnings--satisfied both objectives."

Jan. 12, 2009 - [United Auto Workers \(UAW\)](#) ↕

[**Editor's Note:** ProCon.org estimated UAW's annual dues by multiplying the average hourly wage of each auto company employee by two (two hours pay per month), then multiplying that number by 12 (12 months).]

2. Jeff Karoub, Associated Press Writer, wrote in a Mar. 31, 2007 *Japan Times* article titled "Unions Get No Traction at Japanese U.S. Carmakers":

"Leaders of the United Auto Workers union said recently that they want to organize employees at the U.S. operations of foreign automakers and their suppliers. But labor experts question whether they'll be successful, saying decent wages, factory location and some subtle screening all enable the foreign carmakers to remain union-free.

'A union has a difficult time convincing others to join when workers already get what they perceive to be really good benefits and pay,' said Steven Szakaly, an economist with the Center for Automotive Research in Ann Arbor, Mich...

Toyota and Honda representatives say they've done little to keep unions at bay and insist their employees simply choose not to form unions. But the timing of their arrival and even the

locations they choose has helped.

Assembly plants for Japanese automakers first started appearing in the United States in the 1980s, about 50 years after a 'tidal wave' of labor organization swept through U.S. plants, said Greg Saltzman, a labor researcher at the University of Michigan.

Japanese automakers tend to avoid union-friendly areas like Detroit, Saltzman noted...

Many build factories in areas that already have a low average wage for the labor market, Saltzman said. That means factory pay looks great regardless of whether it approaches union standards."

Mar. 31, 2007 - Jeff Karoub ↗

3. Mark Brenner, PhD, Director of Labor Notes, noted average dues amounts in a LaborNotes.org article titled "Give Your Union a Dues Checkup" (accessed Jan. 12, 2009):

"Table 1 - Average [Annual] Dues and Due Growth		
<i>Union</i>	<i>Average dues per member \$ 2004</i>	<i>Real dues growth % 2000-2004</i>
NEA*	281	4.3
SEIU	405	16.7
UFCW	399	12.3
AFSCME**	269	17.1
IBT	490	18.6
UNITE-HERE	380	4.8
AFT*	236	- 6.4
LIUNA	647	- 8.1
IBEW	688	4.6
UAW	516	7.1
IAM**	231	- 15.9
CWA	396	15.6
USWA**	210	- 7.1
UBC**	271	- 16.4
IUOE	830	10.2
<i>Total</i>	<i>\$377</i>	<i>- 8.4%</i>

* Includes members in states without public sector collective bargaining rights who only pay dues to the national organization.

** Includes retirees who pay much lower average dues than active members.

Data from the Labor Management Reporting and Disclosure Act (LMRDA) provide the only national picture of union dues in the country. Table 1 shows the average annual dues per

member for the 15 largest unions in 2004 (the latest year with complete data)."

Jan. 12, 2009 - [Mark Brenner, PhD](#) ☆☆☆

Commentary on UAW Union Dues

Ken Thomas, MA, Associated Press Writer, wrote in a Mar. 29, 2008 *USA Today* article titled "UAW Membership Drops Below 500,000":

"United Auto Workers union membership has fallen below 500,000 for the first time since World War II, reflecting the massive restructuring undertaken by Detroit's automakers.

The union maintained financial health in terms of assets, according to the report, despite a decline in membership and dues. UAW assets fell slightly to about \$1.25 billion last year from \$1.26 billion in 2006.

Union dues, meanwhile, fell to nearly \$169 million in 2007 from \$191 million the previous year. In 2004, for example, dues brought in about \$206 million, records show.

[UAW President Ron] Gettelfinger saw a slight increase in salary in 2007, from \$145,125 in 2006 to \$150,763 last year."

Mar. 29, 2008 - [Ken Thomas, MA](#) ☆

The United Auto Workers (UAW) noted on a website page titled "UAW Dues at Work" at www.uaw.org (accessed Jan. 12, 2009):



"The UAW Constitution explains how your dues are normally divided with 38% staying in the local union, 30% going to the strike fund, and 32% going to the International Union. As long as the strike fund remains over \$500 million, locals get a rebate from the strike fund that brings their share to 48% and the international gets a rebate that brings its share to 37%. If the strike fund should drop below \$500 million, the rebates would end until the strike fund was rebuilt to \$550 million. In late 2000 the UAW strike fund was about \$800 million."

Jan. 12, 2009 - [United Auto Workers \(UAW\)](#) ☆

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May 6, 2010

The Committee on House Administration
1309 Longworth Building
Washington, DC 20515

Dear Chairman Brady, Ranking Member Lungren, and Members of the Committee,

We commend the Chairman, Rep. Chris Van Hollen (D-Md.), Rep. Mike Castle (R-DE), and Rep. Walter Jones (R-N.C.) for introducing legislation aimed at blunting the Supreme Court's wrongheaded decision in *Citizens United v. FEC*.

Disclosure measures are important to highlight the likely influx of outside spending, but it's also important for Congress to ensure the voices of everyday Americans are heard louder than millions of dollars spent by Wall Street and other special interests. As the legislative process for the DISCLOSE Act moves forward, another piece of legislation should also be considered: the Fair Elections Now Act (H.R. 1826). This legislation provides an alternative to the nonstop chase for special interest campaign cash and puts voters back in the driver's seat.

Sponsored by Reps. John Larson (D-Conn.) and Walter Jones (R-N.C.), the Fair Elections Now Act would give candidates the option of running competitive campaigns for office on a blend of limited public funds and a four-to-one match on in-state donations of \$100 or less. If faced with the threat of outside attacks that are now allowed under *Citizens United*, Fair Elections enables candidates to raise ample funds to respond without depending on wealthy special interests.

The legislation has the broad bipartisan support of nearly 150 House members, with strong support from Blue Dogs, New Democrats, and the Congressional Black and Hispanic Caucuses. With a strong Fair Elections system in place, candidates will be able to spend less time courting the small portion of Americans who fund campaigns and be able to spend more time engaging constituents and addressing our country's challenges.

As you and your colleagues work to bring transparency to the campaign spending process, you can also empower the voices of all Americans by supporting the Fair Elections Now Act.

Signed,

Bob Edgar	Joan Mandle	Robert Weissman	Nick Nyhart
President and CEO	Executive Director	President	President and CEO
Common Cause	Democracy Matters	Public Citizen	Public Campaign

GIBSON DUNN

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May 11, 2010

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Client: 93403-0028

Chairman Robert A. Brady
 Committee on House Administration
 U.S. House of Representatives
 1309 Longworth House Office Building
 Washington, D.C. 20515

Ranking Member Daniel E. Lungren
 Committee on House Administration
 U.S. House of Representatives
 1309 Longworth House Office Building
 Washington, D.C. 20515

Re: *Testimony Before Committee on House Administration*

Dear Chairman Brady and Ranking Member Lungren:

I am writing to clarify a statement from my May 6, 2010, testimony during the hearing on H.R. 5175 (the DISCLOSE Act) before the Committee on House Administration. During a colloquy with Representative Lungren regarding the bill's provisions regulating coordinated communications, I stated that, if enacted, I would advise clients unclear about the bill's requirements to seek an advisory opinion from the Federal Election Commission (the "Commission"). I indicated that it can take more than six months, and sometimes up to two years, to obtain final resolution of an advisory opinion request.

That statement was based on my understanding that, although the Commission is subject to a sixty-day statutory deadline for responding to advisory opinion requests, the process can take much longer in practice. Indeed, the sixty-day period does not begin to run until the Commission deems an advisory opinion request to be "complete." 2 U.S.C. § 437f(a)(1). Before certifying that a request is complete, the Commission often seeks additional information from the party submitting the request, which can add weeks or months to the process. The Commission may also seek extensions of time to render a decision, which can further delay resolution of advisory opinion requests. For example, the Committee for Chris Dodd for President, Inc., submitted an advisory opinion request to the Commission on February 26, 2008 (Advisory Opinion Request 2008-04). As a result of the Commission's requests for additional information and extensions of time, a final advisory opinion was not issued until September 2, 2008, a full six months later.

Moreover, as I referenced during my testimony, from December 2007 to June 2008, the Commission had only two sitting Commissioners and therefore lacked a quorum. During this period, the Commission could not issue binding advisory opinions, which created a backlog of advisory opinion requests and left speakers without authoritative guidance as to whether they would face felony prosecution for engaging in constitutionally protected political expression—during a very critical portion of the 2008 presidential campaign.

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Chairman Robert A. Brady
Ranking Member Daniel E. Lungren
Committee on House Administration
U.S. House of Representatives
May 11, 2010
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Finally, these delays in the advisory opinion process can be exacerbated by protracted litigation in which the Commission seeks to defend its application of campaign-finance restrictions to core political speech. For example, Citizens United filed suit against the Commission on December 14, 2007, seeking to enjoin the Commission from applying McCain-Feingold's prohibition on corporate "electioneering communications" to its distribution of a movie regarding a candidate in the 2008 Democratic presidential primary. Citizens United did not receive a decision from the Supreme Court of the United States until January 21, 2010. During the intervening two-year period, the moment for Citizens United to engage in its desired political speech had long since passed.

Thus, while the Commission has historically responded to advisory opinion requests in less than six months, it could take well more than a year to obtain final resolution of an advisory opinion request when ensuing litigation is taken into account.

I hasten to add that I intended no disrespect to the Commission or its very conscientious legal staff by suggesting that responses to requests for advisory opinions can take time. Election speech is highly time-sensitive. In a great many instances, a speaker needs to know immediately whether speech will result in prosecution. Any delay or uncertainty will result in silence, not speech. That is inherent in the system, not the fault of the Commission's legal staff.

Respectfully submitted,


Theodore B. Olson

[Whereupon, at 1:58 p.m., the committee was adjourned.]

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