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# Business in the Bulls-Eye? Target Corp. and the Limits of Campaign Finance Disclosure

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## Business in the Bulls-Eye? Target Corp. and the Limits of Campaign Finance Disclosure

Taren Kingser and Patrick Schmidt

### ABSTRACT

The Supreme Court's 2010 decision in *Citizens United* has generated a storm of debate about the role of corporations and unions in American elections. Since organizations may not be barred from participating directly in elections, the political agenda turned to whether disclosure of corporate and union involvement can serve as a check or tool of accountability. In this article we argue that disclosure provides a very limited check, grounding this conclusion on the highest profile case study to emerge in the 2010 midterm election cycle, that of the Target Corporation's contribution supporting a Republican gubernatorial candidate in Minnesota. We argue that this case should have provided extremely fertile ground for opponents of direct corporate political contributions, but that even with disclosure and targeted mobilization, the effect appears to have been sharply limited.

ON JANUARY 21, 2010, the Supreme Court's instant landmark, *Citizens United*, overturned long standing prohibitions on corporate spending in elections, and made progressives and the media concerned that corporate dollars would overwhelm other voices. When Minnesota-based Target Corporation's contentious political contribution was disclosed in July 2010 under state law, it was the "first one out of the box"<sup>1</sup> to catch the watchful eye of liberal critics and became the focus of a campaign against corporate political contributions. The factors and forces that pushed Target to the front line of the campaign finance debate made it the best singular context with which to evaluate the impact of electoral disclosure in the changed environment for corporations. In this article we ask: What was learned from the Target case about the effectiveness of disclosure as a tool for policing the boundaries of corporate political activity?

We argue that the Target case highlights the limits of disclosure and the public's ability to meaningfully use the disclosed information to shape organizational involvement in elections. Rather than marking how disclosure can suppress organizational participation in politics, the campaign against Target most importantly evidences the gap between what reformers had hoped corporations would learn from the Target case and what corporations have actually taken away from it. Furthermore, we argue, the unique combination of factors that came together to make Target the exemplar of the 2010 midterm elections makes it relatively unlikely to be replicated in other situations. The Target case presented a prime opportunity for the public to use disclosed information to hold political actors accountable, but even in this exceptionally inviting case, collective action found only limited success.

We begin this analysis by briefly reviewing the context in which protests to corporate political spending have been launched. After discussing the

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<sup>1</sup>Confidential interview by authors with a political law lawyer, Washington, DC. For a note on methods, see note 6, *infra*.

*Citizens United* decision and its immediate aftermath, we widen the frame to contextualize what opponents of Target's political involvement aimed for when seeking to promote corporate accountability. We then provide a close account of the events of the Target case, culminating in concluding discussions about the challenges facing the effectiveness of campaign finance disclosure.

### THE POST-CITIZENS UNITED DEBATE

In the annals of American elections, the 2010 election cycle may come to be viewed as remarkable in a number of ways, especially as it occurred in a non-presidential year. The Supreme Court provided one part of the drama when its January 2010 decision in *Citizens United v. FEC* appeared to alter the competitive dynamic in American politics and give First Amendment protection to formerly prohibited participation by corporations and labor unions. The decision, striking down laws which banned such organizations from spending their treasury funds on independent political expenditures or electioneering communications, immediately rose to landmark status. Setting aside any wrangling over whether it was "activist," the decision continued the cycle of crisis-and-response about the flow of money from organizations into elections. The Tillman Act of 1907, the Taft Hartley Act of 1947, the post-Watergate Federal Election Campaign Act (FECA), and the Bipartisan Campaign Reform Act of 2002 (BCRA, or "McCain-Feingold") evidence the cyclical and incomplete nature of efforts to manage the intersection between election campaigns and the organizational resources of corporations and labor unions.<sup>2</sup> Across these efforts lie questions of political dynamics and accountability, which we consider in this section.

#### *Reverberations of the decision*

This most recent salvo in the long-standing battle grew out of the election of 2008 when Citizens United, a non-profit corporation, sought to distribute its film, *Hillary: The Movie*, on pay-per-view cable television during the 2008 Democratic presidential primaries. The Federal Election Commission deemed that the film's attack on Hillary Clinton ran afoul of McCain-Feingold's restriction on electioneering communications because it

clearly identified a candidate for federal office within 30 days before a primary election. The Court split 5–4 with the Court's conservative bloc constituting the majority. In authoring the Court's opinion, Justice Anthony Kennedy advanced the central argument that prohibiting corporations from spending in elections violates the First Amendment's protection of free speech and he rejected the argument that the Court could have ruled on narrower grounds (such as whether the film qualified as an electioneering communication). The Court left in place the prohibition on corporations and unions making direct contributions to candidates and it maintained existing regulations prohibiting coordination between the candidates themselves and those making independent expenditures. Of particular importance for the legislative responses to the ruling, by an 8–1 margin the Court maintained that regulations requiring disclosures were still valid saying, "[t]he Government may regulate corporate political speech through disclaimer and disclosure requirements."<sup>3</sup>

The Court's decision set off an immediate firestorm of media attention. Many in the media, calling the decision monumental, proclaimed that elections would be forever changed. Drawing sharp criticism, primarily from Democrats, and praise from many Republicans, supporters of the decision heaped praise on the Court for upholding the First Amendment's most basic free speech principle: the protection of political speech. Critics blasted the decision, asserting that it would hurt the public interest by increasing the influence of special interests in elections. BCRA co-author, Senator Russ Feingold, described the Court's decision as a tragic error that would change the landscape of election law in drastic ways and harm democracy. He also suggested that the *Citizens United* ruling would lead to increased corporate influence over politicians.<sup>4</sup> The highest profile critic was President Obama who, in his State of the Union Address merely

<sup>2</sup>Anthony Corrado, *The New Campaign Finance Sourcebook* (Washington, DC: Brookings Institution Press 2005).

<sup>3</sup>*Citizens United v. Federal Election Commission*, 558 U.S. \_\_\_\_ (2010).

<sup>4</sup>Russ Feingold, *Feingold Testifies that Supreme Court's Citizens United Decision Produced a "Frankenstein,"* YOUTUBE, February 2, 2010, <http://www.youtube.com/watch?v=4LWYq2oYCOE>.

days after the Court announced its decision, warned that the decision would open the floodgates to special interest money and that future elections could be bankrolled by America's most powerful.<sup>5</sup>

Both sides were merely speculating in the testy first days following the decision. Those closer to the campaign finance field, and those able to reflect after more time, offered additional perspective. In July and August 2010, we conducted a series of broadly ethnographic interviews with leading political law lawyers in Washington D.C. on the topic of campaign finance disclosure.<sup>6</sup> In the course of that fieldwork, we asked all respondents for the impact of *Citizens United* in their practices. In contrast to the strong response from the media and critics, most attorneys in election law practice had a tempered reaction, commonly expressing the sentiment that the reaction was “way overblown.”<sup>7</sup> One lawyer who primarily represents large corporate clients noted that many states had allowed what *Citizens United* had made possible, but most corporations did not take up this direction:

[T]his case is about independent expenditures. Twenty-eight states have allowed this for years, very few companies did it, and [*Citizens United*] doesn't say anything about corporate contributions being allowed for direct contribution, and that's how government relations departments work...not one blessed thing should change in any government relations department of any major corporation, it all needs to remain intact—your political action committees, all your compliance programs, and all your lobby activities, because not one thing changed.<sup>8</sup>

If there were any effects, however modest, most believed that *Citizens United* wouldn't change participation but simply allow more flexibility in terms of organizational structure and message type for groups who had already been engaging in similar political spending activity. One Republican attorney who represents a variety of non-profit organizations as well as candidates and political party units reported:

It has shifted the type of organizations that we create for people who come to us for advice... Whether it's pre- or post-*Citizens United*, there will be a steady stream of people coming to law firms and saying, “I would like to get

involved and I would like to do ‘this’ or ‘that’, how do I do it?” After *Citizens United* we were just able to give them a different option as to how to go about doing the “this” or the “that” that they wanted.<sup>9</sup>

Other lawyers reiterated that the choice for corporations is frequently *what* to say:

You're seeing a change in the tone and tenor of advertising. I think the biggest change in *Citizens United* is not that it extends more people the opportunity to say something. It extends the flexibility that they have in terms of what they are going to say.<sup>10</sup>

[M]y first view was that electioneering communications would disappear, no one would run them anymore because if you can run an ad that says, “Vote against Smith” why would you run an ad that says, “Smith is a schmuck”? But political consultants have almost uniformly said, “No, we actually don't want to tell people how to vote because

<sup>5</sup>Press Release, Office of the Press Secretary, *Remarks by the President in State of the Union Address*, January 27, 2010, available at <http://www.whitehouse.gov/the-press-office/remarks-president-state-union-address>.

<sup>6</sup>The fieldwork included 13 interviews with lawyers in private practice, who ranged across the political spectrum by self-identification, and whose practices varied by a number of variables, including client type, professional experience, and practice setting. Although most of the lawyers expressed that their practices were non-partisan and claimed they would represent any client, seven of the lawyers interviewed were Democrats and six were Republicans. These interviewees formed part of a larger project studying campaign finance disclosure which also included approximately two dozen other interviews, including campaign treasurers in Texas and Minnesota, officials and staff in the Federal Election Commission, and staff in interest groups and election compliance consultancies. Interviewees were selected by consulting the Chambers ranking of top political law attorneys (*see* <http://www.chambersandpartners.com>) and by using a “snowballing” technique, common to sociological research, in which interviewees were asked to name other candidates for interviews, until we encountered no new names. We were attentive to ensure that the sample included both Democrats and Republicans, lawyers across different practice settings, and non-lawyers.

<sup>7</sup>Confidential interview by authors with a political law lawyer.

<sup>8</sup>Confidential interview by authors with a political law lawyer.

<sup>9</sup>Confidential interview by authors with a political law lawyer.

<sup>10</sup>Confidential interview by authors with a political law lawyer who primarily represents Democratic candidates and party units.

people don't like it when you tell them how to vote."<sup>11</sup>

Even so, the lawyer behind the last quote foresaw an explosion of 501(c)(4) organizations in an attempt to distance the organization from the message, such that "the only thing the public is going to know is, it was paid for by Americans for Apple-Pie and Motherhood..."<sup>12</sup>

Post-2010 election commentary has reinforced this view that the consequences were significant, if only because that the total amount of spending reached record levels.<sup>13</sup> At a minimum, lawyers in the field were able to relate the significance of the changed law to internal corporate discussions: This was a time to ask how they might change their corporate practices. As we will consider in the case study, activist opponents of corporate political spending mobilized with that same assumption in mind. The initial scholarly assessments of campaign spending in the 2010 cycle suggests that interest groups did change: They spent considerably more, especially in television advertising, and one effect of *Citizens United* may be psychological, making candidates raise more money out of fear of interest group mobilization.<sup>14</sup> Advertisements in House and Senate campaigns from 2010 also contained a marked increase in the amount of "express advocacy" language, though that increase comes from a low base and many groups still seek to avoid express advocacy so as to avoid disclosure or tax implications.<sup>15</sup>

In terms of election regulation, a major effect of *Citizens United* was to spur a debate on disclosure. The Supreme Court, rejecting a challenge to the law's disclosure provisions, echoed a wider norm that has driven disclosure regulation across many areas of policy,<sup>16</sup> and other courts soon followed the high court in allowing compulsory disclosure regulations.<sup>17</sup> The impact was much wider than just federal regulation because the constitutional ruling applied to state elections as well. Before the ruling, twenty-two states had prohibited corporate independent expenditures in state elections, including the state of Minnesota.<sup>18</sup>

On the federal level, Democrats hoped to soften the effects of *Citizens United* with the DISCLOSE Act (Democracy is Strengthened by Casting Light on Spending in Elections). The comprehensive disclosure bill would have required all groups running such ads to disclose the identities of the contributors

who helped fund the ad, as well as requiring corporate or interest group executives to appear in "stand-by-your-ad" disclaimers at the end of each message. Democrats were successful in passing the DISCLOSE Act in the U.S. House of Representatives (219–206), picking up two Republicans votes<sup>19</sup> but fell just short of the sixty votes in the Senate needed to overcome a Republican filibuster.<sup>20</sup> Republicans argued that the DISCLOSE Act was a partisan scheme which placed more requirements on corporations than unions.

The push for enhanced disclosure and disclaimer regulations was successful in a number of states, however, including Alaska, Arizona, Colorado, Connecticut, Iowa, Massachusetts, Minnesota, North Carolina, South Dakota, and West Virginia.<sup>21</sup> Minnesota, in particular, passed nation-leading

<sup>11</sup>Confidential interview by authors with a Democratic political law lawyer who primarily represents corporations and trade associations.

<sup>12</sup>Confidential interview by authors with a Democratic political law lawyer who primarily represents corporations and trade associations.

<sup>13</sup>See Paul Blumenthal, *The Citizens United Effect: 40 Percent of Outside Money Made Possible by Supreme Court Ruling*, The Sunlight Foundation, November 4, 2010, <http://sunlightfoundation.com/blog/2010/11/04/the-citizens-united-effect-40-percent-of-outside-money-made-possible-by-supreme-court-ruling/>; Megan R. Wilson, *Who's Buying This Election? Close to Half the Money Fueling Outside Ads Comes From Undisclosed Donors*, The Center for Responsive Politics, November 2, 2010, <http://www.opensecrets.org/news/2010/11/whos-buying-this-election.html>; Diana Dwyre, *Old Games, New Tricks: Money in the 2010 Elections*, Extensions (Summer 2011): 18–24.

<sup>14</sup>Michael M. Franz, *The Citizens United Election? Or Same As it Ever Was*, *The Forum* 8(4): 19 (2010).

<sup>15</sup>*Ibid.* at 9.

<sup>16</sup>Archon Fung, Mary Graham, and David Weil, *Full Disclosure: The Perils and Promise of Transparency* (Cambridge University Press, 2007) at 20.

<sup>17</sup>Adam Liptak, *A Blockbuster Case Yields an Unexpected Result*, *New York Times*, September 19, 2011.

<sup>18</sup>See the Appendix of the Supplemental Brief of Amici Curiae for Senator John McCain, Senator Russell Feingold, Former Representative Christopher Shays, and Former Representative Martin Meehan in Support of Appellee, *Citizens United v. Federal Election Commission*, [http://www.fec.gov/law/litigation/citizens\\_united\\_sc\\_08\\_mccain\\_supp\\_brief\\_amici.pdf](http://www.fec.gov/law/litigation/citizens_united_sc_08_mccain_supp_brief_amici.pdf).

<sup>19</sup>Caitlin Huey-Burns, *House Passes Campaign Finance Disclosure Act*, *U.S. News and World Report*, June 25, 2010.

<sup>20</sup>Dan Eggen, *Bill on Political Ad Disclosures Falls a Little Short in Senate*, *Washington Post*, July 28, 2010.

<sup>21</sup>*Life After Citizens United*, National Conference of State Legislatures, July 2010, <http://www.ncsl.org/default.aspx?tabid=19607>.

corporate disclosure legislation that drew praise.<sup>22</sup> In the Minnesota legislature, Democratic-Farmer-Labor, State House Rep. Ryan Winkler responded to the *Citizens United* decision by introducing Bill SF2471, which would increase corporate disclosure. Supported by a *Minneapolis Star Tribune* editorial calling on the state legislature to pass new laws requiring increased disclosure,<sup>23</sup> the bill saw little movement until late in the 2010 legislative session when it also gained the support of business groups, led by the Minnesota Chamber of Commerce, and was unanimously passed on May 16, 2010, the final day of the legislative calendar.<sup>24</sup> The law requires that independent political groups spending more than \$5,000 per year on advertising for or against a candidate running for state office disclose their spending and the identity of their donors in five reports during election years.<sup>25</sup> One area to which the law does not reach is “issue ads” that do not expressly endorse or oppose candidates, but whose messages are often indistinguishable to viewers from express advocacy.<sup>26</sup>

Laws such as Minnesota’s remain on the horizon for reformers seeking options for regulating campaign finance that can survive First Amendment challenge, and disclosure regulations have gained increasing attention from critics who see disclosure as a threat to privacy and political participation.<sup>27</sup> Yet the practical effect of these laws is not well understood.

### *Seeking corporate accountability*

The debate about the effects of disclosure statutes has both constitutional and political implications. Having become a ubiquitous element of regulatory policy in nearly all sectors of public life, disclosure has long been accepted as an allowable requirement on candidates and contributors to election campaigns, despite the threat that increasing availability of disclosure filings erodes the privacy interests of individuals.<sup>28</sup> In *Buckley v. Valeo*, the Supreme Court held that disclosure regulations were constitutionally justified by three government interests: first, giving the electorate information about candidates’ financial support—that is, allowing voters to understand their politics and assess future performance; second, fighting corruption and the appearance of corruption; and third, using disclosure and record-keeping to detect violations of campaign finance rules.<sup>29</sup>

In the evolution of campaign finance law since *Buckley*, the Court has articulated the grounds for disclosure in a number of different contexts. In the context of corporate speech in *Citizens United*, and echoing other decisions involving corporations, Justice Anthony Kennedy’s opinion in some ways reinforced, and in other ways expanded upon, *Buckley*’s rationales. He wrote:

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

<sup>22</sup>Jeremy Herb, *Minnesota a Model in Disclosure Law*, *Minneapolis Star Tribune*, October 11, 2010; New York Times Editorial, *Voter (and Customer) Beware*, *New York Times*, August 18, 2010.

<sup>23</sup>*Minneapolis Star Tribune* Editorial, *Editorial: Adjust State Laws After Election Ruling*, *Minneapolis Star Tribune*, January 27, 2010.

<sup>24</sup>In the wake of the Target case, the Minnesota Citizens Concerned for Life joined with the Taxpayers League of Minnesota and Coastal Travel Enterprises to bring a federal lawsuit (*MN Citizens Concerned for Life et al. v. Lori Swanson et al.*) asking that Minnesota’s new disclosure law be declared unconstitutional. In September 2010, Federal District Judge Donovan Frank rejected the groups’ request to grant a temporary injunction to block the law before the 2010 midterm election. In late October of 2010 the U.S. Supreme Court declined to hear their case for an injunction. See Pat Doyle, *Judge Asked to Overturn State Law on Disclosing Corporate Donations*, *Minneapolis Star Tribune*, August 20, 2010; Martiga Lohn, *Judge Backs Minn. Disclosure Law on Political Cash*, *Minnesota Public Radio*, September 20, 2010, available at <http://minnesota.publicradio.org/display/web/2010/09/20/corporate-campaign-donations-disclosure/>; Andy Birkey, *Supreme Court Rejects GOP-aligned Challenge to Campaign Disclosure Laws*, *Minnesota Independent*, November 1, 2010, available at <http://minnesotaindependent.com/73337/supreme-court-rejects-gop-aligned-challenge-to-campaign-disclosure-laws>. At the time of writing, the case had been accepted for review by the *en banc* Eight Circuit Court of Appeals.

<sup>25</sup>Minnesota Session Laws, 2010 Minn. Laws ch. 397 – S.F. No. 2471, <https://www.revisor.mn.gov/laws/?id=397&doctype=chapter&year=2010&type=0>.

<sup>26</sup>Herb, *Minnesota a Model in Disclosure Law*, *supra* note 22.

<sup>27</sup>See Richard Briffault, *Campaign Finance Disclosure 2.0*, *Election Law Journal* 9(4): 273–303 (2010); William McGeeveran, *Mrs. McIntyre’s Persona: Bringing Privacy Theory to Election Law*, *William & Mary Bill of Rights Journal* 19: 859–883 (2011).

<sup>28</sup>Deborah G. Johnson, Priscilla M. Regan, and Kent Wayland, *Campaign Disclosure, Privacy and Transparency*, *William & Mary Bill of Rights Journal* 19: 959–982 (2011) at 960.

<sup>29</sup>424 U.S. 1 (1976) at 66–68.

corporation's interest in making profits, and citizens can see whether elected officials are "in the pocket" of so-called moneyed interests."...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.<sup>30</sup>

The rhetoric of 'informed decisions' echoes *Buckley's* long-accepted emphasis of possible corruption and the need to evaluate candidates based on their supporters. In Kennedy's formulation, shareholders have an interest in ensuring that corporate speech "advances the corporation's interest in making profits" while citizens use the disclosure to assess candidates. The independent corporate political spending ushered in by *Citizens United* dampens the fear of explicit quid-pro-quo corruption, except when this spending is either coordinated with a candidate campaign or party (against regulations barring coordination) or accepted implicitly as a contribution and recognized by a candidate as a favor deserving later favors. Under the *Buckley* rationales, the justification for disclosure of corporate contributions to independent campaign organizations would appear weaker.

Justice Kennedy's analysis provides additional grounds for disclosure by endorsing regulations furthering the shareholder's interest in corporate accountability. Citizens may also possess an interest in assessing the financial sponsorship of all speech, so as to give appropriate weight to all messages appearing in political discourse, but *Citizens United* does not invoke any form of corporate accountability involving non-shareholders as key actors.

Kennedy's reasoning matches academic discussions about disclosure by recognizing that the justification for disclosure is not limited to the voting booth (where citizens make 'informed decisions') but also extends to other fora, such as shareholder meetings. The general theory of regulating through disclosure assumes there will be action beyond simply 'informing' the consumers of information, be they voters or shareholders. In order to fulfill the regulator's interest disclosures must be used, ideally with a knock-on effect: Information alters the behavior of the audience of that information (including shareholders). If the regulation works as

designed, regulated entities seek to prevent these reactions by ensuring that, when others read their disclosures, they find nothing worrisome or troublesome. To the regulator, the regulated entity has moved to a 'better' allocation of financial and social resources sought by the regulation.<sup>31</sup> Sunlight disinfects not because of the regulation alone, but because the market consuming that information amplifies the encouragement to clean house.

Only feedback from shareholders may fall within Kennedy's conception of the legitimate disclosure scheme, but disclosure systems are not hermetically sealed. Information made public can freely be picked up by other, unintended audiences who may have very different understandings of what it means to hold corporations "accountable for their positions." The Court in *Citizens United* dismissed for lack of evidence the advocacy group's concern with harassment or retaliation, but future cases might present circumstances that could make the Court question the constitutional limits of mandated disclosure because of such intimidation. In this case study, MoveOn framed its action against Target as the pursuit of corporate accountability, based on the view that consumers and citizens—i.e., non-shareholders—played a part in keeping corporations accountable. In this light, MoveOn's actions might raise unresolved questions about the constitutional limits to mandatory disclosure, where the value of electoral accountability must be balanced with the costs of disclosure to political participation. The costs of disclosure depend significantly on the context, and in the emerging debate over disclosure's negative effects more attention has been given to the individual's evolving privacy rights (against a wider social backdrop of surveillance, information gathering, and technology) than the extent to which the organizations possess similar privacy claims. Some scholars have noted that contribution thresholds are set much lower in the United States than in comparable countries, unfortunately exposing the political activities of small donors to neighbors, social circles, and possible retaliation.<sup>32</sup>

Accountability, in the paradigmatic case of the electorate evaluating the donations to individual

<sup>30</sup>558 U.S. \_\_\_\_ (2010) at \_\_\_\_.

<sup>31</sup>Fung, Graham, and Weil, *supra* note 16, at 31.

<sup>32</sup>Richard Briffault, *Two Challenges for Campaign Finance Disclosure After Citizens United and Doe v. Reed*, William & Mary Bill of Rights Journal 19: 983–1014 (2011) at 1004.

candidates, involves the fairly restricted choices provided by the electoral process itself: The sanction is to vote against the candidate, and in a two-party system the opposing candidate may even have taken contributions from the same source.<sup>33</sup> The notion of holding individual donors ‘accountable’ for their contributions is mainly limited to the criticism by opponents one would expect in healthy civic discourse. The Supreme Court has protected from disclosure individuals within organizations (such as the NAACP) who feared violence or other direct repercussions from the exposure of their political participation. Even accepting Justice Scalia’s stipulation that citizens must possess “civic courage” when entering public debates,<sup>34</sup> some critics have argued forcefully that the Court’s exemptions have been applied too narrowly to protect the legitimate interests of individuals.<sup>35</sup>

But accountability as applied to organizations acting as speakers or donors to independent electoral efforts involves different dynamics, both in their types of exposure and the reasons someone may seek to oppose their involvement in campaigns. Shareholders have the most direct case for information about a corporation’s political spending because the foundational principles of corporate law allow them to expect that corporate officials will pursue the maximization of shareholder value as the primary or even singular goal. Political activities which are not calculated to advance that end could violate the duties of corporate directors. Consumers have a less clear-cut case. Constitutionally, to be sure, Justice Kennedy in *Citizens United* did not anticipate, much less endorse, consumer action as a legitimating reason for disclosure regulations. By one value system, some individuals may categorically perceive no overlapping interests between their decisions as consumers in economic marketplaces and the activities of firms they patronize—their views of Herman Cain would not or should not affect their assessment of Godfather’s Pizza. But others may see a closer tie, and although this normative debate reaches well beyond the scope of this article, it is sufficient to observe that analyzing both the lawfulness and ethics of boycotting a firm because of its political activities is different in type from analyzing the lawfulness and ethics of harassing your neighbor because of his or her lawn sign.

We bracket the normative and constitutional questions raised when consumers intercept informa-

tion intended for shareholders and use it to mount a boycott, and we focus here on the empirical question resting on these battle lines: whether the conflict in the 2010 election over political contributions by Target shed any light on the likely impact of disclosure as a vehicle of corporate accountability. One of the most important effects of *Citizens United* was not solely its spur to legislative action but also to inspire the belief by those (on both the right and left) that, by publicizing the political contributions of corporations and unions, they could make such spending a political liability, a natural effect of which would be to discourage similar efforts in the future. With Minnesota’s Target Corporation, the combination of cutting-edge disclosure regulation and a highly motivated set of political actors provides an excellent and uncommon test for the potential impact of generalized disclosure-driven reforms.

### TARGET AS TARGET: A CASE STUDY

Emerging from the aftermath of *Citizens United* and in the heat of the 2010 midterm election, the Minnesota-based retailer, Target Corporation (Target), became a highly visible test case of a corporation using its newly minted ability to make independent expenditures. Because Target became the most visible target of a progressive counter-mobilization, it provides the best singular case with which to evaluate the impact of electoral spending disclosure in a changed environment for corporations.

#### *Contentious contributions*

In mid-July of 2010, MN Forward (Minnesota Forward), a Section 527 organization jointly organized between the Minnesota Chamber of Commerce and the Minnesota Business Partnership, began running television ads supporting eventual Republican gubernatorial nominee, Tom Emmer, praising him for cutting taxes and calling him

<sup>33</sup>Briffault, *supra* note 27, at 288.

<sup>34</sup>*Doe v. Reed*, 561 U.S. \_\_\_\_ (2010) (Scalia, J., concurring).

<sup>35</sup>McGeveran, *supra* note 27, at 868.



“the fighter Minnesota needs.”<sup>36</sup> On July 13, MN Forward filed its Pre-Primary Report of Receipts and Expenditures with the Minnesota Campaign Finance and Public Disclosure Board as required under the newly enacted Minnesota disclosure law.<sup>37</sup> The local media were ready to review the filings, and the following day the *Minneapolis Star Tribune* reported that MN Forward had received several large contributions from businesses, including \$150,000 from Target.<sup>38</sup> This data found its way to the national media two weeks later when the *Washington Post* mentioned this as an example of the effect of the *Citizens United* case in an article about the Senate’s failure to pass the DISCLOSE Act.<sup>39</sup>

On July 30, the Human Rights Campaign (HRC), the nation’s largest lesbian, gay, bisexual and transgender (LGBT) civil rights organization, condemned the donation from Target for supporting the election of an anti-equality candidate.<sup>40</sup> While a representative in the Minnesota legislature, Tom Emmer had developed a strong record opposing gay rights legislation and had praised a Christian rock band that condoned violence toward gays.<sup>41</sup> Within the context of Minnesota politics, Emmer was seen as ideologically right-wing among Republicans. Emmer’s unexpected success in beating Marty Seifert, a more moderate Republican, for the party’s nomination was tied to the success of the Tea Party movement and a Sarah Palin endorsement.<sup>42</sup> Target’s support for Emmer appeared to many as an odd pairing, if not an out-right clash of values. The company had long been well regarded by national LGBT rights organizations for its policies promoting an inclusive workplace, and it consistently received 100 percent ratings from the HRC’s Corporate Equality Index.<sup>43</sup> In response to Target’s donation to MN Forward, HRC President Joe Solmonese chafed:

It’s a huge slap in the face to LGBT people and for that matter to all fair-minded Americans. Two of our most trusted brands [Target and Best Buy] have contributed shareholder money that could help elect a candidate that wants nothing but the worst for us. Both companies talk about this contribution as a business decision. I would offer that it’s a really bad business decision. Both companies have now earned the bad will of LGBT people and fair-minded Americans. They need to make it right.<sup>44</sup>

In a national e-mail alert sent out to members that day, the HRC asked members to sign an open letter to Target demanding that it “make it right” by contributing to pro-equality candidates.<sup>45</sup> Later that week the HRC took out a full-page ad in the *Minneapolis Star Tribune* drawing attention to Target’s contribution to MN Forward. This open letter directed at the retailer again called upon Target to “make it right.”<sup>46</sup>

The pressure mounted from other quarters. Several days later MoveOn.org e-mailed its 4.2 million members calling for a boycott of Target.<sup>47</sup> Like the HRC, MoveOn emphasized Emmer’s strong ideological conservatism, describing him as “a far-right Republican who supports Arizona’s draconian immigration law, wants to abolish the

<sup>36</sup>MN Forward, *MN Forward—Creating Jobs. Right Here. Right Now*, YOUTUBE, July 17, 2010, <http://www.youtube.com/watch?v=3xS9kPs5Txs>.

<sup>37</sup>MN Forward, *Report of Receipts and Expenditures for Independent Expenditure Committees and Independent Expenditure Funds—Period Covered: January 1 through July 6, 2010*, Minnesota Campaign Finance and Public Disclosure Board, 2010, <http://www.cfbreport.state.mn.us/rptViewer/Main.php?do=resultAction>.

<sup>38</sup>Pat Doyle, *Corporate Cash Gets Political*, *Minneapolis Star Tribune*, July 14, 2010.

<sup>39</sup>Eggen, *Bill on Political Ad Disclosures Falls a Little Short in Senate*, *supra* note 20.

<sup>40</sup>Zack Pesavento, *HRC to Target and Best Buy: Stop Bankrolling Anti-LGBT Politicians*, Human Rights Campaign, July 30, 2010, <http://www.hrcbackstory.org/2010/07/hrc-to-target-and-best-buy-stop-bankrolling-anti-lgbt-politicians>.

<sup>41</sup>Emmer called the members of You Can Run But You Cannot Hide International, a Christian rock ministry, “nice people” and his campaign made a donation to the group. The group’s lead singer has publically condoned the execution of gays. See Rachel Stassen-Berger, *A Possible Campaign Finance Violation—or not—Connects Emmer to Controversial Group*, *Minneapolis Star Tribune Hot Dish Blog*, May 25, 2010, <http://www.startribune.com/politics/blogs/94874784.html>.

<sup>42</sup>Baird Helgeson, *Tom Emmer: Riding a New Populist Wave*, *Minneapolis Star Tribune*, July 11, 2010, <http://www.startribune.com/politics/local/97671799.html?page=1&c=y>.

<sup>43</sup>Human Rights Campaign, *Corporate Equality Index 2011*, Human Rights Campaign, <http://www.hrc.org/documents/HRC-CEI-2011-Final.pdf>.

<sup>44</sup>Human Rights Campaign, *HRC Message to Target and Best Buy: Make it Right!*, Human Rights Campaign, July 30, 2010, <http://www.hrc.org/14669.htm>.

<sup>45</sup>Pesavento, *HRC to Target and Best Buy: Stop Bankrolling Anti-LGBT Politicians*, *supra* note 40.

<sup>46</sup>David Brauer, *Star Tribune Accepts Ad Criticizing Target and Best Buy, Two of Its Biggest Advertisers*, *MinnPost*, July 31, 2010, available at [http://www.minnpost.com/braublog/2010/07/31/20155/star\\_tribune\\_accepts\\_ad\\_criticizing\\_target\\_and\\_best\\_buy\\_two\\_of\\_its\\_biggest\\_advertisers](http://www.minnpost.com/braublog/2010/07/31/20155/star_tribune_accepts_ad_criticizing_target_and_best_buy_two_of_its_biggest_advertisers).

<sup>47</sup>MoveOn e-mail dated August 2, 2010 (on file with authors).

minimum wage and even gave money to a fringe group that condoned the execution of gay people.”<sup>48</sup> MoveOn looked beyond specific policy questions, however, and hoped to use the Target case to project the larger message that corporations should stay out of elections:

The stakes are much higher than one candidate and one company. Other CEOs are in “wait-and-see” mode following the *Citizens United* decision...If we don’t push back hard, this will just be the tip of the iceberg. Other corporations will learn that they can pour money into elections to buy the outcome they want—without paying a price with their customers or shareholders.<sup>49</sup>

Over the next weeks, MoveOn ramped up its publicity campaign against Target by encouraging local activists to make YouTube protest videos. Among the most watched was that of a Minnesota grandmother making a purchase at a Target store, returning it in protest, and proceeding to cut up her Target credit card in the store entryway.<sup>50</sup> Another video showed a citizen dance troupe performing a musical number inside a Target store, singing “Target ain’t people, so why should it be, that they should be allowed to play around with our democracy?”<sup>51</sup> The video was widely watched, if not “viral,” with over 1.3 million views.<sup>52</sup> On August 6, MoveOn delivered 240,000 petition signatures it had gathered online from people who planned on boycotting the store to the Target Headquarters in Minneapolis.<sup>53</sup>

Target CEO Gregg Steinhafel responded to the public outcry and complaints by Target employees in a statement to Target “team members” reasserting Target’s “unwavering” support of the LGBT community but also defending the company’s contribution to MN Forward.<sup>54</sup> Later that week Steinhafel went further, issuing an apology to employees saying, “I realize our decision affected many of you in a way I did not anticipate, and for that I am genuinely sorry.”<sup>55</sup> In this apology, he also asserted that Target would begin a “strategic review and analysis of our decision-making process for financial contributions in the public policy arena.”<sup>56</sup> For several weeks, Target engaged in negotiations with the HRC and initially had agreed to make \$150,000 worth of contributions to pro-equality candidates but it later reversed course say-

ing, “given the current political and emotionally charged environment” Target thought it best to wait on further action.<sup>57</sup> As a result of its contribution to MN Forward, in the HRC’s October 2010 Corporate Equality Index rating, Target lost 15 points in the “responsible citizenship” category—a measure of whether corporations have “a large-scale official or public anti-LGBT blemish on their recent records.”<sup>58</sup> This brought the company’s rating down to 85 percent.

### *Assessing the boycott*

Target’s limited apology did not convince its opponents to change course. MoveOn’s long-term strategy appeared two-fold, bridging two types of boycotts recognized by scholars: market-oriented boycotts and media-oriented boycotts. Market-oriented boycotts aim to hurt a firm’s profits or

<sup>48</sup>Ibid.

<sup>49</sup>Ibid.

<sup>50</sup>The UpTake, *Consumer Vents At Target For Right-Wing Donation*, YOUTUBE, July 27, 2010, <http://www.youtube.com/watch?v=2SipXbgyi68>.

<sup>51</sup>The Other 98%, *Target Ain’t People*, YOUTUBE, August 15, 2010, <http://www.youtube.com/watch?v=9FhMMmqzdB8&feature=related>.

<sup>52</sup>1,332,574 views as of November 26, 2010. By one understanding, a “viral” video circulates through the efforts of individuals, including bloggers, though when it becomes a viral phenomenon its circulation itself may become a story within the mainstream media. Kevin Wallsten, “Yes We Can”: *How Online Viewership, Blog Discussion, Campaign Statements, and Mainstream Media Coverage Produced a Viral Video Phenomenon*, *Journal of Information Technology & Politics* 7(2): 163–181 (2010).

<sup>53</sup>Tim Pugmire, *Advocacy Group Stages Protest at Target HQ Over Donations Flap*, Minnesota Public Radio, August 6, 2010, <http://minnesota.publicradio.org/display/web/2010/08/06/target-protest-moveon/>.

<sup>54</sup>Gregg Steinhafel, *A Message to Target Team Members From Gregg Steinhafel, Target Chairman, President and CEO*, Target Corporation, July 27, 2010, <http://pressroom.target.com/pr/news/a-message-to-target-team-members.aspx>.

<sup>55</sup>Gregg Steinhafel, *A Message From Gregg Steinhafel, Chairman, President and CEO*, Target Corporation, August 5, 2010, <http://pressroom.target.com/pr/news/civic-activity.aspx>.

<sup>56</sup>Bruce Watson, *Target Boycott Expands Amid Confusion About Protest Goals*, AOL DailyFinance, August 6, 2010, <http://www.dailyfinance.com/story/company-news/target-boycott-expands-amid-confusion-about-protest-goals/19584033/>.

<sup>57</sup>Jackie Crosby, *Target Feeling Investor Backlash*, Minneapolis Star Tribune, August 19, 2010.

<sup>58</sup>Patrick Caldwell, *Target, Best Buy and 3M Get Downgraded in HRC Equality Rating*, Minnesota Independent, October 5, 2010, <http://minnesotaindependent.com/71897/target-best-buy-and-3m-get-downgraded-in-hrc-equality-rating>.

stock value by convincing customers to abstain from purchasing goods and services, measuring success by whether the boycott “induces a change in the targeted firm’s behavior consistent with the boycotting group’s objective.”<sup>59</sup> Media-oriented boycotts primarily focus on influencing the news media to cover the boycotters’ concerns in order to embarrass the company and draw attention to an issue.<sup>60</sup> Though it suggested that the public stop shopping at Target—consistent with a market boycott—MoveOn would have been well aware of the difficulties of changing consumer behaviors.<sup>61</sup> Its additional and arguably greater objective was to use Target as a symbolic focus for a highly visible media campaign against all corporate involvement in politics.<sup>62</sup> As a media campaign, it could raise doubts among other corporations about the desirability of visible and direct corporate political involvement, and it also had an opportunity to keep alive post-*Citizens United* discussion of campaign finance regulations.

Both dimensions of the boycott can be assessed. The effect on Target’s behavior is the easier to observe, even if it is impossible to assess how deeply the firestorm of criticism penetrated the “corporate psyche.” It is clear that the boycott had some impact on Target’s behavior in the 2010 election cycle. The apology from CEO Steinhafel, with the further explanation, showed that the company was operating in a defensive posture, an uncomfortable position for a retail firm. Forced to acknowledge discomfort among its employees and customers—many of whom were attracted to the Minnesota firm because of its seemingly progressive culture—Target’s review of its political spending policy gave ground to its critics. It is unclear whether Target made any further political contributions from its general treasury monies to fund independent expenditures during the remainder of the 2010 election cycle. In early 2011, Target posted a listing of its general treasury political contributions from 2010 showing it contributed a total of \$412,250 for the year. It itemized the 12 largest donations, the biggest being the \$150,000 to MN Forward.<sup>63</sup> However it is unclear whether these other contributions were made before or after the blowup of the MN Forward contribution because the report provides no dates. From a review of MN Forward’s post-election 2010 Year-End Report, it is clear that Target at least did not make any additional contributions to MN Forward.<sup>64</sup> However,

FEC reports show that Target did continue its PAC activities for the remainder of the 2010 election season. Target’s PAC made close to \$80,000 in contributions to a mixture of Republican and Democratic candidates and groups<sup>65</sup> in the months following Target CEO Steinhafel’s August 5th public commitment to conduct a strategic review of the company’s decision-making process for political contributions.<sup>66</sup> No PAC contributions were made to the Emmer campaign or MN Forward.

As possible further evidence of the boycott’s effect on Target, by August 18, 2010, Target had lost \$1.3 billion in stock market capitalization since its contribution to MN Forward came to light. However, Target questioned whether the boycott was the cause for the decline in stock price arguing that there were “too many factors that we can’t attribute it to just one thing.”<sup>67</sup> Even so, some investor backlash was real: Three large fund

<sup>59</sup>Philippe Delacote, *On the Sources of Consumer Boycotts Ineffectiveness*, *Journal of Environment and Development* 18(3): 306 (2009).

<sup>60</sup>Monroe Friedman, *Ethical Dilemmas Associated with Consumer Boycotts*, *Journal of Social Philosophy* 32(2): 232–240 (Summer 2001).

<sup>61</sup>*Ibid.*

<sup>62</sup>MoveOn e-mail dated August 2, 2010 (on file with authors).

<sup>63</sup>The total of the itemized listings only adds up to \$326,000 meaning that Target made \$86,250 in small contributions all under the \$5,000 mark that it did not report individually. See Target Corporation, *Target Corporate Political Contributions in 2010*, Target Civic Activity Web site, [http://hereforgood.target.com/\\_ui/pdf/2010\\_Political\\_Contributions.pdf](http://hereforgood.target.com/_ui/pdf/2010_Political_Contributions.pdf).

<sup>64</sup>MN Forward, *2010 Year-End Report of Receipts and Expenditures*, Minnesota Campaign Finance and Public Disclosure Board, 2010, <http://www.cfbreport.state.mn.us/pdfStorage/2010/CampFin/YE/41035.pdf>. The authors also contacted Target’s press office in December 2010, and company representatives refused to answer any questions about political spending, referring us to their Web site which at that time did not provide information regarding additional contributions.

<sup>65</sup>OpenSecrets, *Target Corp PAC Expenditures 2010*, Center for Responsive Politics, December 8, 2010, <http://www.opensecrets.org/pacs/expend.php?sort=A&cmt=C00098061&cycle=2010&Page=1>.

<sup>66</sup>Target also gave \$5.6 million to various trade associations in 2010, but it has a policy of expressly requiring organizations receiving their financial support not to spend it on campaign contributions or to influence the outcome of specific elections or ballot initiatives. This policy is not new, having been in place since at least 2008. See Target Corporation, *Trade Association and Policy-Based Organization Support in 2010*, Target Civic Activity Web site, [http://hereforgood.target.com/\\_ui/pdf/2010\\_Organization\\_Support.pdf](http://hereforgood.target.com/_ui/pdf/2010_Organization_Support.pdf).

<sup>67</sup>Tom Webb, *Has Emmer Donation Cost Target on Stock Market?*, St. Paul Pioneer Press, August 18, 2010.

management firms, collectively holding \$57.5 million of Target stock, requested that Target perform a review of its political spending practices. The New York State Pension Fund, which holds \$283 million worth of Target shares, also considered joining in this request.<sup>68</sup> Over the next several months however, Target's stock price rebounded and August sales rose at a comparable rate to the year before.<sup>69</sup>

The eventual results of Target's strategic review, as embodied in an altered corporate policy made public in February 2011, "[fell] short of what critics demanded: that Target quit using corporate money in political campaigns."<sup>70</sup> Target declined to halt corporate spending in political races, rather creating a new panel of executives who must pre-approve contributions and report to the Target board, ensuring that the company takes account of "considerations that may be important to our team members, guests or other stakeholders."<sup>71</sup> In short, it seemed that Target took steps to avoid a repeat of the MoveOn protest.

Over the next year Target's contribution headache continued. In February 2011, pop singer and vocal gay rights supporter, Lady Gaga, who had agreed to release an exclusive Target edition of her new album, "Born This Way," asserted that the deal "hinged upon their reform in the company to support the gay community and to redeem the mistakes they've made."<sup>72</sup> In an interview with *Billboard Magazine* about the Lady Gaga deal, Target's VP of Communications Dustee Jenkins refused to rule out future contributions to candidates who oppose gay rights.<sup>73</sup> Several weeks later, in March 2011, a Gaga spokesperson announced that the deal had fallen through, apparently because of Target's past political donations.<sup>74</sup> The issue reappeared during Target's annual shareholder meeting in June 2011 where it faced a series of critical questions from shareholders over its political spending. Though Target CEO Steinhafel told shareholders that "[w]e want to move forward and not reflect on the past," ten of the twelve questions asked by shareholders revolved around Target's political giving.<sup>75</sup> Shareholder activism might be the most immediate and significant threat toward changed corporate behavior, but Target's reply to date has been limited and vague, calling into question whether disclosure could much aid shareholders in keeping firms accountable.

Judged solely by the market-oriented goal of keeping Target out of elections, the boycott was

only mildly successful, and possibly only for the immediate 'crisis management' stage. The questions that follow are: What does this case tell us about the prospect for boycotts or other mass-media strategies as a way of incentivizing organizations to stay out of elections? And, to the extent that MoveOn organizers were successful in either the market or media aspects of the campaign, how replicable is that effort? The evidence leans against MoveOn's approach on both scores.

Certainly, contrasted with the observed effect on Target, MoveOn was less successful with its loftier goal of discouraging corporate involvement. Evidence from Minnesota's other corporate actors who donated to MN Forward provides the most powerful and direct evidence because it holds constant the candidates, the timing and setting, the state's political culture, and the state's disclosure law. MN Forward's contributors included a number of industry associations, including the Chamber of Commerce, but companies that were similarly exposed to the campaign included Best Buy, 3M, and Red Wing Shoes, all Minnesota based. Simply put, none were affected to the same degree as Target, if at all. The latter two are the easiest to explain. Unfazed by the negative publicity received by Target, in September 2010 Minnesota-based 3M made a \$100,000 donation to MN Forward. 3M differs most markedly from Target in that its business

<sup>68</sup>Jennifer Martinez and Tom Hamburger, *Target Feels Backlash From Shareholders*, L.A. Times, August 19, 2010.

<sup>69</sup>Target Corporation, *Target Corporation Reports August Sales Results*, September 2, 2010, <http://investors.target.com/phoenix.zhtml?c=65828&p=irol-newsArticle&ID=1466271&highlight=>.

<sup>70</sup>Tom Webb, *Target Reformulates Its Policy on Contributions*, St. Paul Pioneer Press, February 18, 2011.

<sup>71</sup>Target Corporation, *Civic Activity*, <http://hereforgood.target.com/learn-more/civic-activity>.

<sup>72</sup>Bill Werde, *Lady Gaga Talks Target Deal for "Born This Way,"* Billboard Magazine online, February 18, 2011, <http://www.billboard.com/features/lady-gaga-talks-target-deal-for-born-this-1005041982.story#/features/lady-gaga-talks-target-deal-for-born-this-1005041982.story>.

<sup>73</sup>Bill Werde, *Target's Public Relations Vice President On Company's Relationship With Lady Gaga, LGBT Initiatives*, Billboard Magazine online, February 18, 2011, <http://www.billboard.biz/bbbiz/industry/retail/target-s-public-relations-vice-president-1005042332.story>.

<sup>74</sup>The Advocate.com Editors, *Gaga Dissolves Deal With Target*, The Advocate, March 09, 2011, [http://www.theadvocate.com/Arts\\_and\\_Entertainment/Entertainment\\_News/Gaga\\_Dissolves\\_Deal\\_With\\_Target/](http://www.theadvocate.com/Arts_and_Entertainment/Entertainment_News/Gaga_Dissolves_Deal_With_Target/).

<sup>75</sup>David Phelps, *Questions on Political Giving Still Dog Target*, Minneapolis Star Tribune, June 8, 2011.

base is much less dependent on consumers; though it sells some products under easily identifiable brands (such as Scotch tape and Post-Its), much of its business comes from research and development and services to industry. Red Wing Shoes, although a retail chain, produces shoes under many brand names that may be hard to link with its corporate parent. More importantly, Red Wing Shoes, as a privately held, family owned company, does not face shareholder pressures.

The more revealing example is Best Buy because, aside from Target, it received the most attention in media reports. Like Target, Best Buy had a good reputation with progressives, consistently receiving 100 percent ratings on the HRC's Corporate Equality Index. Best Buy also had clear exposure to consumers as a visible retail chain. Best Buy had reason for concern, and CEO Brian Dunn initiated a review of its donations.<sup>76</sup> Still, the company failed to attract further criticism. A few YouTube videos included Best Buy as a named target, but none of these received more than a few thousand hits. An important possibility is that a multi-pronged boycott consumes too much media oxygen and only the focus on Target was sustainable. To be sure, if all corporations became directly active in elections, a boycott of all would not be possible. It is likely that MoveOn recognized this challenge of sustaining a boycott on two fronts and perhaps just picked one company to focus on and in so doing chose Target as a more symbolic 'target' of a media campaign. Furthermore, Best Buy exemplifies another challenge facing boycotts because, although it faces competition with varied retailers for certain various product lines (such as cellphones or computers), Best Buy dominates the Minnesota market for consumer electronics and media. If they learned of the boycott at all then customers lacked a viable alternative.

An important dimension of the analysis must be to emphasize why Target presents an exceptional case, even more so in national perspective. The under-realized potential displayed in 2010 makes it difficult to envision Target as a widely replicable example for how to use disclosures as a tool to regulate organizational political participation and corporate influence. A number of factors were already working in MoveOn's favor. The setting of the Target donation played a large role in making it the high profile case it became. Historically influenced by progressive political movements, possessing a "moralistic" political culture, and associated

with good government reforms,<sup>77</sup> Minnesota has a particularly strong climate of citizen centered campaigns and more strongly rejects what voters see as corrupting or undue influence. The backlash against Target would likely have fared much worse in other states with a less civically engaged public.<sup>78</sup> Within that environment, Target had positioned itself as a progressive company that had earned consistently strong reviews on progressive scorecards. Compared to its more down-market competitor, Wal-Mart, Target's market segment has long been higher income customers who tend to be more socially aware in their shopping decisions.<sup>79</sup> The perception of Target as a socially responsible company may have been felt only by Minnesota consumers, if at all, given the concentration of Target employees in the Twin Cities, the public relations around Target's charitable giving in the state, and the irony (noted by the Democratic candidate for governor himself, Mark Dayton) that Target had started as a subsidiary of his family's Dayton-Hudson Corporation department store chain, which provided him with his personal wealth.<sup>80</sup>

Context combined with circumstance: Tom Emmer's strongly conservative views, particularly his vocal opposition to gay rights, made him a provocative lightning rod around which the political left could rally in opposition. MoveOn tied Emmer's conservatism to Target, helping the organization put a controversial, hypocritical face on the home-grown retailer. Though Target attempted to distance itself from Emmer's views on social policy, emphasizing that the sole intent of its contribution to MN Forward was to support economic

<sup>76</sup>Eliza N. Carney, *New Spending Rules Mean New Backlash*, National Journal, August 30, 2010, <http://nationaljournal.com/columns/rules-of-the-game/new-spending-rules-mean-new-backlash-20100830>.

<sup>77</sup>Daniel Judah Elazar, Virginia Gray, and Wyman Spano, *Minnesota Politics & Government* (University of Nebraska Press, 1999). Though Republicans, often from a centrist tradition, have found success in gubernatorial races, Minnesota has voted primarily Democratic in Presidential elections since 1932, last going Republican in Nixon's 1972 lopsided victory.

<sup>78</sup>See Harry C. Boyte and Nan Skelton, *2009 Minnesota Civic Health Index*, National Conference on Citizenship, 2009, <http://www.ncoc.net/index.php?download=2kccfl173>.

<sup>79</sup>Knowledge@Wharton, *Wal-Mart: Is There a Downside to Going Upscale?*, June 14, 2006, <http://knowledge.wharton.upenn.edu/article.cfm?articleid=1499>.

<sup>80</sup>Rachel Stassen-Berger, *Dayton Says He's "Disappointed" in Target MN Forward Donation*, Minneapolis Star Tribune, August 24, 2010.

growth and job creation,<sup>81</sup> the contrast of Emmer's strong opposition to gay marriage with Target's pro-LGBT policies made it much easier to tarnish Target's reputation. The hook for MoveOn's campaign appears not to have been its corporate political activity *per se* but the raw contradiction of its support for a candidate who had made a key stand against gay rights.

In sum, MoveOn found a very good target at just the right moment of weakness: a publicly held retail company trading on its progressive and upper-middle-class credentials, taking an apparently hypocritical stance in a state with a moralistic political culture. Unsurprisingly then, the protest reached no further. That the timing of its campaign was unique by definition, coming after the *Citizens United* flap had primed the media and positioned Target as the "first one out of the box,"<sup>82</sup> makes MoveOn's strategy even more difficult to replicate.

### ON THE LIMITS OF DISCLOSURE

The central narrative for critics of *Citizens United* has been the impropriety of corporate speech in a healthy democracy, but the more active policy making agenda to flow from the case has been the potential of disclosure as the best available regulatory tool. Minnesota's 2010 extension of state election disclosure law was essential for the Target contribution even to come to light, and specifically the law required not only spending disclosure by independent groups but also donor disclosure. Only a handful of other states have such laws currently on the books and prospects at the federal level stalled with the return of divided government. Even with a change in the political winds, however, we argue that the Target case highlights the limited impact of further disclosure.<sup>83</sup>

This case study brings to light two more general phenomena. The first, as already discussed, is the difficulty of collective action such as boycotts as an effective tool for the promotion of corporate 'political' accountability, at least in the electoral context. The underlying reasons may be many, but likely include the cynicism of the American electorate, a general acceptance of the rhetorical narrative of First Amendment rights for all (including organizations), and the lack of genuine choice in consumer behavior. Individuals and organizations have multiple identities; only some individuals will concern

themselves with the ethical and political stances of market participants. Knowing those values, only some will seek to act on them. Trying to act on them, only some will find acceptable alternatives.

Whatever the explanation, it has proven very difficult for organizations of the political left to turn anxiety about corporate influence on elections into effective collective action. Marketplace 'coercion' appeared as a threat, in the case of Target, only when its corporate identities clashed in a particularly vivid way. What Justice Kennedy suggested in *Citizens United* as a possible governmental interest in supporting shareholder interests appears to operate highly conditionally. In that environment, only exceptional companies will be discouraged from participation.<sup>84</sup> Though shareholders are better placed to raise objections to corporate political involvement, it is not yet well understood how substantially those efforts may affect corporate behavior other than to inspire stronger public relations efforts, and absent a wider consumer revolt, even those efforts may not result. In time corporations may even see *Citizens United* as an opportunity to engage in targeted political participation as a positive consumer strategy—supporting causes and candidates likely to reverberate with their customer base.

Ironically, if any argument to suppress organizational political activity gains traction, it may be because of the electoral activity of labor unions. In the denouement of the 2010 campaign in Minnesota, the most influential campaign may have been the Alliance for Better Minnesota, with substantial labor union support, which spent \$5.7 million in support of Mark Dayton's successful gubernatorial bid, more than the \$5.3 million Dayton spent himself.<sup>85</sup> MoveOn's campaign looked strictly at the corporate side, of course, but conservatives—in

<sup>81</sup>Steinhafel, *A Message From Gregg Steinhafel, Chairman, President and CEO*, *supra* note 55.

<sup>82</sup>Confidential interview by authors with a political law lawyer.

<sup>83</sup>Our conclusion echoes and validates the findings of David Schultz, *Disclosure Is Not Enough: Empirical Lessons From State Experiences*, *Election Law Journal* 4(4): 349–370 (2005).

<sup>84</sup>See Briffault, *supra* note 27, at 287.

<sup>85</sup>Tom Scheck, *Report Shows Influence of Outside Groups on Gov Campaign*, Minnesota Public Radio, February 1, 2011, <http://minnesota.publicradio.org/display/web/2011/02/01/campaign-spending-folo/>.

the ascendancy in the 2010 elections—have increasingly pushed against labor union spending as a wedge toward possible reform in union regulations.

The second general observation suggested by the Target case is the message gap that plagues efforts to narrate the meaning of disclosures. In making an example out of Target, MoveOn hoped to send the message to all corporations to stay out of politics,<sup>86</sup> but it may have had the counterproductive effect on other corporations of encouraging them to spend without disclosing. This possibility has not been lost on observers, who recognized how corporations would pay closer attention to how to avoid disclosure.<sup>87</sup> For decades, with the law bounded by what is possible politically and under prevailing interpretations of the First Amendment, all reform has been partial. Restrictions on contributions, like disclosure obligations, close some avenues while leaving others open. The only reason Target's contribution came to light was because it contributed to a group that was legally required to disclose its donors. However, as many political law lawyers today can advise, there are a number of 'vehicles' in which to spend money undisclosed, including 501(c)(4) groups as registered under the U.S. tax code or 501(c)(6) trade associations which are not required to disclose their donors. The enforcement of disclosure laws governing 527 organizations remains an active concern to critics of campaign finance, as well.<sup>88</sup> Instead of convincing corporations to stay out of political spending as MoveOn had hoped, the Target case may have had the unintended consequence of reinforcing preexisting corporate tendencies to hide contributions. The 2010 midterm election displayed a surfeit of this type of spending, as organizations adapted to the changed environment and possibly, too, the desire not to be "another Target," by shifting strategies to undisclosed funds. As reported by the Center for Responsive Politics in an Election Day analysis, of the \$300 million spent by independent groups in the 2010 elections, 42% was spent by organizations that were not required to disclose their donors.<sup>89</sup> These donors instead chose to contribute behind the veil of trade associations, like the Chamber of Commerce,<sup>90</sup> or behind innocuous sounding pseudonyms such as Americans for Job Security<sup>91</sup> or the 60 Plus Association.<sup>92</sup> As long as donors contributed to these groups in a general manner and did not specify exactly how their contribution was to

be spent, they could contribute unlimited amounts without their name ever being disclosed.

This message is not new to organizations: Scholars have observed that the incentives of much regulation do not drive good-faith compliance with the spirit of the law but rather "perfectly legal" adherence to the letter.<sup>93</sup> The response to external incentives provided by law (and activism that seeks to mobilize the law for political goals) tends to be efficient rather than ambitious. Some disclosures must be made as a cost of doing business, but partial disclosure requirements will drive "perfectly legal" alternatives. Even if disclosures are required in the schemes being contemplated as a reaction to *Citizens United*, those laws may allow for effectively "non-disclosing disclosures" that fulfill the letter of the regulation without shedding light on the real identity or purpose of some contributions. The policy prescription for the future would seem to lay in the hope of "perfecting" the regulations so as to avoid all such loopholes. That may be a faint hope for reformers, both in the realm of the politically possible and in the realm of the law, where the legal creativity wielded by lawyers has proven useful in identifying and creating gaps.

<sup>86</sup>MoveOn e-mail dated August 2, 2010 (on file with authors).

<sup>87</sup>Peter Overby, *The Real Lesson In Target's Campaign Cash Trouble*, National Public Radio, August 16, 2010, <http://www.npr.org/templates/transcript/transcript.php?storyId=129236311>.

<sup>88</sup>Treasury Inspector General for Tax Administration, *Improvements Have Been Made, but Additional Actions Could Ensure That Section 527 Political Organizations More Fully Disclose Financial Information*, February 4, 2010, <http://www.treasury.gov/tigta/auditreports/2010reports/201010018fr.pdf>.

<sup>89</sup>Megan R. Wilson, *Who's Buying This Election? Close to Half the Money Fueling Outside Ads Comes From Undisclosed Donors*, The Center for Responsive Politics, November 2, 2010, <http://www.opensecrets.org/news/2010/11/whos-buying-this-election.html>.

<sup>90</sup>Eric Lipton, Mike McIntire, and Don Van Natta Jr., *Top Corporations Aid U.S. Chamber of Commerce Campaign*, New York Times, October 21, 2010.

<sup>91</sup>Mike McIntire, *Hidden Under Tax-Exempt Cloak, Political Dollars Flow*, New York Times, September 23, 2010.

<sup>92</sup>David Weigel, *Mystery Millions: The 60 Plus Association's Conservative Message Isn't New, But Its Wealth Is*, Slate Magazine, October 7, 2010, <http://www.slate.com/id/2270318/>.

<sup>93</sup>See, e.g., Doreen McBarnet and Christopher Whelan, *The Elusive Spirit of the Law: Formalism and the Struggle for Legal Control*, *Modern Law Review* 54: 848–873 (1991); McBarnet and Whelan, *Creative Accounting and the Cross-Eyed Javelin Thrower* (John Wiley, 1999).

## CONCLUSION

Emerging out of the *Citizens United* decision, the example of Target's political contributions during the 2010 election season tested the limits of disclosure, a system in which exposure is used as a tool to influence the behavior of the parties involved. We find that case useful in understanding the possibilities and limits of disclosure as an instrument of accountability. The Target case, set against the context of widened undisclosed spending during the 2010 cycle, sends the important lessons that (1) disclosure can easily be sidestepped, and more importantly, (2) even when information is disclosed, the public and critics of campaign contributions are limited in their ability to use those disclosures to shape the behavior of political actors. The benefits of disclosure regulations for producing organizational accountability are likely overstated, but by the same token, so are the fears of critics that disclosure opens up corporate political actors to risk in the economic marketplace.

If disclosure of Target's contribution did not even have a significant impact in this exceptional situation, it is worth asking the hypothetical question: Where would disclosure ever serve as the tool

of accountability that reformers seek? In many ways, the DISCLOSE Act and the Minnesota disclosure law are analogous legislation, one at the federal level and the other on the state level. Even if the DISCLOSE Act became law, the lessons from the Target case bode poorly on its prospects as a sufficient regulatory scheme. That said, many would agree with the ambitions of wider disclosure, and as a politically possible "next step," the agenda will likely remain centered on it. Disclosure is important and perhaps even necessary in a democratic political system, but it is not a sufficient condition, even in very favorable circumstances. Without other regulatory schemes, disclosure seems unlikely to significantly re-shape the dynamics of modern American elections.

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