SENATE JUDICIARY COMMITTEE
SUBCOMMITTEE ON THE CONSTITUTION,
CIVIL RIGHTS & HUMAN RIGHTS
HEARING ON APRIL 12, 2011

"The Fair Elections Now Act: A Comprehensive Response to *Citizens United*"

TESTIMONY OF CLETA MITCHELL, ESQ.
PRESIDENT, REPUBLICAN NATIONAL LAWYERS ASSOCIATION

Mr. Chairman, Ranking Member Graham, Members of the Subcommittee:

Thank you for the opportunity to appear before you today to offer my thoughts and perspective on S. 749, the so-called "Fair Elections Now Act of 2011". I appear here before you today both as a campaign finance attorney and practitioner and also in my capacity as President of the Republican National Lawyers Association ("RNLA").

As background, my day job is as an attorney, specializing in the field of campaign finance, election law, ethics and lobbying compliance – my field of expertise is advising candidates, campaigns, political parties, issue groups, individuals, corporations and organizations on matters involving what I describe as the 'business and regulation of politics'.

I am a bit puzzled at the title of today's hearing, which couches S. 749 in terms of a 'response' to the Supreme Court's decision in *FEC v. Citizens United*. I am puzzled for several reasons:

For starters, this bill was first introduced by the Chairman in the 110th Congress and was reintroduced in the 111th Congress. The *Citizens United* decision was handed down by the Supreme Court in January, 2010, nearly three years after the Fair Elections Now legislation was first introduced. So I'm wondering how this legislation is in 'response' to a decision of the Supreme Court three years after its initial introduction.

Secondly, *Citizens United* has nothing to do with <u>contributions</u> to candidates or how they finance their campaigns. In fact, the Court in the decision specifically stated that none of the provisions of federal law related to contributions were disturbed by the decision. The ruling applies solely to political expenditures by

corporations (and labor unions) that are made independently of campaigns, candidates and political parties.

The legislation at issue here today deals not with expenditures, but rather, with contributions to candidates and their campaigns and creating a public financing scheme for Senate campaigns.

It would seem, then, that the very essence of S. 749 is wholly different from the principles at issue in *Citizens United.*

I realize that *Citizens United* has become something of a proxy for everything that liberals detest about our American system of financing campaigns through the voluntary, after tax contributions from individuals. But to suggest that this legislation is in 'response' to a court decision nearly three years after this legislation was first introduced in Congress is nonetheless more than a bit odd.

About *Citizens United:* what the Supreme Court decided in the case is that the metastasizing regulation of political speech in America had created a nationwide, chilling effect on political speech during the election process that simply could not withstand strict scrutiny under the First Amendment.

Citizens United addressed the ability of citizens, organized in the corporate form, to associate and speak through that form. The Court concluded that because speech is an essential mechanism of democracy, political speech must prevail against laws that would suppress it by design or inadvertence.

Speech is the means to hold officials accountable to the people -- and the highest protections of the Constitution must be applied to such expression. *That* is the meaning of *Citizens United.*

The Supreme Court essentially held that citizens *must* be allowed to speak, whether individually or collectively organized even if the collective form chosen is the corporate form. The First Amendment has long been applied to corporations by the Supreme Court. *Citizens United* is hardly the first instance of such an application: the Court determined in 1978 in *First National Bank of Boston v. Bellotti,* that the government lacks the power to restrict political speech based on the speaker's 'corporate identity'.

Then, in a departure from that reasoning, the Court in 1990 upheld Michigan's ban on independent corporate political expenditures. That decision

(*Austin v Michigan Chamber of Commerce)* recognized a 'new' governmental interest in preventing "the corrosive and distorting effects of immense aggregations of corporate wealth …".

The Supreme Court in *Citizens United* was confronted with pre- and post-*Austin* lines of reasoning, which were clearly in conflict. Before *Austin,* the Court had found that the government could not confer preferred status on some speakers over others. *Austin* had concluded the opposite – and *Citizens United* is merely a reaffirmation of the principles that existed before the Court's 1990 decision in *Austin* — namely, that restricting the speech of a corporation merely because of the corporate identity is not permissible under the First Amendment.

Political speech is "indispensable in a democracy, and this is no less true because the speech comes from a corporation". That is what the Supreme Court held in 1978 … and it is that principle to which the Supreme Court rightly returned in *Citizens United.*

The court also reaffirmed the principle in *Buckley* in 1976 that the prevention of corruption or the appearance of corruption is a proper rationale for the government to prohibit corporate <u>contributions</u> … but that restrictions on expenditures are not likewise susceptible to the same concerns. Thus, the prohibition on corporate political expenditures made independently of a candidate or campaign may not constitutionally be subject to the same rationale, restrictions or prohibitions.

The Court's decision in *Citizens United* reveals a thoughtful analysis and a proper reliance on longstanding principles of First Amendment jurisprudence, regardless of the uninformed, hysterical and reactionary outrage of the *New York Times* and *Washington Post* editorial pages.

The correlation between the Supreme Court's reasoning and conclusion in *Citizens United* that it is beyond the authority of Congress to deprive citizens of their rights to engage in political speech if they are organized in a corporate form, and the bill before the subcommittee today as somehow being a 'response' to that decision is, as I have said, puzzling.

But since the Subcommittee has linked the two together, I would turn my attention to the Fair Elections Now legislation.

Reading S. 749 reminds me that in Washington and, indeed, in the Congress of the United States, there are those who seem to *yearn* for the days when only the wealthy and powerful could get elected to the Congress, when money from big donors was all that mattered in getting elected and re-elected and when there were only three networks, no internet, no cable tv, no talk radio, no Bill O'Reilly and no tea party movement. Unfortunately, those days are not the America of 2011 and will never be the America of the future.

S. 749 is premised upon a number of myths that simply are that: myths. The guiding principles of S. 749 are centered around beliefs that, while sincerely and fervently held, are factually incorrect. This bill simply ignores reality

It is hard to know where to actually begin to dissect this proposal, but I will focus my testimony on just a few of its flaws. The bill's stated purpose(s) are, themselves, myths.

Myth #1: "This is something 'the people' want".

This Friday, there will be a national referendum on the essence of S. 749 … something that sponsors of other legislation could only *dream of.*

This Friday is April 15 – and as millions and millions of Americans go to the polls ... their local post offices … they will be voting on this very issue: whether or not the federal government should provide public funds to political campaigns.

And guess what!!! If this year is anything like the LAST 35 years, the American people will answer that question in a very loud voice – and they will say NO. Again. As they have done every year since 1976.

There are simply no facts to assert that the public wants anything akin to public financing of political campaigns. And the people have shown that through their lack of appetite for the public financing system we already have, the presidential financing system.

All the facts since the inception of the presidential election public financing system demonstrate that 'the people' do *not* want tax subsidies for political campaigns.

I've attached as an exhibit to my testimony a chart from the Federal Election Commission which demonstrates that the American people are on to this system … and they have rejected it. Soundly. Annually.

In fact, the presidential election financing system has less support today than at any time in its history. At its zenith, only 28.7% of taxpayers supported the system … that was in 1978. Now, in the last year of reporting (2007), only 8.3% of American taxpayers chose to support this welfare for politicians. There is *less* money being contributed to the presidential campaign financing fund than ever in its history. And since Congress tripled the amount of the checkoff from $1 to $3 in 1994, the actual amount of funds voluntarily contributed by American taxpayers has declined every year since.

Why is that? How about being fairly sickened to see payments from the public coffers of nearly $3 million to Leonore Fulani or almost $2 million to Lyndon LaRouche … even when he was in prison in the 1992 campaign. Only in Washington would anyone think that this is a system worth expanding.

So S. 749 would mimic the failed presidential financing system and impose it on campaigns for the United States Senate. In the name of 'the people'. Which people are those?

I noticed that the sponsors of this legislation had Alec Baldwin present at the press conference to endorse this bill. I wonder if anyone asked Mr. Baldwin if he participates in the current public financing system for presidential elections.

The reason I ask is because I looked at Mr. Baldwin's record on contributing to candidates for office … and his last reported contribution to any federal candidate or political committee was his 1999 contribution of $10,000 to the Democratic Senate Campaign Committee. Mr. Baldwin makes more than $1 million per episode of his tv show … and it is certainly his choice to contribute or not contribute to candidates and political parties.

But now, Mr. Baldwin urges Congress to enact a law that would levy a mandatory fee on those who contract with the federal government, to force those individuals and companies to pay to fund the campaigns of US Senate candidates … whether the candidates espouse views or philosophies the federal contractors agree with or not.

Ironically, it is illegal under federal law for a federal contractor – *any* federal contractor – to make a contribution of his/her personal funds to any federal candidate, PAC or political party. But *this* bill would change the statute to now *force* federal contractors to finance the campaigns of Senate candidates with whom they may disagree. They still could not contribute voluntarily to candidates they support … but they would be forced to pay into a fund to finance candidates whose views and philosophies are contrary to their own. How does that possibly pass constitutional muster?

Myth #2: We Must Have Government Subsidies for Politicians to "Fix" a Broken System.

I'm not exactly sure what is broken about the present system, where citizens voluntarily contribute funds to candidates and causes with which they agree. Other than members of labor unions whose dues are mandatory and who are not allowed to withhold amounts that might be spent by their labor unions for political purposes, generally speaking in America, campaigns are funded from the voluntary after-tax contributions of the citizens. I'm wondering what exactly is wrong with that system. If people don't want to contribute – they don't have to. Like Alec Baldwin.

But since liberals are for anything as long as it is mandatory, perhaps we should look at the facts of the last two election cycles and ascertain whether the facts support the 'concerns' of the sponsors of S. 749, that somehow only certain people get to run for office because the 'real' people can't raise the money without government intervention as envisioned by S. 749.

If we want to focus on what is broken in our system, the only thing broken *is* the presidential election funding system … not the system of private funding of Senate campaigns through voluntary contributions.

In 2008, we witnessed the rejection by the Democratic Party standard bearer Barak Obama of the presidential financing system and he has now indicated his reelection plans do not include participation in 2012 in the government program.

Which is par for the course. I've always said that the reason Democrats have no compunction about enacting these cockamamie campaign finance regulations and proposals is that they have absolutely no intention of abiding by them, and S. 749 would absolutely be *no* exception.

And, actually, if one just looks at the numbers from 2008, it is clear that the government funding system is hopelessly outdated and *should* be rejected by all prospective candidates. According to reports of the Federal Election Commission, the GOP nominee for President, Sen. John McCain received $84.1 million in public funds to conduct his general election campaign.[1] That is the amount Barack Obama would have received had he accepted government funding for the 2008 general election. However, by staying outside the government funding system, the Obama campaign raised a total of $745.7 million in private funds for his primary nomination and general election campaign. It was the first time in the history of presidential public financing that a major party nominee declined to accept public funds for the general election.

Hillary Clinton also rejected the government funding – and raised and spent $224 million in the 2008 primaries. John Edwards, on the other hand, received $12 million in federal matching funds and spent a total of $48 million in the primaries. If there was an imbalance in the system, it was between those who opted into the government funding system and those who rejected public funds.

Of note: the Obama campaign's total receipts of $745.7 million for the 2008 election are equivalent to more than half of the $1.49 billion provided in public funds to all presidential candidates, parties, and conventions since the inception of the public funding program.

And looking forward to 2012 … President Obama and his political allies are now projecting that they will raise and spend $1 billion in 2012 … from voluntary donations … compared to no more than $90 million they could anticipate receiving for the 2012 general election from government funding. Any candidate who looks at those numbers from 2008 and the projections for 2012 and would then decide to accept the government money isn't qualified to be President

But what about the Senate … and the so-called 'broken' system of electing senators … really? Seriously? Have you even *looked* at the facts before reintroducing S. 749?

Let's just go through some of the races last year.

---

[1] McCain-Palin raised an additional $46.4 million for legal and accounting expenses, which may not be spent for campaign activities

Let's start with Harry Reid vs. Sharron Angle. Sen. Majority Leader Harry Reid raised and spent $26 million in his reelection campaign during 2010.

His opponent, Sharron Angle, raised and spent … $27 million.

Sharron Angle's 3d quarter FEC had some interesting statistics that you should know:

The report reflected contributions to the campaign for THAT quarter alone of almost $14.4 million dollars … from 194,178 donors, with an average contribution of $73.00. The average contribution to Sharron Angle's entire campaign was $92.00. Less than 1% of the contributions to her campaign came from PACs or anything like 'political insiders'.

The Angle 3d Quarter 2010 report, like all FEC reports for Senate campaigns was filed on paper, rather than electronically. And I might say that the only good thing in S. 749 is to remedy that absurd situation.

When the Sharron Angle 3d Quarter FEC report was delivered, it was 9112 pages, filled 3 bankers boxes, was almost 3 feet high and 4 feet long and weighed 103 lbs.

What that demonstrated then and now is the *power* of the internet, small donors, the excitement around ideas both for and against candidates and the willingness of the American people to support candidates through their voluntary contributions *when the spirit moves them.*

And the Reid-Angle race is but one example.

Sen. Lisa Murkowski raised and spent $3.6 million and lost her Republican primary to Joe Miller, who raised and spent $179,443.23 during the same period of time.

Charlie Crist was the endorsed candidate of the National Republican Senatorial Committee because he could raise money in the expensive state of Florida … and Crist had indeed raised a sizeable "war chest" of $8.8 million by year end 2009 … with a seemingly insurmountable advantage … until Marco Rubio came along and raised money from more than 100,000 donors in an average contribution of $85 … and reported $6.8 million in contributions by the end of March 2010 … and the rest, as we know, is history.

And how about the Democratic Senate primary in Pennsylvania ... Sen. Arlen Specter raised and spent approximately $15 million to lose his primary election to former Congressman Joe Sestak … who spent $6 million in his primary victory.

The point is this: S. 749 is an anachronism. It is an idea whose time has long since passed *if* it ever was a good idea, which I believe it wasn't.

The internet, the ability of grassroots citizens to get involved in the electoral process, the ability of candidates to reach the people without going through party bosses, national party committees, Washington insiders, the mainstream media or any power broker anywhere is self-evident.

The only broken campaign finance system is the presidential public funding system … after which S. 749 appears to be patterned.

S. 749 should be quietly shredded and the presidential financing system ended along with it.

No serious candidate in 2012 will participate in the system and it is time to get rid of it.

Myth #3: The public would be upset to know how much time Senators have to spend raising money.

This is the one that is most amusing … when it is not the most infuriating. The public would not be the least bit upset to know that Senators have to spend time raising money … because, actually, that's what people in the private sector have to do. Every day.

If I'm to be able to have a paycheck to support my family, I have to not only be able to do my job as an attorney – knowing the substance of the law, doing my work, taking care of my clients' needs … but I also have to market my services, ask people to hire me, get paying clients … and then I have to keep track of my time, prepare and send invoices, collect receivables and generally run my business.

I could say and I know a lot of attorneys who DO say … "it is beneath me to have to do those things … to have to ask people to hire me … to pay me … to be able to build and maintain my law practice … I would just much rather have someone pay me without ever having to worry about those pesky things like whether or not I'm doing a good enough job to warrant their continued investment in me …". And those people should go to work for the government.

There is nothing wrong with Senators having to go out and mix among the people … and to say, "this is what I'm doing … and I need your support to keep doing it."

Frankly, the most disturbing aspect of long tenure in the United States Senate is a tendency of entrenched Senators to become removed and remote from their constituents. One of the last vestiges of a real life connection for many Senators is their obligation to meet with people to raise money.

It doesn't have to be that way. Senators could have "townhall" meetings every weekend of the year if they wanted to. It doesn't take S. 749 to keep Senators in touch with their constituents.

Finally, S. 749 purports to "level the playing field" of candidates in a democratic society. That is something the Supreme Court has rejected repeatedly, starting *not* with the Roberts court, as some on the left allege, but as far back as 35 years ago in *Buckley v. Valeo*, when the Supreme Court opined that such an approach is anathema to the First Amendment. The Supreme Court recently struck down the "Millionaires' Amendment" added on the Senate floor to McCain-Feingold … and the Court may well invalidate the Arizona so-called "Clean Elections" law this term which was designed by the same forces who now bring us S. 749. Leveling the playing field is a governmental effort to pick winners and losers in the political arena and is, thankfully, not allowed under the First Amendment.

In fact, government funding of political campaigns is nothing more than a concerted effort to shape the debate and the outcomes in our democracy … and to the extent S. 749 *is* in response to *Citizens United*, it is an effort by liberals to silence or drown out certain voices that they deem objectionable.

In sum, S. 749 is a terrible idea for a myriad of reasons. It is patterned after a presidential funding system that is demonstrably failed and failing. S. 749 ignores facts, is based on myths and is constitutionally flawed. It should never see the light of day.

I am pleased to answer any questions from the Committee. Thank you.