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Feb. 3, 2010

The Hon. Robert Brady
Chairman, 1309 LHOB
The Hon. Daniel Lungren
Ranking Member, 1313 LHOB
Committee on House Administration
House of Representatives
Washington, D.C. 20515

RE: Testimony submitted on behalf of Public Citizen on *Citizen United v. FEC*

Dear Chairman and Ranking Member:

Public Citizen is pleased that the Committee on House Administration is holding a hearing in recognition of the danger to our democratic form of governance posed by the United States Supreme Court's decision in *Citizens United v. Federal Election Commission*. We respectfully submit testimony to the Committee on the scope of the problem and on appropriate legislative and constitutional responses to the Court's decision.

Public Citizen is a national, nonprofit consumer advocacy organization founded in 1971 to represent consumer interests in Congress, the executive branch and the courts. Public Citizen played an important role in the Supreme Court proceedings in *Citizens United*, with Public Citizen attorney Scott Nelson serving as co-counsel for the key congressional sponsors of the Bipartisan Campaign Reform Act (BCRA) as amicus curiae.

Background on *Citizens United*

On January 21, 2010, the Supreme Court unleashed a flood of corporate money into our political system by announcing, contrary to long-standing precedents, that corporations have a constitutional right to spend unlimited amounts of money to promote or defeat 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 parts of the Court's 2007 ruling in *Wisconsin Right to Life v. Federal Election Commission*.

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's unprecedented logic also may endanger the century-old tradition of prohibiting direct corporate contributions in federal elections, established by the 1907 Tillman Act.

There is nothing judicious about this decision. Reversing well-established laws and judicial precedents barring direct corporate financing of elections is a radical affront to 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 the business or labor communities.

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. 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.

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.

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.

Three Powerful Ways to Curb Excessive Corporate Spending in Elections

Several options for reining in the damage caused by the Court in *Citizens United* are under consideration. Many of these legislative responses – such as prohibiting foreign nationals from funneling money into American elections through U.S. subsidiaries of foreign corporations, strengthening the anti-coordination rules to prevent corporations from hiring as campaign

consultants the same people hired by the candidates, and enhancing transparency requirements of corporate entities financing ads – will mitigate the expected corporate onslaught and are worthy of consideration.

Three other means for curbing excessive corporate political spending deserve special consideration by Congress. We discuss these options below.

1. Public Financing of Elections

Public financing of elections is the single most effective legislative remedy for unlimited corporate spending. The public financing plans now under consideration have been designed specifically to overcome the barriers imposed by the courts on campaign finance laws, as well as to embrace the new small donor phenomenon seen in the 2008 election. The Fair Election Now Act creates a congressional public financing system with the following features:

- Qualified candidates are provided with ample public funding—more money than nearly all winning House or Senate candidates have raised from private sources—giving candidates the resources necessary to respond to attacks from corporate spenders.

- Participating candidates are not bound by contribution ceilings, which enables those who are the targets of excessive corporate spending to continue raising funds in small donations and to spend those funds without limit.

- In-state small donors who give $100 or less to a candidate have their contributions matched four-fold with public dollars, making small donors very important players in financing campaigns.

The Fair Elections Now Act (S. 752 and H.R. 1826) was introduced in the Senate by Sens. Dick Durbin (D-Ill.) and Arlen Specter (D-Pa.) and in the House of Representatives by Reps. John Larson (D-Conn.) and Walter Jones, Jr. (R-N.C.). The House bill has more than 130 cosponsors and should be passed now to provide congressional candidates with an alternative to corporate-funded elections in 2010.

It is critical that we modernize the presidential public financing system in advance of the 2012 presidential elections. Public financing is also key to addressing the corrosive influence of corporate spending in elections for local, judicial, and state candidates.

2. A Shareholder Protection Act and Other Legislative Remedies

Corporate executives should not be able to use other people's money - corporate funds from investors and shareholders, including funds that people invest into retirement accounts - to further their own political agendas without shareholders' consent or even knowledge.

In 2000, the United Kingdom adopted a shareholder protection act that requires CEOs to receive shareholder approval for political contributions to parties or candidates.

We need shareholder protections for the United States that are tailored to the American context and made considerably stronger than the UK law. One such proposal (H.R. 4537) has been introduced in the House by Rep. Michael Capuano (D-Mass.). Specifically, the Shareholder Protection Act of 2010 would do the following:

- Require majority approval by shareholders for corporate political expenditures over $10,000, including expenditures for campaign ads, electioneering communications, issue advocacy and ballot measure campaigns at the state and federal levels.

- Provide that brokers of other people's money cannot vote on behalf of their investors.

  It is important that the language in the bill is clarified to establish clearly that it also requires mutual funds to receive consent from their own shareholders for any vote on a corporate political expenditure, and pension funds to obtain consent from beneficiaries. A critical weakness of the UK system is that it allows institutional investors to vote on behalf of shareholders. As a result, only one resolution for corporate political expenditures has ever been rejected by UK shareholders since inception of the shareholder protection law in 2000. An effective shareholder protection act for the United States, where corporations have shown a far greater willingness to spend to influence politics, must close this loophole.

- Create public records, available on the Internet, that fully inform shareholders and the general public of the specific candidates, parties, or issues subject to corporate political spending.

Public Citizen supports other legislative measures to mitigate the damage from Citizens United, as well, including proposals to prohibit government contractors, corporations receiving specific benefits from the government (e.g., TARP recipients) and lobbyists from making political expenditures.

3. A Constitutional Amendment

Corporations are not people. They do not vote, and they should not have power to influence election outcomes. We should end the debate about the freedom of speech of for-profit corporations by amending the Constitution to make clear that First Amendment rights belong to natural persons and the press and do not apply to for-profit corporations.

Public Citizen does not take amending the Constitution lightly. The proposition requires careful deliberation. But the Roberts Court 5 justice majority has interpreted the First Amendment in a way that does grave harm to our democracy, and the Court shows every sign of extending the damage further. A constitutional amendment is the only way to overcome with finality the profound challenges to our democracy posed by the *Citizens United* decision.

As a starting point for deliberating an appropriate constitutional remedy, Public Citizen is proposing the following language:

Amendment XXVIII

The freedoms of speech and the press, and the right to assemble peaceably and to petition the Government for the redress of grievances, as protected by this Constitution, shall not encompass the speech, association, or other activities of any corporation or other artificial entity created for business purposes, except for a corporation or entity whose business is the publication or broadcasting of news, commentary, literature, music, entertainment, artistic expression, scientific, historical, or academic works, or other forms of information, when such corporation or entity is engaged in that business. A corporation or other artificial entity created for business purposes includes a corporation or entity that, although not itself engaged in business pursuits, receives the majority of its funding from other corporations or artificial entities created for business purposes.

The proposed amendment would clarify that the First Amendment rights guaranteed to human beings do not apply to for-profit corporations and other entities primarily funded by for-profit corporations. Members of the media would retain full First Amendment rights when engaged in publishing, broadcasting, and similar activities. Like other for-profit corporations, however, media organizations would not have the right to sponsor campaign ads or make campaign contributions.

Conclusion

Congress must move swiftly and decisively to mitigate the damage to our democratic system of governance posed by the *Citizens United* decision. Unlimited corporate spending will give wealthy special interests an overwhelming advantage in affecting election outcomes, further reduce the role of citizens and small donors in the election process, and contribute to the alienation of citizens from their government. Just as damaging will be the impact a corporation can have on the legislative process, with lawmakers keenly aware that their decision to support or oppose legislation of particular interest to a given corporation or business association may seal the lawmaker's fate in the next election.

Several steps must be taken to respond to Citizens United. The most significant include a strong shareholder protection act, robust public financing of elections, and a constitutional amendment declaring that for-profit corporations are not entitled to First Amendment protections.

Sincerely,

Robert Weissman, President, Public Citizen

David Arkush, Director, Public Citizen's Congress Watch

Craig Holman, Government Affairs Lobbyist, Public Citizen