Chief Justice Roberts holds key in campaign-finance case

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Supreme Court's first major case in upcoming term represents conservatives' latest effort to remove government restrictions on political speech.

WASHINGTON — Limits on federal election campaign contributions that have stood for nearly 40 years appear ready to fall unless Supreme Court Chief Justice John Roberts rescues them, as he did President Obama's health care law.

That's the growing assessment of legal experts on the left and right who are gearing up for the first big case of the high court's 2013 term, one that could fortify the Roberts court's opposition to restrictions on campaign spending.

Three years after their blockbuster decision in *Citizens United v. Federal Election Commission* struck down limits on independent spending by corporations and labor unions, the justices are being asked to eliminate the ceiling on what wealthy donors can contribute to federal candidates, parties and political action committees. Limits on each donation would be retained, but donors would be allowed to make as many as they like.

The case pits the First Amendment's freedom of speech against the government's interest in stopping political corruption — and Roberts, more than any of his colleagues, is the man in the middle. He has ruled five times in a row against restrictions on political speech, but unlike several of his conservative colleagues, he has not debunked limits on federal contributions.

"This court has long recognized the governmental interest in preventing corruption and the appearance of corruption in election campaigns," Roberts said in his 2007 majority opinion in *Federal Election Commission v. Wisconsin Right to Life*. Four years later in *Arizona Free Enterprise Club v. Bennett*, he noted that "the interest in alleviating the corrupting influence of large contributions is served by ... contribution limitations."

On the other hand, the chief justice noted in the 2007 case that the First Amendment remains paramount. "When it comes to drawing difficult lines in the area of pure political speech between what is protected and what the government may ban, it is worth recalling the language we are applying," he said — that "Congress shall make no law ... abridging the freedom of speech."

No other justice is being watched as closely in the upcoming case of *McCutcheon v. Federal Election Commission*, which asks the court to strike down "aggregate" limits on a donor's federal contributions — currently $123,200 over two years, divided among candidates, parties and PACs.

The court's four liberal justices are expected to defend those limits. Three conservatives, including Justice Anthony Kennedy, the most frequent swing vote, have made clear their disdain for the contribution limits upheld in *Buckley v. Valeo*, the landmark 1976 case that still holds sway. And Justice Samuel Alito is considered less likely to surprise court-watchers than Roberts, whose usual inclination is to respect precedent and make changes only incrementally.

'MINIMALIST' OR 'MUSCULAR'?

Roberts "is both by nature and by what he's written in this area either more cautious, or he has not formed as hard a view on these issues as some of the other justices on both sides," says Bobby Burchfield, the lawyer for Senate Republican leader Mitch McConnell, who will help make the case against the contribution limits in court on Oct. 8.

Roberts' majority opinion in the *Wisconsin Right to Life* case, which eased but did not eliminate all restrictions on outside advertising in the weeks preceding elections, was less than his fellow conservatives sought. Justices Kennedy, Antonin Scalia and Clarence Thomas wrote separately that they would have struck down those restrictions.

The chief justice also ordered that the *Citizens United* case be argued a second time before signing on to Kennedy's opinion striking down independent spending limits. Those actions give backers of campaign finance restrictions hope and opponents doubts about how Roberts will rule this time.

"I think it will come down to Roberts," says Ilya Shapiro, a Supreme Court expert at the libertarian Cato Institute. "He's a minimalist, and he doesn't want to be seen as biting off too much."

That isn't always the case. In June, Roberts wrote the 5-4 decision striking down the Voting Rights Act's method of determining which states and municipalities need federal clearance to change voting procedures.

"Sometimes he rules incrementally, and sometimes he doesn't," says Erwin Chemerinsky, dean of the University of California-Irvine School of Law. Campaign finance, he says, "is an issue that Roberts cares a lot about, and that the Roberts court cares a lot about."

Thus far, that care has taken the form of lifting government restrictions, and some campaign-finance experts see no reason why this case should be different.

Joel Gora, a Brooklyn law school professor who represented the American Civil Liberties Union in the *Buckley* case 37 years ago, says Roberts' "very muscular decision" in the *Arizona* case showed that he would not tolerate even a small intrusion on a candidate's ability to spend his own money — by giving more public funds to the opponent.

"It really insisted that the government justify the kinds of restrictions or burdens on campaign speech that the public funding laws would claim to impose," Gora says.

THE $123,200 QUESTION

Those who want to keep the contribution limits say that without them, wealthy donors could give unlimited amounts to 'joint fundraising committees' controlled by party leaders. Such contributions then could be funneled to one candidate, which would otherwise be illegal.

"The wealthiest people in the country are the people who have the greatest capacity to corrupt the government," says Fred Wertheimer, president of Democracy 21, a watchdog group.

But James Bopp, the nation's most prominent litigator opposing campaign-finance restrictions who will argue Shaun McCutcheon's case for the Republican National Committee in court, says that argument is more fantasy than reality.

"That's just gross speculation," Bopp says. "There's no proof of any contributor trying to put together a scheme like that."

Which side Roberts will come down on remains the $123,200 question.

"It will be interesting to see what Roberts does in this case," Burchfield says, "if he's reached a fixed view of the way he thinks the Constitution should treat campaign-finance restrictions, or if he's still open to reviewing them a case at a time."