

## **Supreme Court to Consider *Citizens United* Case Next Month, Amicus Briefs Due Today: An Historic Moment for Our Democracy and the Supreme Court, Part 1**

On September 9, 2009, the Supreme Court will hear oral argument in the case of *Citizens United v. Federal Election Commission*. The parties filed briefs in the case last week and *amicus* briefs were required to be filed by today.

“At stake for the country in the *Citizens United* case is whether the sixty-year old ban on corporate expenditures to directly influence federal elections will be declared unconstitutional, along with similar corporate bans in many states,” according to Democracy 21 President Fred Wertheimer. (The federal ban also exists for labor unions, although it is not directly at issue in this case.)

“The *Citizens United* case represents an historic moment for our democracy and for the Supreme Court,” Wertheimer said.

Wertheimer is one of the attorneys on an *amicus* brief filed by the Campaign Legal Center, Democracy 21 and five other groups in support of the ban. (See below for a list of fourteen *amicus* briefs filed in support of the constitutionality of the corporate expenditure ban. These *amicus* briefs, along with the briefs filed by the parties, will be available on the Democracy 21 web site at [www.democracy21.org](http://www.democracy21.org).)

### **Stakes Involved in the Case**

“If the Supreme Court declares the corporate expenditure ban unconstitutional, it will unleash the immense aggregate wealth of corporations in America to flood and overwhelm federal campaigns, with disastrous consequences for the country and our electoral system,” Wertheimer said.

“Such a decision would open the door to corporations gaining enormous undue influence over the decisions made by federal officeholders, based on the extraordinary amounts of money corporations would be able to spend to defeat or elect federal candidates,” Wertheimer stated.

According to an Internal Revenue Service estimate in 2005, the total net worth of U.S. corporations was \$23.5 trillion and their post-tax profits were nearly \$1 trillion.

“Huge corporate expenditures in campaigns would have the capacity to exercise powerful corrupting influences over government policy decisions. They would also have the ability to drown out and overwhelm the voices of citizens,” Wertheimer said.

Unlimited corporate spending to support or oppose federal candidates could have a huge, if not dispositive, effect on the outcome of House and Senate races.

“If a corporation spent \$5 million or \$10 million or more to support a member of Congress who did the corporation’s bidding, or to oppose a member of Congress who refused to abide by the corporation’s wishes, this could easily be the determinative factor in a congressional election,”

Wertheimer stated.

“Even the threat of enormous campaign spending by a corporation could dramatically increase its influence on legislation with members of Congress – even if the threat was never explicitly voiced.

As *The New York Times* aptly noted in a recent editorial (July 5, 2009), overturning the ban on corporate expenditures would be “a disaster for democracy.”

The ban on corporate expenditures in federal campaigns was upheld by the Supreme Court nearly 20 years ago in the *Austin* case (1990) and reaffirmed in the *McConnell* case in 2003, after being cited approvingly by the Court in earlier cases.

Both the *Austin* and *McConnell* decisions were cited and relied on just two years ago in a decision written by Chief Justice John Roberts in the *Wisconsin Right to Life* case.

The effort to keep corporate funds out of campaigns dates back more than a century to 1907 when Congress banned corporations from making contributions to federal candidates. The ban on corporate contributions was extended in 1947 to prohibit corporate expenditures in federal campaigns. Similar restrictions were enacted in 1947 for labor unions.

These longstanding restrictions are based on a fundamental democratic principle: individuals elect our representatives and individuals should provide the private financing for federal elections, not corporations or other artificial entities.

### **Core Judicial Principles**

“Also at stake in the *Citizens United* case is whether the Supreme Court is prepared to issue a radical decision that would ignore core judicial principles that are applicable to this case,” according to Wertheimer.

“These longstanding core principles include respect for and deference to past precedents, or *stare decisis*, and avoiding decisions on broad constitutional grounds when lesser grounds are available to decide the case, or constitutional avoidance,” Wertheimer stated.

Here, the Supreme Court has already decided that the ban on corporate expenditures is constitutional. It did so in its 1990 decision in the *Austin* case, and reaffirmed that decision in the *McConnell* case in 2003.

The Court has often said that overruling a precedent is an extraordinary action that requires “special circumstances” – such as where a decision proves to be unworkable, or where the factual basis for the decision has changed or ended up to be unfounded, or where recent decisions have left the precedent as an abandoned doctrine.

No “special circumstances” exist in the *Citizens United* case that would justify overturning past precedent. In these circumstances, overruling *Austin* and *McConnell* would be contrary to the

fundamental principle that the Court should respect its precedents. It would also deeply disturb settled expectations about the role of corporations in the political process that have been relied on by Congress and the states.

Similarly, it is a longstanding principle that the Court will not reach out to decide constitutional questions that are not necessary to the resolution of a case. Here, *Citizens United* did not even ask the lower court to rule on the constitutionality of the ban on corporate expenditures.

Instead, it presented a variety of narrower grounds for deciding the case in its favor – such as whether the prohibition on “electioneering communications” by a corporation applies to a non-profit like *Citizens United* and whether it applies to a movie distributed by on-demand cablecasting.

Under the prudential principle of “constitutional avoidance,” if the Court were to rule for *Citizens United*, it should not reach for broad constitutional grounds to do by adopting a sweeping ruling to overturn *Austin* and *McConnell*, when there are narrower grounds available to decide the case.

### **Court Broadens Case**

The *Citizens United* case was originally argued on March 24, 2009 before the Supreme Court and focused on a narrow question: whether *Citizens United*, a nonprofit corporation, could constitutionally be prohibited from paying for a particular communication that it wished to make.

On June 29, 2009, its last scheduled day for the term, the Court issued an order requiring further briefing and additional oral argument in the case on a much broader and far reaching question: whether the *Austin* decision should be overturned and the ban on corporate expenditures in federal campaigns declared unconstitutional.

*Washington Post* columnist E.J. Dionne has described the Supreme Court’s expansion of the case as “a remarkable exercise of judicial overreach.”

The Supreme Court also asked for briefing on whether the portion of the *McConnell* decision that upheld the constitutionality of the ban in the Bipartisan Campaign Reform Act of 2002 (BCRA) on the use of corporate funds to pay for “electioneering communications” should be overturned.

(The portions of the *McConnell* decision that upheld the BCRA ban on political soft money in federal campaigns are not at issue in this case.)

In its 2003 decision in *McConnell*, the Supreme Court reaffirmed the *Austin* decision in upholding the constitutionality of the “electioneering communications” provisions of BCRA. These provisions prohibit the use of corporate and labor union expenditures to pay for broadcast communications mentioning federal candidates close to an election. These BCRA provisions were narrowed in their application in the 2007 *Wisconsin Right to Life* decision written by Chief Justice Roberts.

If Chief Justice Roberts were to support overturning the portions of the *McConnell* decision that upheld the “electioneering communications” provisions, he would be voting to reverse the *WRTL* decision that he wrote just two years ago.

### ***Amicus* Briefs**

*Amicus* briefs are being filed by a broad array of individuals and groups in support of the constitutionality of the ban on corporate expenditures in campaigns, including by:

Senators John McCain (R-AZ) and Russell Feingold (D-WI) and former Representatives Christopher Shays (R-CT) and Marty Meehan (D-MA), the sponsors of the Bipartisan Campaign Reform Act of 2002;

Twenty-six State Attorney Generals;

The Committee for Economic Development, a national organization of more than 200 business leaders and university presidents;

Campaign Legal Center, Democracy 21, Common Cause, U.S. PIRG, Americans for Reform, League of United Latin American Citizens and Asian American Legal Defense and Education Fund;

Representatives Chris Van Hollen (D-MD), David Price (D-NC), Mike Castle (R-DE) and John Lewis (D-GA), long-time supporters of campaign finance reform;

Democratic National Committee;

Campaign Finance Scholars Anthony Corrado, Norm Ornstein, Tom Mann and Dan Ortiz

Former Leaders of the ACLU

Justice at Stake, an organization that supports effective campaign finance laws for state judicial elections

The Brennan Center for Justice at NYU, Center for Independent Media

The League of Women Voters, Constitutional Accountability Center

Independent Sector

American Independent Business Alliance

Center for Public Accountability

The congressional sponsors of BCRA and the Solicitor General of the United States, Elena Kagan, have jointly asked the Supreme Court to allocate 10 minutes of the Solicitor General's 30 minutes for oral argument in *Citizens United* to former U.S. Solicitor General Seth Waxman.

Waxman serves as lead counsel for the *amicus* brief filed by the BCRA sponsors and argued in the Supreme Court on behalf of the sponsors in support of BCRA in *McConnell v. Federal Election Commission*. The Court upheld the constitutionality of BCRA in the *McConnell* case, including provisions that are now before the Court in the *Citizens United* case.

## **The *Citizens United* Case: An Historic Moment for Our Democracy and the Supreme Court, Part 2**

### **Excerpts on Core Judicial Principles Applicable to the Case from Briefs Filed by U.S. Solicitor General and by Congressional Sponsors of Bipartisan Campaign Reform Act of 2002**

On September 9, 2009, the Supreme Court will hear oral argument in *Citizens United v. Federal Election Commission*.

The case raises a question of central importance for our elections and democracy: whether the *Austin* decision by the Supreme Court nearly 20 years ago that upheld the constitutionality of a ban on spending corporate treasury funds to influence elections should be overturned.

“If the Supreme Court were to declare the corporate expenditure ban unconstitutional, it would unleash the immense aggregate wealth of corporations in America to flood federal elections and buy influence with federal officeholders,” according to Democracy 21 President Fred Wertheimer. “This would dramatically change the character of our elections, with disastrous consequences for citizens.”

This release contains excerpts from the two main briefs filed to defend the corporate expenditure ban. The excerpts focus on core judicial principles that support the law.

The briefs were filed by U.S. Solicitor General Elena Kagan for the government and by former U.S. Solicitor General Seth Waxman for the congressional sponsors of the Bipartisan Campaign Reform Act of 2002 (BCRA), Senators John McCain (R-AZ) and Russell Feingold (D-WI) and former Representatives Christopher Shays (R-CT) and Marty Meehan (D-MA). Scott Nelson of Public Citizen Litigation Group co-authored the BCRA sponsors' *amicus* brief with Waxman.

The full briefs are available at [www.democracy21.org](http://www.democracy21.org) as is an earlier [release](#) on the *Citizens United* case issued on July 31, 2009 by Democracy 21.

The *Citizens United* case was originally argued in the Supreme Court on March 24, 2009. On June 29, 2009, the Court issued an order requesting further briefing and oral argument on the far reaching question of whether the *Austin* decision should be overruled and whether a portion of

the *McConnell* decision in 2003 upholding BCRA's ban on the use of corporate funds to pay for "electioneering communications" should be overturned.

These issues had not been raised when the lower federal court heard the case.

### **History of Corporate Expenditure Ban**

In 1907, Congress banned corporate contributions in federal elections. In 1947, Congress enacted the Taft-Hartley Act, which included a ban on corporate expenditures in federal elections and a similar ban on labor union contributions and expenditures.

Bans on corporate expenditures in state elections date back further to the late 1890s.

Legislative history shows that the federal corporate expenditure ban enacted in 1947 was intended to reaffirm the original scope of the 1907 law, which, according to Senator Robert Taft, included a ban on "indirect" corporate contributions, or corporate expenditures, as well as on direct corporate contributions.

"It is important to recognize that the corporate expenditure ban is a ban on the use of *corporate treasury funds* in federal campaigns," said Wertheimer.

"It is not a ban on speech," Wertheimer stated.

Corporations are free to speak in federal elections but they must do so through their PACs that raise voluntary contributions from individuals, subject to a \$5,000 annual limit per individual. What corporations cannot do is use their corporate wealth to influence federal elections.

This reflects a century-old democratic principle: individuals vote and only individuals should provide the private funds for our elections, not corporations or other artificial entities.

According to an Internal Revenue Service estimate in 2005, the total net worth of U.S. corporations was \$23.5 trillion and their post-tax profits were nearly \$1 trillion. It is this immense corporate wealth that corporations cannot spend in federal campaigns.

### ***Stare Decisis***

In his Senate confirmation hearings, Chief Justice Roberts addressed the judicial principle of *stare decisis*, a Latin term referring to the obligation of courts to follow their own precedents. He testified that part of the "humility" of an appropriately "modest judge" is "respect for precedent that forms part of the rule of law that the judge is obligated to apply under principles of *stare decisis*."

Chief Justice Roberts also testified:

I do think that it is a jolt to the legal system when you overrule a precedent. Precedent plays an important role in promoting stability and evenhandedness. It is not enough -- and

the court has emphasized this on several occasions -- it is not enough that you may think the prior decision was wrongly decided. That really doesn't answer the question, it just poses the question. And you do look at these other factors, like settled expectations, like the legitimacy of the court, like whether a particular precedent is workable or not, whether a precedent has been eroded by subsequent developments. All of those factors go into the determination of whether to revisit a precedent under the principles of *stare decisis*.

The briefs of the Solicitor General and the BCRA sponsors make clear that the application of the standards cited by Chief Justice Roberts in his confirmation testimony leads to the conclusion that the principle of *stare decisis* should prevail in this case and *Austin* should not be overruled.

According to the brief of the Solicitor General:

Congress has prohibited corporate treasury contributions to federal candidates since 1907, and since 1947 it has barred the use of corporate treasury funds for independent expenditures in federal election campaigns. That longstanding congressional judgment, on a matter (the conduct of federal elections) as to which federal legislators have particular expertise, is entitled to this Court's respect.

At the time *Austin* was decided, moreover, 20 States already barred electioneering expenditures by corporations. J.S. at 16 n.13, *Austin, supra* (No. 88-1569). Like 2 U.S.C. 441b, many of those state regimes (including the Michigan law at issue in *Austin*) forbade the use of corporate treasury funds for electioneering but authorized corporations and unions to create and administer segregated funds to finance election-related spending. Because overruling *Austin* would negate a longstanding and central principle of federal and state campaign-finance law, concerns of *stare decisis* have especial force.

The BCRA sponsors' brief states:

Overruling *Austin* or *McConnell* in this case would be unwarranted and unseemly. *Stare decisis* requires respect for precedents absent a special justification for overruling them. No such justification exists. *Austin* and *McConnell* (and their antecedents) are vital cornerstones of modern campaign finance regulation and have engendered much reliance. Overruling them would severely jolt our political system by suddenly overturning not only federal statutes that have stood for decades, but also laws of many States.

The foundations of *Austin* and *McConnell* have not been undermined by precedential development, and their holdings have not proved unworkable. Nor does the Court have new information that undermines their factual basis; there is *no* factual record in this case that even bears on, let alone undermines, the justifications for the longstanding restrictions on the use of corporate treasury funds for express candidate advocacy.

### **Constitutional Avoidance**

The judicial principle of constitutional avoidance requires the Court to avoid deciding cases on broad constitutional grounds when narrower grounds are available for resolving the case.

The BCRA sponsors' brief states:

Citizens United has advocated a number of much narrower grounds for deciding the case in its favor, some of which do not require constitutional adjudication at all. See *Pipefitters Local Union No. 562 v. United States*, 407 U.S. 385, 400-401 (1972). Its arguments question whether its film contains the functional equivalent of express advocacy under the *WRTL* standard, whether that standard can constitutionally be applied to “on-demand” television programming, and whether the FEC’s regulations even reach on-demand programming. Citizens United has also argued that the criteria set forth in *MCFL* should be expanded to cover nonprofit corporations that have received some contributions from business corporations. Under such an approach, nonprofit corporations whose receipts from business corporations are so modest that they plainly are not being used as conduits would not need to establish and maintain a PAC to fund express advocacy or its functional equivalent.

We continue to believe that the judgment below should be affirmed; but if this Court concludes otherwise, a decision on any one of those narrower bases, as opposed to a wholesale overruling of *Austin* and *McConnell*, would be more consistent with the “venerable principle,” *Webster v. Reproductive Health Servs.*, 492 U.S. 490, 525 (1989) (O’Connor, J., concurring), that the Court will not “formulate a rule of constitutional law broader than is required by the precise facts to which it is to be applied.” *Ashwander v. TVA*, 297 U.S. 288, 347 (1936) (Brandeis, J., concurring).

### **Reliance on Supreme Court Decisions**

Chief Justice John Roberts also testified during his Senate confirmation hearings, “People expect that the law is going to be what the court has told them the law is going to be. And that’s an important consideration.”

According to the brief filed by the Solicitor General:

For the Court to overrule *Austin* now would open the political system, at every level of our representative democracy, to a form of corporate influence that federal law has proscribed since 1947. And it would do so in direct affront to Congress, which conducted years of fact finding and debate in reliance on *Austin*’s holding that corporations may constitutionally be required to finance electoral advocacy with funds donated specifically for political purposes.

The brief of the Solicitor General brief also states:

A decision overruling *Austin* and the relevant portion of *McConnell* would call into question the constitutionality of all federal and state regulation of all independent corporate electoral advocacy, including a federal law dating back to 1947 and the laws of dozens of States. Overruling *Austin* and *McConnell* would fundamentally alter the legal rules governing participation of corporations—including the Nation’s largest for-profit

corporations—in electoral campaigns, and would make vast sums of corporate money available for overt electioneering.

The BCRA sponsors’ brief states:

Overruling *Austin* and *McConnell* would deeply disturb settled expectations regarding the role of corporations in the electoral process. It would overturn not only BCRA’s restriction on use of corporate and union treasury funds for electioneering communications, but also the provision originating in the Taft-Hartley Act of 1947 that requires corporations and unions to use segregated funds (PACs) for expenditures in connection with federal elections. 2 U.S.C. § 441b.

It would also—at a stroke—invalidate laws of twenty-two States that prohibit corporations from using treasury funds for campaign advocacy and jeopardize statutes in two others that strictly limit corporate expenditures. That alone is a powerful reason for adhering to precedent. “*Stare decisis* has special force when legislators or citizens ‘have acted in reliance on a previous decision, for in this instance overruling the decision would dislodge settled rights and expectations or require an extensive legislative response.’” *Hubbard v. United States*, 514 U.S. 695, 714 (1995).

### **The *Citizens United* Case, Part 3: Will the Supreme Court Return America to the 19<sup>th</sup> Century?**

By Fred Wertheimer  
President, Democracy 21

In 1891, Kentucky banned corporations from spending their funds in Kentucky state elections.

By 1897, Florida, Missouri, Nebraska and Tennessee had enacted similar corporate spending prohibitions in their state elections, and many more states would follow, according to a brief filed in the Supreme Court by 26 state Attorneys General in *Citizens United v. Federal Election Commission*.

*Citizens United* is scheduled for oral argument in the Supreme Court on September 9, 2009 and will consider whether to overturn the Court’s 1990 decision in the *Austin* case, which upheld the constitutionality of laws banning corporate expenditures in elections.

The state AGs' brief supports the constitutionality of such bans, stating, "Corporate electioneering corrupts the relationship between public officials and the public interest by encouraging political dependence on narrowly concentrated private interests embodied in the corporate form" and does so "at the expense of the broader and more dispersed interests represented by the people themselves."

It did not take long for the federal government to follow the lead taken in the states.

In 1907, in response to major corporate scandals at the national level, Congress enacted a law to prohibit corporations from making contributions to federal candidates.

Forty years later, in enacting the Taft-Hartley Act, Congress added language to extend the ban to expenditures by corporations. In doing so, Senator Robert Taft explained that the new language simply affirmed what had been understood to be the coverage of the 1907 ban – that it prohibited corporate expenditures, or indirect contributions, as well as direct corporate contributions.

The constitutionality of banning corporate expenditures in campaigns was upheld by the Supreme Court in the *Austin* decision in 1990, which followed a number of earlier cases in which the Court had commented favorably on the expenditure ban.

The ban's constitutionality was reaffirmed by the Court in the *McConnell* decision in 2003, stating, "Since our decision in *Buckley*, Congress' power to prohibit corporations and unions from using funds in their treasuries to finance advertisements expressly advocating the election or defeat of candidates in federal elections has been firmly embedded in our law."

Nevertheless, the Supreme Court announced on June 29, 2009 that it wanted further briefing and oral argument in the *Citizens United* case, originally argued on March 24, on the far reaching constitutional question of whether the *Austin* decision should be overturned and the federal ban on corporate expenditures should be declared unconstitutional.

The Court also asked the parties to brief and argue the question of whether the corporate spending restrictions on "electioneering communications" enacted in the Bipartisan Campaign Reform Act of 2002 (BCRA) should be declared unconstitutional. The BCRA provision was enacted to prevent the use of "sham" issue ads to circumvent the longstanding ban on corporate expenditures in federal campaigns.

The *Citizens United* case had previously been focused on a much narrower question: whether payments by Citizens United to distribute *Hillary: The Movie* by on-demand cablecast

fell within the scope of the BCRA provisions governing corporate spending on “electioneering communications,” and if so whether the provision was constitutional as applied to these payments.

The same BCRA provision was upheld as constitutional in the *McConnell* decision issued by the Court just six years ago. The *McConnell* decision was narrowed in scope but otherwise reaffirmed in an opinion written in 2007 by Chief Justice Roberts in the *WRTL* case.

If Chief Justice Roberts were to vote now to overturn *McConnell* and declare the BCRA “electioneering communications” provision unconstitutional, he would be voting to overturn a decision he wrote just two years ago in the *WRTL* case.

A decision by the Supreme Court to overturn the *Austin* decision would dramatically change the character of our elections and open them up to domination by the immense aggregate wealth of corporations. Corporations would become free to use their treasury funds to conduct unlimited direct campaigns to elect and defeat federal candidates.

The Internal Revenue Service estimated in 2005 that the total net worth of U.S. corporations was \$23.5 trillion and their post-tax profits were nearly \$1 trillion.

Overturning *Austin* would also fundamentally change the character of our democracy, opening the door to massive corporate influence-buying affecting a wide range of government decisions.

Just imagine the impact on a member of Congress in the midst of deciding what to do on health care or climate control or banking legislation if the Member knew that dozens of companies in affected industries could each spend millions of dollars of corporate wealth on full-scale campaigns to defeat or elect the Member, depending on how the Member voted on the issues.

There is no question that unlimited corporate expenditures in federal campaigns would exercise undue influence over federal officeholders, as well as create the appearance of such influence.

This problem was recognized in the *McConnell* case, where the record in the case showed that “federal office-holders and candidates were aware of and felt indebted to corporations and unions that financed electioneering advertisements on their behalf or against their opponents,” according to the brief filed by the U.S. Solicitor General in the *Citizens United* case.

The *McConnell* record dealt with sham “issue ads” that were in reality campaign ads and were being used by corporations to circumvent the ban on corporate spending in federal elections. These so-called “issue ads” led to the new BCRA corporate restrictions.

The Solicitor General’s brief stated:

[T]he record compiled in the *McConnell* case indicated that *corporate* spending on candidate-related speech, even if conducted independent of candidates, had come to be used as a means of currying favor with and attempting to influence federal office-holders.

To overturn *Austin* and *McConnell* in the *Citizens United* case would be an unjustifiable rejection of the long standing judicial principle of *stare decisis*, a Latin term referring to the obligation of courts to follow their own precedents.

In testifying at his confirmation hearings, Chief Justice Roberts recognized the importance of *stare decisis*.

He stated, “I do think that it is a jolt to the legal system when you overrule a precedent. Precedent plays an important role in promoting stability and evenhandedness.” He continued, “It is not enough -- and the court has emphasized this on several occasions -- it is not enough that you may think the prior decision was wrongly decided.”

It is hard too imagine anything that would be more destabilizing and more of a jolt to the legal system than for the Court to do away with federal and state laws that have served for a century to protect democracy against corruption, and that have been upheld and reaffirmed in past Supreme Court decisions.

As the Supreme Court said in *McConnell* just six years ago, in reaffirming *Austin*, Congress’s power to ban corporate expenditures is “firmly embedded in our law.”

The brief filed by the BCRA congressional sponsors in *Citizens United* states,

Overruling *Austin* or *McConnell* in this case would be unwarranted and unseemly. *Stare decisis* requires respect for precedents absent a special justification for overruling them. No such justification exists. *Austin* and *McConnell* (and their antecedents) are vital cornerstones of modern campaign finance regulation and have engendered much reliance.

The *Citizens United* case provides no exceptional circumstances to justify such a radical decision by the Supreme Court, all the more because there are much narrower grounds for deciding the case. The judicial doctrine of constitutional avoidance calls for the Supreme Court

to refrain from deciding cases on broad constitutional grounds when narrower grounds are available. The doctrine is certainly applicable in *Citizens United*.

And surely past Supreme Court decisions should not be overturned purely because the makeup of the Court has changed, as it did in 2005 and 2006 when Chief Justice Roberts and Justice Samuel Alito respectively joined the Court.

It has been a core principle of our democracy, dating back more than a century to 1907, that corporate wealth should not be used in federal elections. This principle is based on the fundamental idea that individuals vote to choose our federal officeholders and only individuals should provide the private financing to elect these officeholders, not corporations or other artificial entities.

This approach does not stop corporations from being involved in federal elections, just from using their immense corporate wealth to do so. Corporations can participate in federal campaigns through their PACs which raise contributions voluntarily given by *individuals* for the purpose of influencing elections, subject to limits on how much each individual can contribute.

It makes no sense to say that after a century, a constitutional right has suddenly been discovered for corporations to unleash their immense aggregate wealth to flood our elections and thereby to purchase influence with elected officials.

There is simply no basis for the Supreme Court to overturn *Austin* and *McConnell* and declare unconstitutional long established federal and state bans on corporate expenditures in elections.

This op-ed article is Part 3 of a series of releases being issued by Democracy 21 on the *Citizens United* case. Parts 1 and 2 are available at [www.democracy21.org](http://www.democracy21.org).

Democracy 21 and the Campaign Legal Center, joined by five other groups, filed an *amicus* brief in the *Citizens United* case in support of the constitutionality of banning corporate expenditures in campaigns, upheld in the *Austin* case, and of the BCRA “electioneering communications” provisions, upheld in the *McConnell* case. Briefs filed by the parties and the *amicus* briefs filed in support of the constitutionality of corporate expenditure bans and the BCRA provisions also are available at [www.democracy21.org](http://www.democracy21.org).

## **The *Citizens United* Case, Part 4: Key Points Made in Briefs Supporting the Ban on Corporate Expenditures in Campaigns**

This background memo on *Citizens United v. Federal Election Commission* is Part 4 of a series of Democracy 21 releases on the case. It summarizes key points made in briefs to the Supreme Court on the constitutionality of the federal ban on corporate expenditures in campaigns, and on why the Court's decisions in *Austin* and *McConnell* that have upheld corporate campaign expenditure bans should not be overturned. Parts 1, 2 and 3 are available at [www.democracy21.org](http://www.democracy21.org).

On September 9, 2009, the Supreme Court will again hear oral argument in the *Citizens United* case. The Court originally heard argument in the case on March 24, 2009, but on June 29, 2009 asked for further briefing and argument.

The specific issue that the Court has asked the parties to address is the following:

In order to dispose of the *Citizens United* case, should the Court overrule either or both of its decisions in *Austin v. Michigan Chamber of Commerce* (1990), upholding the constitutionality of a ban on corporate expenditures in campaigns, and in *McConnell v. Federal Election Commission* (1990), upholding the constitutionality of a ban on corporate expenditures to pay for “electioneering communications” broadcast in the immediate pre-election period.

This background memorandum includes quotes from briefs supporting the constitutionality of banning corporate campaign expenditures filed by U.S. Solicitor General Elena Kagan and by a legal team, led by former U.S. Solicitor General Seth Waxman, representing the congressional sponsors of the Bipartisan Campaign Reform Act of 2002 (BCRA).

### **Bans on Corporate Expenditures in Campaigns Date Back to 1891**

In 1891, Kentucky banned corporations from spending their funds in Kentucky state elections. By 1897, Florida, Missouri, Nebraska and Tennessee had enacted similar corporate spending prohibitions in their state elections, and many more states would follow, according to a brief filed by 26 state Attorneys General in *Citizens United*.

In 1907, in response to major corporate scandals at the national level, Congress enacted a law to prohibit corporations from making contributions to federal candidates.

In 1947, in enacting the Taft-Hartley Act, Congress added language to explicitly ban corporate expenditures in federal campaigns. In doing so, Senator Robert Taft made clear that the purpose of the new language was simply to affirm what had been understood to always be the case – that the 1907 corporate ban had prohibited corporate expenditures, or indirect contributions, as well as direct corporate contributions. [The 1947 law also banned labor union contributions and expenditures.]

## **Ban on Corporate Expenditures in Campaigns Upheld by Supreme Court as Constitutional and as “Firmly Embedded in our Law”**

The constitutionality of the ban on corporate campaign expenditures was upheld by the Supreme Court in the *Austin* decision in 1990 and reaffirmed by the Court in the *McConnell* decision in 2003. The corporate expenditure ban had been commented on favorably by the Court in earlier cases.

In the *McConnell* case, the Court recognized its long-standing support for the constitutionality of bans on corporate campaign expenditures going back to its *Buckley* decision in 1976:

Since our decision in *Buckley*, Congress' power to prohibit corporations and unions from using funds in their treasuries to finance advertisements expressly advocating the election or defeat of candidates in federal elections *has been firmly embedded in our law*. (emphasis added).

In 1982, in the *National Right to Work Committee* case, the Supreme Court stated regarding the federal ban on corporate and labor union expenditures:

The careful legislative adjustment of the federal electoral laws, in a cautious advance, step by step, to account for the particular legal and economic attributes of corporations and labor organizations warrants considerable deference...[I]t also reflects a permissible assessment of the dangers posed by those entities to the electoral process.

In order to prevent both actual and apparent corruption, Congress aimed a part of its regulatory scheme at corporations. The statute reflects a legislative judgment that the special characteristics of the corporate structure require particularly careful regulation...Nor will we second guess a legislative determination as to the need for prophylactic measures where corruption is the evil feared. As we said in *California Medical Association v. FEC*, 453 U.S. 182, 201 (1981), the ‘differing structures and purposes; of different entities ‘may require different forms of regulation in order to protect the integrity of the electoral process...’”

The governmental interest in preventing both actual corruption and the appearance of corruption of elected representatives has long been recognized, *First National Bank of Boston v. Bellotti*, *supra*, and there is no reason why it may not in this case be accomplished by treating unions, corporations and similar organizations different from individuals.

In 1986, in the *Massachusetts Citizens for Life* case, the Supreme Court stated regarding the federal ban on corporate expenditures in campaigns:

This concern over the corrosive influence of concentrated corporate wealth reflects the conviction that it is important to protect the integrity of the marketplace of political ideas...

Direct corporate spending on political activity raises the prospect that resources amassed in the economic marketplace may be used to provide an unfair advantage in the political marketplace...The resources in the treasury of a business corporation...are not an indication of popular support for the corporation's political ideas. They reflect instead the economically motivated decisions of investors and customers. The availability of these resources may make a corporation a formidable political presence, even though the power of the corporation may be no reflection of the power of its ideas.

By requiring that corporate independent expenditures be financed through a political committee expressly established to engage in campaign spending, § 441b seeks to prevent this threat to the political marketplace. The resources available to this fund, as opposed to the corporate treasury, in fact reflect popular support for the political positions of the committee.

### ***Stare Decisis* and Chief Justice Roberts**

In testifying at his confirmation hearings, Chief Justice Roberts recognized the importance of the judicial doctrine of *stare decisis*, the obligation of courts to follow past decisions unless there are exceptional circumstances for not doing so:

I do think that it is a jolt to the legal system when you overrule a precedent. Precedent plays an important role in promoting stability and evenhandedness. It is not enough -- and the court has emphasized this on several occasions -- it is not enough that you may think the prior decision was wrongly decided. That really doesn't answer the question, it just poses the question. And you do look at these other factors, like settled expectations, like the legitimacy of the court, like whether a particular precedent is workable or not, whether a precedent has been eroded by subsequent developments. All of those factors go into the determination of whether to revisit a precedent under the principles of *stare decisis*.

The brief filed by the BCRA congressional sponsors spells out the absence of the exceptional circumstances necessary to justify ignoring past precedents in the *Citizens United* case, stating:

Overruling *Austin* or *McConnell* in this case would be unwarranted and unseemly. *Stare decisis* requires respect for precedents absent a special justification for overruling them. No such justification exists. *Austin* and *McConnell* (and their antecedents) are vital cornerstones of modern campaign finance regulation and have engendered much reliance. Overruling them would severely jolt our political system by suddenly overturning not only federal statutes that have stood for decades, but also laws of many States. The foundations of *Austin* and *McConnell* have not been undermined by precedential development, and their holdings have not proved unworkable. Nor does the Court have new information that undermines their factual basis; there is *no* factual record in this case that even bears on, let alone undermines, the justifications for the longstanding restrictions on the use of corporate treasury funds for express candidate advocacy.

The BCRA congressional sponsors' brief further states:

Given the unusual circumstances here, overruling precedents may well suggest that the outcome rested on “a ground no firmer than a change in [the Court’s] membership,” which would “invite[] the popular misconception that this institution is little different from the two political branches of the Government. No misconception could do more lasting injury to this Court and to the system of law which it is our abiding mission to serve.” *Mitchell v. W.T. Grant Co.*, 416 U.S. 600, 636 (1974) (Stewart, J., dissenting). Such a decision could threaten the Court’s legitimacy in the eyes of the Nation and undermine the respect this Court’s precedents should command.

The brief filed by the Solicitor General similarly argues for the application of *stare decisis* in this case:

Congress has prohibited corporate treasury contributions to federal candidates since 1907, and since 1947 it has barred the use of corporate treasury funds for independent expenditures in federal election campaigns. That longstanding congressional judgment, on a matter (the conduct of federal elections) as to which federal legislators have particular expertise, is entitled to this Court’s respect.

At the time *Austin* was decided, moreover, 20 States already barred electioneering expenditures by corporations. J.S. at 16 n.13, *Austin, supra* (No. 88-1569). Like 2 U.S.C. 441b, many of those state regimes (including the Michigan law at issue in *Austin*) forbade the use of corporate treasury funds for electioneering but authorized corporations and unions to create and administer segregated funds to finance election-related spending. Because overruling *Austin* would negate a longstanding and central principle of federal and state campaign-finance law, concerns of *stare decisis* have especial force.

### **Settled Expectations**

Chief Justice John Roberts also testified during his Senate confirmation hearings, “People expect that the law is going to be what the court has told them the law is going to be. And that’s an important consideration.”

The BCRA sponsors’ brief states:

Overruling *Austin* and *McConnell* would deeply disturb settled expectations regarding the role of corporations in the electoral process. It would overturn not only BCRA’s restriction on use of corporate and union treasury funds for electioneering communications, but also the provision originating in the Taft-Hartley Act of 1947 that requires corporations and unions to use segregated funds (PACs) for expenditures in connection with federal elections. 2 U.S.C. § 441b.

It would also—at a stroke—invalidate laws of twenty-two States that prohibit corporations from using treasury funds for campaign advocacy and jeopardize statutes in two others that strictly limit corporate expenditures. That alone is a powerful reason for adhering to precedent. “*Stare decisis* has special force when legislators or citizens ‘have acted in reliance on a previous decision, for in this instance overruling the decision would dislodge

settled rights and expectations or require an extensive legislative response.’’ *Hubbard v. United States*, 514 U.S. 695, 714 (1995).

The brief filed by the Solicitor General states:

For the Court to overrule *Austin* now would open the political system, at every level of our representative democracy, to a form of corporate influence that federal law has proscribed since 1947. And it would do so in direct affront to Congress, which conducted years of fact finding and debate in reliance on *Austin*’s holding that corporations may constitutionally be required to finance electoral advocacy with funds donated specifically for political purposes.

The Solicitor General’s brief further states:

A decision overruling *Austin* and the relevant portion of *McConnell* would call into question the constitutionality of all federal and state regulation of all independent corporate electoral advocacy, including a federal law dating back to 1947, and the laws of dozens of States. Overruling *Austin* and *McConnell* would fundamentally alter the legal rules governing participation of corporations—including the Nation’s largest for-profit corporations—in electoral campaigns, and would make vast sums of corporate money available for overt electioneering.

### **Chief Justice Roberts Overruling Himself**

The *Citizens United* case was originally focused on a narrow question: whether payments by Citizens United to distribute *Hillary: The Movie* by on-demand cablecast fell within the scope of the BCRA provisions governing corporate spending on “electioneering communications,” and if so whether the provisions were constitutional as applied to these payments.

The same BCRA “electioneering communications” provisions involved in *Citizens United* were upheld as constitutional in the *McConnell* decision and then narrowed in scope but otherwise reaffirmed in an opinion written in 2007 by Chief Justice Roberts in the *Wisconsin Right to Life (WRTL)* case.

If Chief Justice Roberts were to vote now to overturn the *McConnell* decision and declare the BCRA “electioneering communications” provisions unconstitutional, he would be voting to overturn a decision he himself wrote just two years ago in the *WRTL* case.

### **The Constitutional Avoidance Doctrine**

Overturning the *Austin* and *McConnell* decisions on corporate campaign expenditures would require the Court to ignore the judicial doctrine of “constitutional avoidance.” This doctrine provides that the Court should not decide a case on broad constitutional grounds when there are narrower grounds for resolving the case, such as there are in the *Citizens United* case.

The BCRA sponsors’ brief states:

Citizens United has advocated a number of much narrower grounds for deciding the case in its favor, some of which do not require constitutional adjudication at all. See *Pipefitters Local Union No. 562 v. United States*, 407 U.S. 385, 400-401 (1972). Its arguments question whether its film contains the functional equivalent of express advocacy under the *WRTL* standard, whether that standard can constitutionally be applied to “on-demand” television programming, and whether the FEC’s regulations even reach on-demand programming. Citizens United has also argued that the criteria set forth in *MCFL* should be expanded to cover nonprofit corporations that have received some contributions from business corporations. Under such an approach, nonprofit corporations whose receipts from business corporations are so modest that they plainly are not being used as conduits would not need to establish and maintain a PAC to fund express advocacy or its functional equivalent.

We continue to believe that the judgment below should be affirmed; but if this Court concludes otherwise, a decision on any one of those narrower bases, as opposed to a wholesale overruling of *Austin* and *McConnell*, would be more consistent with the “venerable principle,” *Webster v. Reproductive Health Servs.*, 492 U.S. 490, 525 (1989) (O’Connor, J., concurring), that the Court will not “formulate a rule of constitutional law broader than is required by the precise facts to which it is to be applied.” *Ashwander v. TVA*, 297 U.S. 288, 347 (1936) (Brandeis, J., concurring).

### **The *Austin* and *McConnell* Cases Were Correctly Decided on the Merits**

The *Austin* and *McConnell* cases were correctly decided on the merits and the decisions remain sound today.

According to the brief filed by the Solicitor General:

The Court in *Austin* held that corporations may constitutionally be prohibited from financing electoral advocacy with funds derived from business activities. That holding was correct when issued and should not be overturned now. Use of corporate treasury funds for electoral advocacy is inherently likely to corrode the political system, both by actually corrupting public officeholders and by creating the appearance of corruption. Moreover, such use of corporate funds diverts shareholders’ money to the support of candidates whom the shareholders may oppose.

Congress’s interest in preventing these pernicious consequences is compelling, and Congress has chosen a valid means of achieving it—requiring a corporation to fund its electoral advocacy through the voluntary contributions of officers and shareholders who agree with its political statements.

The Solicitor General’s brief further stated:

Corporate participation in candidate elections creates a substantial risk of corruption or the appearance thereof. Corporations can use electoral spending to curry favor with particular candidates and thus to acquire undue influence over the candidates’ behavior once in

office. See *Austin*, 494 U.S. at 678 (Stevens, J., concurring) (concluding, with respect to “corporate participation in candidate elections,” that “the danger of either the fact, or the appearance, of *quid pro quo* relationships provides an adequate justification for state regulation of both expenditures and contributions”).

The record in *McConnell*—which is by far the most extensive body of evidence ever compiled on these issues—indicated that, during the period leading up to BCRA’s enactment, federal office-holders and candidates were aware of and felt indebted to corporations and unions that financed electioneering advertisements on their behalf or against their opponents. See *McConnell v. FEC*, 251 F. Supp. 2d 176, 623-624 (D.D.C. 2003) (Kollar-Kotelly, J.); see also *id.* at 555-560 (discussing evidence).

The nature of business corporations makes corporate political activity inherently more likely than individual advocacy to cause *quid pro quo* corruption or the appearance of such corruption. Even minor modifications in complex legislation have great potential to benefit or burden particular companies, industries, or sectors. The economic stake of corporations in the nuances of such matters as industry-specific tax credits, subsidies, or tariffs generally dwarfs that of any set of individuals.

And when those benefits can be obtained through a game of “pay to play,” corporations are better suited than individuals to afford the ante. Corporate managers need not assemble a coalition of the like-minded; they can draw on the firm’s entire capitalization without seeking the approval of shareholders. If only businesses can afford the investment necessary to pursue rents in this way, only businesses can reap the (even larger) reward. See, e.g., *McConnell*, 251 F. Supp. 2d at 491, 511- 512 (Kollar-Kotelly, J.). And the public perception that businesses reap such rewards from legislators whom they supported in campaigns creates an appearance of corruption that corrodes popular confidence in our democracy. *Id.* at 517.

The brief filed by the BCRA sponsors states:

More fundamentally, *Austin and McConnell* were correctly decided. Unlimited expenditures supporting or opposing candidates may create at least the appearance of corruption, as *Caperton v. A.T. Massey Coal Co.*, 129 S. Ct. 2252 (2009), illustrates. The tremendous resources business corporations and unions can bring to bear on elections, and the greater magnitude of the resulting apparent corruption, amply justify treating corporate and union expenditures differently from those by individuals and ideological nonprofit groups.

So, too, does the countervailing free-speech interest of the many shareholders who may not wish to support corporate electioneering but have no effective means of controlling what corporations do with what is ultimately the shareholders’ money. *Austin* was rightly concerned with the corruption of the system that will result if campaign discourse becomes dominated not by individual citizens—whose right it is to select their political representatives—but by corporate and union war-chests amassed as a result of the special benefits the government confers on these artificial “persons.” That concern remains a

compelling justification for restrictions on using corporate treasury funds for electoral advocacy—constraints that ban no speech but only require that it be funded by individuals who have chosen to do so.

The holdings of *Austin* and *McConnell*—that it is constitutional to require business corporations to use segregated funds contributed by shareholders, officers and employees for express candidate advocacy or its functional equivalent—remain sound today. The interests in preventing actual or apparent corruption of the electoral process and protecting shareholders provide compelling justification for such requirements, which neither unduly burden nor overbroadly inhibit protected speech.

The corporate PAC option, moreover, is ideally suited to balancing the First Amendment interests of corporate entities and their shareholders. It allows the corporation to direct political spending only to the extent shareholders have personally decided to contribute for that specific purpose. It thus ensures that the corporation may have a voice, but one that is not subsidized unwillingly by those who may disagree with its electoral message. And there is no basis in the record for concluding that PACs are inadequate or unduly burdensome for *business* corporations, whatever may be true of certain ideological nonprofit corporations. Indeed, PAC requirements pale in comparison with the detailed recordkeeping and accounting otherwise required of corporations and unions.

### **Immense Aggregate Wealth of Corporations**

The Internal Revenue Service estimated that the total net worth of U.S. corporations in 2005 was \$23.5 trillion and their post-tax profits were nearly \$1 trillion.

According to Democracy 21 President Fred Wertheimer:

Overturing *Austin* and declaring a ban on corporate campaign expenditures unconstitutional would open the door to massive corporate influence-buying with federal officeholders affecting a wide range of government decisions.

Just imagine the impact on a member of Congress in the midst of deciding what to do on health care or climate control or banking legislation if the Member knew that dozens of companies in affected industries each could spend millions of dollars of corporate wealth on full-scale campaigns to defeat or elect the Member, depending on how the Member voted on the issues.

### **Ability of Corporate Campaign Expenditures to Influence Federal Officeholders**

The ability of corporate campaign expenditures to buy influence with federal officeholders, and to create the appearance of such influence-buying, was recognized in the *McConnell* case.

According to the brief filed by the BCRA sponsors:

Not surprisingly, the *McConnell* record provided strong corroboration that corporate and union expenditures on ads that were the functional equivalent of express advocacy created the appearance of corruption. Based on that record, Judge Kollar-Kotelly found that such expenditures “permit corporations and labor unions to inject immense aggregations of wealth into the process” and “radically distort[] the electoral landscape.” 251 F. Supp. 2d 176, 555 (D.D.C. 2003). She further found that candidates are “acutely aware of” and “appreciate” such expenditures, *id.*, and “feel indebted to those who spend money to help get them elected,” *id.* at 556 (citing declaration of former Sen. Bumpers). She concluded that “the record demonstrates that candidates and parties appreciate and encourage corporations and labor unions to deploy their large aggregations of wealth into the political process,” and that “the record presents an appearance of corruption stemming from the dependence of officeholders and parties on advertisements run by these outside groups.” *Id.* at 560.

According to the Solicitor General’s brief, the record in the *McConnell* case showed that:

federal office-holders and candidates were aware of and felt indebted to corporations and unions that financed electioneering advertisements on their behalf or against their opponents.

The Solicitor General’s brief further stated:

[T]he record compiled in the *McConnell* case indicated that *corporate* spending on candidate-related speech, even if conducted independent of candidates, had come to be used as a means of currying favor with and attempting to influence federal office-holders.

**The Supreme Court’s Decision in *Bellotti* Does Not Provide Support for Overturning *Austin* or *McConnell*; The *Bellotti* Decision States That It is Not Applicable to Corporate Expenditures in Candidate Campaigns**

The Supreme Court in the 1978 *Bellotti* case explicitly stated that the holding in that case, which dealt with corporate speech about issues in ballot referenda, is not applicable to corporate speech in candidate campaigns:

[O]ur consideration of a corporation's right to speak on issues of general public interest *implies no comparable right* in the quite different context of participation in a political campaign for election to public office. (emphasis added).

The Supreme Court stated in *Bellotti*:

The overriding concern behind the enactment of statutes such as the Federal Corrupt Practices Act was the problem of corruption of elected representatives through the creation of political debts. The importance of the governmental interest in preventing this occurrence has never been doubted. The case before us presents no comparable problem, and our consideration of a corporation’s right to speak on issues of general public interest implies no comparable right in the quite different context of participation in a political

campaign for election to public office. Congress might well be able to demonstrate the existence of a danger of real or apparent corruption in independent expenditures by corporations to influence candidate elections.

The BCRA sponsors' brief states:

*McConnell* and *Austin* extensively discussed and rejected *Bellotti*'s application outside of ballot measures, and *MCFL* also recognized that requiring corporations to use PACs for candidate advocacy was "of course distinguishable" from the law in *Bellotti*. 479 U.S. at 259 n.12. *WRTL* also emphasized the distinction between candidate advocacy and the issue advocacy in *Bellotti*. 551 U.S. at 480. *Bellotti* itself said it "implied no comparable right" to make expenditures in "the quite different context of participation in a political campaign for election to public office." 435 U.S. at 788 n.26. It is one thing for a corporation to spend treasury funds on a measure that will have the same effect as a law passed by a legislature that it may freely lobby, and quite another for it to unleash its wealth on elections in which sovereign citizens determine who will exercise their proxies on the full breadth of public issues. Moreover, there is no "risk of corruption ... in a popular vote on a public issue." *Id.* at 790. In contrast, as *Bellotti* recognized, § 441b was enacted to combat "the problem of corruption of elected representatives through the creation of political debts." *Id.* at 788 n.26.

### **The Supreme Court's *Buckley* Decision Rejecting the Constitutionality of Limits on Independent Campaign Expenditures by Individuals is Not Applicable to Bans on Independent Campaign Expenditures by Corporations**

The holding in the *Buckley* decision that it is unconstitutional to limit independent expenditures by *individuals* in campaigns is not applicable to independent expenditures by corporations in campaigns. This distinction was recognized by the Supreme Court when it upheld the constitutionality of a ban on independent expenditures by corporations in campaigns in the *Austin* decision, fourteen years after the *Buckley* decision had invalidated a similar restriction on individuals.

It was again recognized in the *McConnell* decision, twenty-seven years after the *Buckley* decision, where the Court reaffirmed the constitutionality of a ban on independent expenditures by corporations in campaigns and stated that the corporate campaign expenditure ban was "firmly embedded in our law."

The BCRA sponsors' brief states:

It remains true, as it was when *Austin* was decided, that distinguishing corporate and union expenditures from those of individuals is justified by the much greater magnitude of the resources that business corporations and unions can bring to bear on elections: Using state-conferred legal advantages and privileges, these entities can accumulate "political 'war chests,'" *NRWC*, 459 U.S. at 207, so that "resources amassed in the economic marketplace may be used to provide an unfair advantage in the political marketplace." *MCFL*, 479 U.S. at 257; see also *FEC v. National Conservative Political Action Comm.*, 470 U.S. 480, 500-

501 (1985). The vast sums at corporations' disposal create a much more formidable risk of corruption than those generally available to individuals. Business corporations, moreover, necessarily deploy wealth in the electoral process to serve relatively narrow economic interests. To be sure, individuals' participation in electoral politics may also be driven by particular interests. But a citizen's involvement in our system of representative democracy also reflects a broad range of considerations reflecting each citizen's status as a sovereign member of a republic, engaged in a process of selecting representatives entrusted to act on her behalf across the full range of public issues—a process in which artificial persons, unlike individuals, have no direct role. This important distinction is surely an appropriate consideration for a democratic society arranging its electoral politics.

In *National Right to Work Committee*, in 1982, the Supreme Court said in discussing the corporate expenditure ban:

The governmental interest in preventing both actual corruption and the appearance of corruption of elected representatives has long been recognized, *First National Bank of Boston v. Bellotti*, *supra*, and there is no reason why it may not in this case be accomplished by treating unions, corporations and similar organizations different from individuals.” 459 U.S. at 210-211.

The Solicitor General's brief states:

The nature of business corporations makes corporate political activity inherently more likely than individual advocacy to cause *quid pro quo* corruption or the appearance of such corruption...

Corporations, moreover, are artificial persons endowed by government with significant “special advantages” that no natural person possesses. *NRWC*, 459 U.S. at 207. Well before *Austin*, this Court recognized the need for “particularly careful regulation” to limit the effect of those corporate special advantages on the political process. *Id.* at 209-210; see *id.* at 207; *MCFL*, 479 U.S. at 256-257. Because corporations do not age, retire, or die, they can amass great wealth from their business activities even while changing owners, directors, and officers as needed. Corporations also benefit from limited liability; by permitting investors to contribute without taking responsibility for the corporations' actions, state law promotes corporations' accumulation of investment capital. See, *e.g.*, *Grojean v. Commissioner*, 248 F.3d 572, 575 (7th Cir. 2001) (Posner, J.). The government may take into account in its regulatory framework these state-created “advantages unique to the corporate form.” *Austin*, 494 U.S. at 665.

### **The Ban on Corporate Campaign Expenditures Does Not "Ban Books"**

The prohibition on corporate campaign expenditures does not "ban books".

The BCRA sponsors' brief states:

At oral argument, members of the Court expressed concern over the possibility that limits on corporate express advocacy might lead to banning of books that incidentally express views on electoral outcomes. Such concerns cannot justify the drastic step of overruling *Austin* or *McConnell*. The statute at issue—BCRA § 203—does not apply to books or to any mode of expression other than television and radio broadcasts. It would be unprecedented to strike down a law on its face because of concerns that some *other* statute, such as 2 U.S.C. § 441b, might be applied overbroadly.

Even were § 441b at issue, there would be no basis for overruling *Austin*'s holding that restrictions on corporate expenditures are facially constitutional. As far as we are aware, § 441b has never been applied to a book. The bare possibility that the statute might be applied to expression that was incidentally campaign related or that, taken as a whole, was not reasonably understood as being “in connection with” an election (as § 441b requires) does not establish that the statute is overbroad, because such isolated, hypothetical impermissible applications are not “substantial ... ‘relative to the scope of the law’s plainly legitimate applications.’” *McConnell*, 540 U.S. at 207 (quoting *Virginia v. Hicks*, 539 U.S. 113, 120 (2003)). Should § 441b or a similar state statute be applied outside the realm of true electioneering activity, an as-applied challenge would remain available, as *WRTL* demonstrates.

**It Makes No Sense to Suddenly Discover a Constitutional Right for Corporations to Make Campaign Expenditures After More Than a Century of Bans on Corporate Campaign Expenditures and After the Supreme Court Has Upheld and Reaffirmed the Constitutionality of Such Bans**

According to Democracy 21 President Fred Wertheimer:

It has been a principle of our democracy, dating back more than a century, that corporate wealth should not be used in federal elections. This principle is based on the fundamental idea that individuals vote to choose federal officeholders and only individuals should provide the private financing to elect these officeholders, not corporations or other artificial entities.

This approach does not stop corporations from being involved in federal elections, just from using their immense corporate wealth to do so. Corporations can participate in federal campaigns through their PACs which raise contributions voluntarily given by *individuals* for the purpose of influencing elections, subject to limits on how much each individual can contribute.

It makes no sense to say that a constitutional right has suddenly been discovered for corporations to unleash their immense aggregate wealth to flood our elections and thereby to buy influence with elected officials. There is no basis for the Supreme Court to overturn *Austin* and *McConnell* and declare unconstitutional long established federal and state bans on corporate expenditures in campaigns.

## **The *Citizens United* Case, Part 5: Are Corporations About to Take Over American Politics and Washington Decision-Making?**

By Fred Wertheimer  
President, Democracy 21

The Supreme Court will hear oral argument tomorrow in *Citizens United v. Federal Election Commission*.

The stakes in this case for American politics and Washington decision-making are momentous. The Supreme Court will be considering a question of profound importance for our democracy: is the longstanding ban on corporations spending their immense aggregate wealth to elect or defeat candidates constitutional?

It has been the nation's policy for more than a century to prohibit corporate wealth from being used to influence federal elections and officeholders.

It has been the Supreme Court's position for decades that the federal ban on corporate campaign expenditures is constitutional.

The Supreme Court just six years ago reaffirmed the constitutionality of the corporate expenditure ban in *McConnell v. Federal Election Commission*, based on a record that showed corporations had been using electioneering advertisements to curry favor with, and gain influence over, federal officeholders. This is the same kind of "corruption" standard the Court has used in numerous past campaign finance decisions to uphold the constitutionality of campaign finance laws.

The Court in *McConnell*, furthermore, found the constitutionality of the ban "firmly embedded in our law," stating:

Since our decision in *Buckley* [1976], Congress' power to prohibit corporations and unions from using funds in their treasuries to finance advertisements expressly advocating the election or defeat of candidates in federal elections has been firmly embedded in our law.

The only real change that has occurred between the Court's 2003 decision in *McConnell* and now is a change in the makeup of the Court – which, in and of itself, has never been considered sufficient legal grounds for overturning past precedents.

If in these circumstances, the Supreme Court were to suddenly discover in the Constitution a brand new First Amendment right for corporations to spend their immense corporate wealth to

influence federal elections and officeholders, this would constitute what could only be considered as “radical activism” on the part of a new “conservative” majority on the Court.

The influence-buying dangers involved in allowing corporations to flood federal elections with their immense corporate wealth are clear.

In 2005, for example, total corporate net wealth was \$23.5 trillion and total net profits nearly \$1 trillion, according to an IRS estimate. A Supreme Court decision to declare the corporate expenditure ban unconstitutional would free up corporations and their trade associations, in industries such as health care, energy and financial services, among many others, to spend vast amounts of corporate funds to elect or defeat federal officeholders, depending on how those officeholders voted.

And it would not take too many \$10 or \$20 million campaigns by a corporation or corporate trade association to successfully defeat a House member who voted against the corporation or association’s economic interests to establish the mere threat of such expenditures as sufficient to obtain undue influence over the Member’s votes.

Corporate campaign contributions were banned in federal elections in 1907. In 1947, the law was amended to affirm what had been understood to be the case – that the contribution ban applied to corporate campaign expenditures as well.

The basic purpose of these restrictions was clear: to prevent corporations from using their corporate wealth to buy influence with federal officeholders over government decisions.

The 1907 corporate contribution ban followed a period in American history when U. S. Senators came to be known, not as the Senator from New York or Pennsylvania, but as the Senator from Standard Oil or U.S. Steel.

In 1894, Elihu Root, who went on to become Secretary of State and a winner of the Nobel Peace prize, captured the essence of the problem. He wrote that massive corporate donations were “a constantly growing evil in our political affairs” and that debts were being created “to be recognized and repaid with the votes of representatives.”

The same kind of influence-buying through corporate contributions that Root described in 1894 is accomplished through corporate campaign expenditures, as the Supreme Court recognized in 2003 in the *McConnell* case in reaffirming the constitutionality of the corporate campaign expenditure ban.

In so doing, the Court endorsed the argument made at the time by then Solicitor General Ted Olsen, currently Citizen United’s counsel, in support of the constitutionality of the corporate expenditure ban. The Olsen brief submitted in *McConnell* asserted that it was "clear that the Constitution permits source-of-funding limits on corporate expenditures in connection with candidate elections with respect to corporations that do not share the 'crucial features' of the nonprofit corporation in *MCFL*."

The influence-buying danger that Root described more than a century ago would return in dimensions unimaginable to Root if the Supreme Court were to reverse its previous decisions and now declare the corporate campaign expenditure ban unconstitutional.

Some have questioned whether corporations would actually make these kinds of expenditures. If you look, however, at the huge economic stakes involved for corporations in government decisions today, and the responsibility of corporate managers to maximize corporate profits, it should be quite clear what will happen.

Corporations and corporate trade associations will end up flooding federal elections with massive amounts of influence-buying campaign expenditures.

The *Citizens United* case was originally brought and considered by the lower court on narrow grounds. It was turned into a case of sweeping constitutional significance by the Supreme Court on June 29, 2009.

As a result, the Court now faces the question of whether to ignore its past decisions and the judicial principle of *stare decisis*, and its own declaration in 2003 that the constitutionality of the corporate expenditure ban is “firmly embedded in our law.”

In his Senate confirmation testimony, Chief Justice John Roberts stated:

I do think that it is a jolt to the legal system when you overrule a precedent. Precedent plays an important role in promoting stability and evenhandedness. It is not enough -- and the court has emphasized this on several occasions -- it is not enough that you may think the prior decision was wrongly decided.

Chief Justice Roberts also testified, “People expect that the law is going to be what the court has told them the law is going to be. And that’s an important consideration.”

Thus, the *Citizens United* case is a defining moment for Chief Justice Roberts, just as it is for one of the nation’s most important anti-corruption campaign finance laws.

In *Citizens United*, we have a case that involves a longstanding national policy to prevent corporate influence-buying through corporate campaign expenditures, and past Supreme Court decisions upholding the constitutionality of this policy.

We have a case where the constitutionality of the corporate expenditure ban was not even challenged by *Citizens United* in its original lawsuit and not argued or considered by the lower court. As a result, we have a case where there is no factual record upon which to base a decision to overturn past precedents.

We have a case which can be decided on much narrower grounds than declaring the corporate campaign expenditure ban unconstitutional, following the judicial doctrine of constitutional avoidance.

We have a case, where there are no change circumstances from the Court’s last decision in 2003 in *McConnell* reaffirming the constitutionality of the ban.

Thus, we have a case that cannot justify overturning past precedents and declaring the ban on corporate campaign expenditures unconstitutional.

## ***The Citizens United Case, Part 6***

### **Chief Justice Roberts Faces Unusual Choice: Will He Say “Never Mind”**

Chief Justice John Roberts faces a rare, if not unprecedented, choice in the *Citizens United* case argued before the Supreme Court on September 9, 2009 and awaiting a decision.

If Chief Justice Roberts votes in *Citizens United* to overturn the 2003 Supreme Court decision in *McConnell v. Federal Election Commission* that upheld restrictions on the use of corporate funds for campaign-related expenditures, he also would be voting to overturn a Supreme Court decision he himself wrote in 2007, just two years ago.

“It may be unprecedented for a Justice to vote to overturn a decision he wrote just a few years earlier,” Democracy 21 President Fred Wertheimer stated.

“In essence, Chief Justice Roberts would be saying, in the words made famous in the 1970s by Roseanne Rosannadanna on Saturday Night Live, ‘Never mind’,” said Wertheimer.

In 2007, Chief Justice Roberts cast the deciding vote and wrote the controlling opinion in the 5 to 4 decision in *Wisconsin Right to Life v. Federal Election Commission (WRTL)*.

The case involved an “as applied” challenge to the “electioneering communications” provisions of the Bipartisan Campaign Reform Act of 2002 (BCRA).

The BCRA “electioneering communications” provisions prohibit corporations and labor unions from using their own treasury funds to pay for broadcast ads that refer to a federal candidate and that run in the candidate’s district or state within 60 days of a general election or 30 days of a primary. Corporations and labor unions are required instead to use PAC funds voluntarily given by individuals to pay for such broadcast communications.

The “electioneering communications” provisions were enacted to stop the widespread practice of corporations and labor unions using “sham” issue ads to circumvent the longstanding ban on

corporate and labor union expenditures in federal elections.

In 2003, the Supreme Court in the *McConnell* case upheld the constitutionality of the “electioneering communications” provisions against a “facial” challenge to the statute.

The “electioneering communications” provisions were challenged again in 2004, in a lawsuit brought by WRTL which argued more narrowly that the provisions were unconstitutional as applied to specific ads WRTL wanted to run regarding a U.S. Senator.

Chief Justice Roberts in writing the *WRTL* opinion found that the “electioneering communications” provisions were unconstitutional as applied to the specific WRTL ads in question in the case.

The Roberts opinion significantly narrowed the permissible scope of the statute, holding that an ad can be constitutionally regulated as an “electioneering communication” only if it is "express advocacy" or the “functional equivalent” of express advocacy. The opinion further held that the "functional equivalent" test is met “only if the ad is susceptible of no reasonable interpretation other than as an appeal to vote for or against a specific candidate.”

The Roberts opinion nevertheless reaffirmed the *McConnell* decision, as narrowed, and recognized that the BCRA “electioneering communications” provisions were constitutional as applied to “express advocacy” and “the functional equivalent” of express advocacy.

Now, in *Citizens United*, the Supreme Court is considering whether the "electioneering communications" provisions can be applied even to express advocacy and its functional equivalent.

“If the Chief Justice were to vote now in *Citizens United* to overturn the *McConnell* decision and hold the BCRA 'electioneering communications' unconstitutional, he would in effect be declaring his own opinion two years ago in the *WRTL* case null and void. This would be a strange and inexplicable decision for any Justice to make, let alone the Chief Justice of the Supreme Court,” Wertheimer said.

## ***The Citizens United Case, Part 7:***

### **The Supreme Court and How It Defines “Corruption” in**

## **Determining the Constitutionality of Campaign Finance Laws**

The Supreme Court is expected to decide the case of *Citizens United v. FEC* in the coming weeks. At issue in this key campaign finance case is the constitutionality of the ban on the spending of corporate treasury funds to influence federal elections enacted in 1947.

(This is Part 7 of a series of releases issued by Democracy 21 that examine the *Citizens United* case. The series can be found at [www.democracy21.org](http://www.democracy21.org).)

The Supreme Court has consistently upheld campaign finance laws where the laws can be shown to serve the compelling governmental interest of preventing corruption or the appearance of corruption. These rationales, for example, have served as the Court's basis for upholding the constitutionality of individual, party and PAC contribution limits, starting in 1976 with the landmark decision in *Buckley v. Valeo*.

“There has been some misunderstanding about what the Supreme Court means when it uses the term ‘corruption’ in cases involving the constitutionality of campaign finance laws,” according to Democracy 21 President Fred Wertheimer.

“Opponents of the campaign finance laws like to argue that the ‘corruption’ standard applies only to ‘quid pro quo’ corruption. But that kind of corruption is already prohibited by bribery laws and the Supreme Court has never interpreted ‘corruption’ so narrowly in campaign finance cases,” Wertheimer said.

“In fact, the Supreme Court has made clear for more than three decades that the term ‘corruption’ has a meaning that goes far beyond ‘quid pro quo’ corruption when used in campaign finance cases,” Wertheimer stated.

A principal issue in the *Citizens United* case is whether the ban on corporate *expenditures* is constitutionally justified on the grounds that it prevents corruption or the appearance of corruption, just as the Court has repeatedly held in cases upholding the constitutionality of *contribution* limits.

In his controlling opinion in *Wisconsin Right to Life v. FEC (WRTL)*, a case decided in 2007, Chief Justice John Roberts wrote that the Supreme Court in its decision in *McConnell v. FEC* (2003) arguably had accepted the corruption rationale as a basis for upholding the corporate expenditure ban.

In discussing whether the corporate expenditure ban could be applied to corporate expenditures for ads which did not expressly advocate the election or defeat of a candidate, Chief Justice Roberts wrote for the Court:

This Court has long recognized “the governmental interest in preventing corruption and the appearance of corruption” in election campaigns. *Buckley*, 424 U.S., at 45, 96 S.Ct.

612. This interest has been invoked as a reason for upholding contribution limits...We have suggested that this interest might also justify limits on electioneering expenditures because it may be that, in some circumstances, “large independent expenditures pose the same dangers of actual or apparent quid pro quo arrangements as do large contributions.” *Id.*, at 45, 96 S.Ct. 612. (emphasis added).

The Chief Justice further wrote:

*McConnell* arguably applied this interest-which this Court had only assumed could justify regulation of express advocacy-to ads that were the “functional equivalent” of express advocacy. See 540 U.S., at 204-206, 124 S.Ct. 619

But after stating that *McConnell* had arguably used the “corruption” interest to uphold restrictions on corporate expenditures for ads that contain express advocacy or the functional equivalent of express advocacy, the Chief Justice went on to conclude in *WRTL* that the interest in preventing corruption or the appearance of corruption could not be extended to restrict corporate expenditures for issue ads that did not contain such language.

*Citizens United*, unlike *WRTL*, is a case that deals with corporate expenditures that involve express advocacy and the functional equivalent of express advocacy. And as Chief Justice Roberts recognized in *WRTL*, “large independent expenditures” arguably can pose the same dangers of corruption as contributions do.

This recognition by the Chief Justice goes to the heart of the “corruption” argument for upholding the ban on corporate expenditures.

As noted above, the Supreme Court has made clear for more than three decades that the term “corruption” when used by the Court in campaign finance cases is not limited to “quid pro quo” corruption. The Court has similarly made clear that the appearance of corruption is itself a constitutional grounds for upholding campaign finance laws.

Both of these judicial principles were set forth by the Supreme Court in its landmark 1976 decision in *Buckley v. Valeo* upholding contribution limits. The Court said in *Buckley*:

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

The Court also stated in *Buckley*:

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

The Court reaffirmed the views it expressed in *Buckley* in *Nixon v. Shrink Missouri Government PAC* (2000). The Court stated:

In speaking of ‘improper influence’ and ‘opportunities for abuse’ in addition to ‘quid pro quo arrangements,’ we recognized a concern not confined to bribery of public officials, but extending to the broader threat from politicians too compliant with the wishes of large contributors. (emphasis added)

The Court explained in *Shrink Missouri* why the appearance of corruption is its own constitutional basis for upholding contribution limits, stating:

Leave the perception of impropriety unanswered, and the cynical assumption that large donors call the tune could jeopardize the willingness of voters to take part in democratic governance.

The Supreme Court in its *McConnell* decision in 2003 cited *Shrink Missouri* in its discussion of “corruption” extending beyond “quid pro quo” arrangements to cover undue influence. The Court said:

Thus, “[i]n speaking of ‘improper influence’ and ‘opportunities for abuse’ in addition to ‘quid pro quo arrangements,’ we [have] recognized a concern not confined to bribery of public officials, but extending to the broader threat from politicians too compliant with the wishes of large contributors.” *Shrink Missouri* 528 U.S., at 389, 120 S.Ct. 897; *see also Colorado II*, 533 U.S., at 441, 121 S.Ct. 2351 (acknowledging that corruption extends beyond explicit cash-for-votes agreements to “undue influence on an officeholder's judgment”).

Of “almost equal” importance has been the Government's interest in combating the appearance or perception of corruption engendered by large campaign contributions. *Buckley*, *supra*, at 27, 96 S.Ct. 612; *see also Shrink Missouri*, *supra*, at 390, 120 S.Ct. 897; *Federal Election Comm'n v. National Conservative Political Action Comm.*, 470 U.S. 480, 496-497, 105 S.Ct. 1459, 84 L.Ed.2d 455 (1985). Take away Congress' authority to regulate the appearance of undue influence and “the cynical assumption that large donors call the tune could jeopardize the willingness of voters to take part in democratic governance.”

The Court made clear in *McConnell* that corruption “extends beyond preventing simple cash-for-votes corruption.” The Court said:

More importantly, plaintiffs conceive of corruption too narrowly. Our cases have firmly established that Congress' legitimate interest extends beyond preventing simple cash-for-votes corruption to curbing “undue influence on an officeholder's judgment, and the

appearance of such influence.” *Colorado II, supra*, at 441, 121 S.Ct. 2351.

Many of the “deeply disturbing examples” of corruption cited by this Court in *Buckley*, 424 U.S., at 27, 96 S.Ct. 612, to justify FECA’s contribution limits were not episodes of vote buying, but evidence that various corporate interests had given substantial donations to gain access to high-level government officials. *See Buckley*, 519 F.2d, at 839-840, n. 36; nn. 5-6, *supra*. Even if that access did not secure actual influence, it certainly gave the “appearance of such influence.” *Colorado II, supra*, at 441, 121 S.Ct. 2351; *see also* 519 F.2d, at 838.

The majority opinion in *McConnell*, in rejecting Justice Kennedy’s view of the meaning of the “corruption” standard, further said:

Justice Kennedy’s interpretation of the First Amendment would render Congress powerless to address more subtle but equally dispiriting forms of corruption. Just as troubling to a functioning democracy as classic quid pro quo corruption is the danger that officeholders will decide issues not on the merits or the desires of their constituencies, but according to the wishes of those who have made large financial contributions valued by the officeholder. Even if it occurs only occasionally, the potential for such undue influence is manifest. And unlike straight cash-for-votes transactions, such corruption is neither easily detected nor practical to criminalize. The best means of prevention is to identify and to remove the temptation.

“A decision by the Supreme Court to strike down the sixty-year old ban on corporate campaign expenditures and to overturn the Court’s own precedents upholding the ban would be nothing short of a radical decision by a so-called ‘conservative’ majority on the Court,” Wertheimer stated.

“It also would be a radical act for the Court to reject more than three decades of Court precedents in a number of cases and rewrite the ‘corruption’ standard to limit it to ‘quid pro quo’ corruption. Such an action would render the ‘corruption’ standard meaningless as a practical matter in campaign finance cases, and would dramatically increase the opportunities for the corruption of our democracy,” Wertheimer said.