Testimony by Democracy 21 President Fred Wertheimer On Draft Obama Administration Executive Order Submitted to Joint Hearing Held by House Oversight and Government Reform and House Small Business Committees

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Thank you for the opportunity to submit testimony today.

My name is Fred Wertheimer and I am president of Democracy 21, a nonprofit, nonpartisan organization that supports effective campaign finance laws, including comprehensive disclosure laws.

We believe such laws are necessary to protect the integrity of our political system and serve as a safeguard against corruption and the appearance of corruption in government.

Democracy 21 strongly supports the draft proposed Executive Order of the Obama Administration to require government contractors to disclose *all* of the campaign contributions and expenditures they make to influence federal elections.

These disclosure provisions are an appropriate way for the Executive Branch to help protect the public against pay-to-play efforts by persons seeking to influence Executive Branch contracting decisions or seeking to obtain earmarks by Members of Congress for government contracts.

I would like to submit for the record a letter recently sent to President Obama by thirty-four organizations urging the President to sign the Executive Order.

In January 2010, the Supreme Court in the *Citizens United* case struck down the ban on corporate expenditures in federal elections. In doing so, the Court made clear that disclosure laws to cover the new campaign finance activities permitted by the decision were constitutional and necessary.

The Supreme Court by an 8 to 1 majority held that disclosure is "needed to hold corporations and elected officials accountable for their positions and supporters." The Court said that disclosure allows citizens to "make informed choices in the political marketplace," and "permits citizens and shareholders to react to the speech of corporate entities in a proper way."

The Court also stated, "A campaign finance system that pairs corporate independent expenditures with effective disclosure has not existed before today."

Unfortunately, however, as evidenced by the 2010 congressional races, such a system of "effective disclosure" did not exist on the day Justice Anthony Kennedy wrote the decision and still does not exist.

The new opportunities for independent spending in federal elections permitted by the *Citizens United* decision resulted in more than *$135 million in secret contributions* being spent by outside groups to influence the 2010 congressional races. This represented an unprecedented return to secret money in federal elections that has not been seen since before the Watergate scandals of the 1970s.

Secret money in American politics is a formula for scandal and corruption. As Albert Hunt, executive Washington editor and a columnist for *Bloomberg News* aptly noted in a column:

> A prediction: The U.S. is due for a huge scandal involving big money, bribery and politicians. Not the small fry that dominates the ethics fights in Washington; really big stuff; think Watergate.
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> It is axiomatic in politics that without accountability there is abuse. This year, there is a massive infusion of special-interest money into U.S. politics that is secret, not reported.

The American people overwhelmingly support disclosure of the campaign finance activities being conducted by outside groups. According to a *New York Times/CBS* Poll last year (October 28, 2010):

> 92 percent of Americans said that it is important for the law to require campaigns and outside spending groups to disclose how much money they have raised, where the money came from and how it was used.

In the landmark case of *Buckley v. Valeo* (1976), the Supreme Court explained why campaign finance disclosure is constitutional and necessary. In upholding the comprehensive disclosure provisions of the Federal Election Campaign Act, the Court stated:

> First, disclosure provides the electorate with information "as to where political campaign money comes from and how it is spent by the candidate" in order to aid the voters in evaluating those who seek federal office.
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> …….

> Second, disclosure requirements deter actual corruption and avoid the appearance of corruption by exposing large contributions and expenditures to the light of publicity.
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> …….
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> Third, and not least significant, recordkeeping, reporting, and disclosure requirements are an essential means of gathering the data necessary to detect violations of the contribution limitations described above.

These basic principles are just as true today as they were thirty-four years ago. The constitutionality of campaign finance disclosure laws has repeatedly been reaffirmed by the Supreme Court, as recently as last year in the *Citizens United* decision.

Democracy 21 supports congressional enactment of new disclosure laws to cover the new campaign finance activities permitted by the *Citizens United* decision. The disclosure should be comprehensive and encompass campaign finance activities by corporations, tax-exempt advocacy groups, business associations and labor unions.

In the last Congress, we supported the DISCLOSE Act, which passed the House and received 59 votes in the Senate, one vote short of the 60 votes needed to break a filibuster and pass the legislation.

We continue to support in this Congress the enactment of new disclosure laws to require all persons – including corporations, tax-exempt advocacy groups, business associations, and labor unions – to disclose the independent campaign finance activities they are undertaking to influence federal elections as a result of the *Citizens United* decision.

Short of new legislation, we support alternative ways to provide to the American people the campaign finance disclosure information that the Supreme Court has made clear citizens have a basic right to know. This includes the draft Executive Order of the Obama Administration.

In considering a disclosure Executive Order applicable to government contractors, it is important to understand that government contractors are in a special category and have long had to abide by a special provision in the campaign finance law designed to protect the integrity of the government contracting process.

Section 441c of the Federal Election Campaign Act explicitly prohibits government contractors from making any contribution, directly or indirectly, to “any political party,

committee, or candidate for public office or to any other person for any political purpose or use." An exemption is provided in the section that allows the PACs of government contractors to make contributions, with such contributions subject to disclosure under existing disclosure laws.

Special rules for government contractors were considered necessary in order to help protect the integrity of the government contracting process and protect against pay-to-play efforts. This has been true both nationally and in a number of states which have enacted strong campaign finance restrictions and/or disclosure requirements on state and local government contractors.

The Draft Executive Order

The draft Executive Order is intended to ensure that the federal contracting process is "free from the undue influence of factors extraneous to the underlying merits of contracting decision-making, such as political activity or favoritism." Draft EO at 1. The draft Order notes that "additional measures are appropriate and effective in addressing the perception that political campaign spending provided enhanced access to or favoritism in the contracting process." *Id.* It states that the Order is intended "to increase transparency and accountability to ensure an efficient and economical procurement process." *Id.*

Contrary to statements made by opponents of the Executive Order, there is nothing new about government contractors making campaign finance disclosures. And, few, if any, concerns were raised in the past about such disclosures having a "chilling effect" or stifling speech"

Under existing campaign finance disclosure laws, government contractors are already required to make a number of campaign finance disclosures. They are required to disclose the campaign contributions and expenditures made by their PACs, as well as the individuals contributing to their PACs. They also are required to disclose the campaign expenditures they directly make on "independent expenditures" and "electioneering communications." The contributions made by officers and directors of government contractors also have to be disclosed by the recipients of the contributions.

What is missing today, however, and what the draft Executive Order would provide, is disclosure of contributions made by government contractors to third parties "with the intention or

reasonable expectation" that the third party groups will spend the contributions on independent expenditures or electioneering communications to influence federal elections.

This information would have been disclosed under existing campaign finance disclosure laws but for Federal Election Commission regulations that have eviscerated the disclosure requirements covering these contributions.

The draft Executive Order is intended to address for government contractors a gaping disclosure loophole that has arisen as a result of the *Citizens United* decision. Following that decision, corporations organized as "social welfare" organizations under section 501(c)(4) of the Internal Revenue Code or as business associations under section 501(c)(6) of the Code engaged in an unprecedented amount of campaign spending to influence the 2010 congressional elections.

This led *to more than $135 million in secret contributions* being spent by third party groups in the 2010 congressional races

. The draft Executive Order would require public disclosure of donations made by government contractors to third party groups where the donor knows or has reason to know that the money will be used by the third party group for expenditures to influence federal elections.

This would ensure that the public is fully informed about the campaign finance activities undertaken by government contractors and would help protect against government contractors using campaign funds to obtain influence with Executive Branch officials and members of Congress over government contractors.

The Executive Order is simply an effort by the Administration to do what the President appropriately can do under his own authority to obtain campaign finance information from government contractors that is being hidden from the American people.

The Executive Order would also provide the public with a more easily accessible database to use to obtain the campaign finance information being disclosed by government contractors. This would help to more effectively carry out the goals of disclosure laws to inform the American people and protect the integrity of government decisions.

The Constitutionality of the Disclosure Requirements

Opponents of the draft Executive Order argue that its disclosure requirements violate the constitutional rights of government contractors to engage in anonymous campaign spending and would "chill" and "stifle" free speech.

It is remarkable that these arguments are even being made, since the Supreme Court has clearly, consistently and repeatedly upheld the constitutionality of campaign finance disclosure requirements against such claims in cases spanning more than 35 years, beginning with *Buckley v. Valeo*, 424 U.S. 1, 43-55 (1976).

Indeed, these issues are completely laid to rest in *Citizens United* itself, where the Court by an 8 to 1 majority made clear in striking down the ban on corporate expenditures that it is constitutional to require corporations and labor unions to disclose the campaign expenditures and the donors behind these expenditures.

I would like to submit for the record a letter sent to House members last year by Democracy 21 on the constitutionality of campaign finance disclosure laws.

In *Citizens United,* the Supreme Court held that that disclosure requirements regarding campaign expenditures by outside groups "do not prevent anyone from speaking" and serve governmental interests in "providing the electorate with information" about the sources of money spent to influence elections so that voters can "make informed choices in the political marketplace."

The Supreme Court noted the importance of disclosure for the new corporate campaign finance activities being permitted, stating:

> With the advent of the Internet, prompt disclosure of expenditures can provide shareholders and citizens with the information needed to hold corporations and elected officials accountable for their positions and supporters. Shareholders can determine whether their corporation's political speech advances the corporation's interest in making profits, and citizens can see whether elected officials are "'in the pocket' of so-called moneyed interests."

The Supreme Court further stated:

> The First Amendment protects political speech; and disclosure permits citizens and shareholders to react to the speech of corporate entities in a proper way. This transparency enables the electorate to make informed decisions and give proper weight to different speakers and messages

Importantly, the Court in *Citizens United* also specifically noted the problems that result when groups run ads "while hiding behind dubious and misleading names," thus concealing the true source of the funds being used to make campaign expenditures. The Court said:

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

Id. (emphasis added).

In rejecting the challenge by Citizens United to the disclosure requirements applicable to its campaign activities, the Court said:

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

Id. at 916 (emphasis added).

While a bare majority of five Justices in the *Citizens United* case voted to strike the ban on corporate expenditures in campaigns, eight of the nine Justices in the same case voted to strongly endorse disclosure as a means to "provide shareholders and citizens with information needed to hold corporations and elected officials accountable for their positions and supporters."

The disclosure provisions for government contractors provided by the draft Executive Order will hold "elected officials accountable for their positions," on government contracts.

The "Chilling" Effect Argument

Opponents of the draft Executive Order claim that disclosure will have a "chilling" effect on government contractors. These opponents contend that disclosure of their campaign finance activities will subject them to harassment by customers or the public.

These arguments are not supported by law or by fact.

They also contend that government contracting officials may use the information to favor Administration supporters or punish Administration opponents by withholding contracts from them. This represents an attempt to take the arguments that have long been considered by Congress and the courts as the justification for disclosure and turn them upside down.

The chilling effect argument ignores the reality that government contractors as noted earlier already are subject to substantial campaign finance disclosure requirements.

What is missing and what the Executive Order would add, is disclosure of the funds given by government contractors to third party groups that are then spent by the third party groups to influence federal elections.

The Executive Order would facilitate disclosure and make it easier for citizens to know what government contractors are doing to influence federal elections by providing all of the relevant campaign finance information for a contractor in one centralized location.

This campaign finance information is necessary for public accountability and to guard against pay-to-play efforts involving decisions by the Executive Branch and actions by Members of Congress.

The idea that disclosure would facilitate the misuse of campaign finance support or opposition to make decisions is backwards. Disclosure to the public will protect against decisions being made on the basis of campaign finances and that is one of the cardinal principles used by the Supreme Court to uphold campaign finance disclosure laws.

Absent disclosure, public officials and elected officeholders are always able to know who provided them campaign finance support and who did not. The only people who will not know are the American people and the public absence of this information will make it easier, not harder, to make improper decisions based on campaign finance support or opposition.

Justice Antonin Scalia rejected the "chilling" effect argument in a forceful defense of disclosure in a concurring opinion in *Doe v. Reed* (2010). In this case, which upheld disclosure requirements for petition signers for ballot measures, Justice Scalia wrote:

> Requiring people to stand up in public for their political acts fosters civic courage, without which democracy is doomed.

Furthermore, as a constitutional memo by the Campaign Legal Center (May 4, 2011) states regarding the harassment issue:

> Moreover, the Supreme Court has already formulated a remedy for any group who can in fact demonstrate a legitimate fear of harassment from campaign finance disclosure. In *Buckley*, it held that a specific group could request an "as-applied" exemption to a campaign disclosure law if it presented evidence showing "a reasonable probability that the compelled disclosure of [its] contributors' names will subject them to threats, harassment, or reprisals from either Government officials or private parties." Indeed, several years after *Buckley*, the Supreme Court recognized that the Socialist Workers Party was entitled to such an exemption.[2] So if there is indeed evidence of harassment or reprisals, the Court has already fashioned a remedy.
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> But the *Buckley* Court resoundingly rejected the proposition that general allegations of potential harassment like those offered by opponents here would render a campaign disclosure law facially unconstitutional. In the words of the Court, "*NAACP v. Alabama* is inapposite where, as here, any serious infringement on First Amendment rights brought about by the compelled disclosure of contributors is highly speculative."
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> . [2] The inadequacy of opponents' arguments is also brought into relief by a review of the evidence of injury offered by the Ohio Socialist Workers Party ("SWP") in *Brown v. Socialist Workers '74 Campaign Committee*, 459 U.S. 87 (1982), where an exemption to disclosure was granted. In *Socialist Workers*, the SWP brought an as-applied challenge to

> the constitutionality of Ohio's state political disclosure law. The SWP had introduced proof of specific incidents of private and government hostility toward the SWP and its members within the four years preceding the trial, including threatening phone calls and hate mail, the burning of SWP literature, the destruction of SWP members' property, police harassment of a party candidate, and the firing of shots at an SWP office. *Id*. at 99. In the year before trial, four Ohio SWP members were fired because of their party membership. *Id*. The District Court also found a past history of government harassment, including FBI surveillance of both the national party and the Ohio SWP, and interference with their political activities. *Id*. at 99-100. The Supreme Court concluded that in light of the "substantial evidence of past and present hostility from private persons and government officials against the SWP," Ohio's disclosure law could not be constitutionally applied to the SWP.

I would like to request the full Campaign Legal Center memo be included in the record.

The Argument that the Executive Order Frustrates Congressional Intent

Opponents of the draft Executive Order also claim that it is an attempt at an end-run around Congress. This argument has no merit and makes no sense.

The Obama Administration is proposing to take steps that it appropriately can under its own authority to provide citizens with campaign finance information that is currently being hidden from the public.

The Executive Order is just one of various ways to provide citizens with important campaign finance information they have a fundamental right to know. Democracy 21 supports and is pursuing legislative, litigation and administrative avenues to ensure that citizens are provided with this campaign finance information.

The United States Congress can and should enact comprehensive legislation to require disclosure for all groups of the new campaign finance activities permitted by the *Citizens United* decision. But Congress has no monopoly on whether voters are informed about the campaign money being used to influence their votes and government decisions.

The President also has a right to act within the appropriate sphere of his powers, which include protecting the integrity of the Executive Branch contracting process.

The courts have a right to determine whether existing campaign finance disclosure laws are being properly interpreted and enforced by the Federal Election Commission. The Democracy 21 legal team joined by the Campaign Legal Center has filed a lawsuit on behalf of Representative Chris Van Hollen on this question that challenges FEC contribution disclosure regulations as contrary to law and as having eviscerated contribution disclosure requirements.

The widespread opposition to new campaign finance disclosure requirements voiced by Republican Members of Congress last year and this year is puzzling, particularly in light of the past history of consensus support for disclosure laws and the overwhelming public support for disclosure.

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

Ten years ago, for example, Congress enacted new disclosure legislation to apply to 527 political organizations that were at the time raising and spending undisclosed money to influence federal elections.

The House passed the disclosure legislation for 527 groups by a vote of 385 to 39. Of the 217 House Republicans who voted, 178 Republican Members voted for the disclosure legislation. The Senate passed the disclosure legislation 92 to 6. Of the 54 Republican Senators who voted, 48 Republican Senators voted for the legislation.

In contrast, last year, two House Republicans and no Republican Senator voted for the DISCLOSE Act.

An article in *TalkingPointsMemo* (May 6, 2011) included comments made last year in support of disclosure by House Majority Leader Eric Cantor and House Majority Whip Kevin McCarthy:

> "Anything that moves us back towards that notion of transparency and real-time reporting of donations and contributions I think would be a helpful move towards restoring confidence of voters," Cantor told *Newsweek* right after the *Citizens*

United ruling.

McCarthy is quoted in the same article as sharing a similar philosophy.

> “I watched in California campaign-finance reform and what's happened is...people now move money through central committees at the last minute so you don't get the transparency," he said. "It doesn't get [at] what the public thought was going to happen. The best way, the fairest way, is greater transparency. Let people understand where it is going and what's happening.”

There is strong editorial support for the draft Executive Order. For example, according to a *New York Times* editorial (May 1, 2011):

> When the Supreme Court legalized a new era of unrestrained corporate campaign spending, the court made a point of upholding disclosure of donors as an alternative safeguard for voters and the democratic process.
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> ……
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> President Obama should take the court up on its transparency blessing forthwith and sign a proposed executive order that would require government contractors to disclose their donations to groups that support or oppose federal candidates.

According to a*Los Angeles Times* editorial (May 5, 2011):

> Twenty-seven Senate Republicans sent a letter to the White House arguing that requiring disclosure of contractors would have a chilling effect "if prospective contractors have to fear that their livelihood could be threatened if the causes they support are disfavored by the administration." Worse still, the Republicans say, it might pressure companies to support the administration's party - a variation on the Washington practice of "pay to play."
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> But that's wrong. Transparency - and scrutiny from the political opposition - would provide a check on any abuses. Disclosure is the solution, not the problem.
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> Government contractors can argue that they are being singled out. The easy remedy for that is to require that all contributions to all groups that engage in political activities be made public. Requiring disclosure by contractors is a first step, but it doesn't have to be the last.

According to a *Baltimore Sun* editorial (May 9, 2011):

> What's particularly galling about the criticism of the proposed executive order is that it's been cast as an example of "pay-to-play" politics. The Republicans claim Democrats could make sure those applying for federal contracts are not donating to GOP causes.

> In reality, transparency requirements like those proposed by the White House actually protect against pay-to-play by forcing contractors to reveal their donations. Without that requirement, a company - Halliburton, let's say - can direct millions of dollars to get a member of Congress or president elected without anyone but those involved knowing about it.
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> ….
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> If Republicans want to level the playing field, let them pass a campaign finance reform law in Congress that covers not just federal contractors but all who give to third-party groups, including unions and other traditional Democratic allies.
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> Of course, that raises the most nonsensical of GOP objections to the proposal, that it would chill free speech. Again, the implication is that a contractor who reveals a third-party political donation to the wrong cause (by which they mean giving to Republicans while a Democrat is in the White House) would be made to suffer.
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> Really? If Joe Bag-of-Doughnuts gives $50 directly to a candidate for federal office, that modest donation must be disclosed to the world. That's the law. Why should corporations be able to hide behind third-party groups when they give $50,000 or $50 million? Exactly whose free speech is being slighted? Wouldn't any favoritism shown to companies that make political donations and subsequently land government contracts only be revealed by disclosure? The converse is also true - if the Obama White House suddenly stopped giving contracts to firms that donated to Republicans, it, too, would become public knowledge.
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> ..…
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> In the end, revealing the political activities of companies that do business with the government can only lead to one thing: better government."

The Supreme Court clearly and unequivocally found in *Citizens United* that campaign finance disclosure laws were constitutional and necessary for the new campaign finance activities permitted by the Court's decision. The draft Executive Order would provide such information to citizens and taxpayers whose funds are being spent on government contracts and who have a basic right to know this information.

President Obama should move promptly to sign the Executive Order.

Congress should enact comprehensive disclosure legislation to require corporations, tax-exempt advocacy groups, business associations and labor unions to disclose the campaign finance activities that were permitted by the *Citizens United* decision.