

January 29, 2010

## **Supreme Court Decision in *Citizens United v. Federal Election Commission***

On January 21, 2010, the U.S. Supreme Court decided *Citizens United v. Federal Election Commission* (No. 08-205), which significantly changes the legal landscape in political spending by corporations (and unions). The Court struck down a law prohibiting corporations (and unions) from using their general treasury funds to pay for advertisements, made separately from a political candidate's campaign, supporting or opposing a political candidate. The Court, by a 5-4 margin, overruled two prior Supreme Court holdings and also ruled that part of the Bipartisan Campaign Reform Act of 2002 (the "McCain-Feingold Act") is unconstitutional. Justice Stevens wrote a vigorous and lengthy (90+ page) dissent, which was joined by Justices Ginsburg, Breyer and Sotomayor.

The case has attracted a considerable amount of media attention. Political and legal commentators from across the spectrum have offered their predictions as to how this ruling will affect the electoral process and the role of corporations in the political process. In this client advisory, we briefly summarize the facts and primary legal issues presented in the case, and we describe the significant ways in which the legal landscape has been changed by the Court's decision.

### **Summary of the Decision**

The primary issue presented in *Citizens United* was the constitutional validity of a federal election law codified at 2 U.S.C. § 441b ("Section 441b"). Under Section 441b, corporations and unions were prohibited from making expenditures from their general treasury funds to expressly advocate for the election or defeat of candidates for federal office. Section 203 of the McCain-Feingold Act amended Section 441b to also prohibit corporations and unions from financing "electioneering communications." An electioneering communication is defined in the McCain-Feingold Act as, "any broadcast, cable or satellite communication" that "refers to a clearly identified candidate for Federal office" and is publicly distributed within 30 days prior to a primary election or 60 days prior to a general election. In 2007, the Supreme Court narrowed the definition of "electioneering communications" to apply only to communications "susceptible to no reasonable interpretation other than an appeal to vote for or against a specific candidate." See *FEC v. Wisconsin Right to Life, Inc.*, 127 S.Ct. 2652 (2007).

During the 2008 presidential primary, a nonprofit corporation called Citizens United produced a film entitled *Hillary: The Movie*, which portrayed Hillary Clinton as unfit for office and urged voters to vote against her. Citizens United anticipated that the film would be made available on cable television through video-on-demand within 30 days of primary elections. Concerned about possible civil penalties for violating Section 441b, Citizens United sought an injunction in U.S. District Court to prevent the Federal Election Commission ("FEC") from enforcing Section 441b against it for *Hillary: The Movie*, arguing that Section 441b was unconstitutional as applied to the film. The District Court sided with the FEC, and dismissed Citizens United's motion for a preliminary injunction. Citizens United appealed directly to the U.S. Supreme Court.

After hearing oral arguments on the more narrow issues brought before the District Court, the Court ordered the case to be reargued on the broader questions of whether the Court should overrule its prior decision in *Austin v. Michigan Chamber of Commerce*, 494 U.S. 652 (1990) (which established the constitutional basis for Section 441b) and/or part of its holding in *McConnell v. Federal Election Commission*, 540 U.S. 93 (2003) (which upheld the constitutional validity of Section 441b).

In *Austin*, the Michigan Chamber of Commerce sought to use its general treasury funds to run a newspaper ad supporting a specific political candidate. However, Michigan law prohibited corporations

from using their treasury funds for independent expenditures in support of or in opposition to candidates for state office. The *Austin* Court upheld the Michigan law, finding that it served to prevent “the corrosive and distorting effects of immense aggregations of wealth that are accumulated with the help of the corporate form and that have little or no correlation to the public’s support for the corporation’s political ideas.” The *Austin* Court held that the political speech restrictions imposed by the Michigan law were justified by this “antidistortional interest.”

In *Citizens United*, the Court expressly overruled its decision in *Austin* and held that Section 441b’s ban on corporate expenditures was an unconstitutional restriction on political speech. Throughout the majority opinion, Justice Kennedy reiterated the principle that political speech cannot be restricted based on the corporate identity of the speaker. The majority ruled that the antidistortion rationale used by the *Austin* Court was “insufficient” to justify Section 441b’s restrictions on the political speech rights of a corporation. The Court acknowledged that preventing corruption (or the appearance of corruption) was a valid justification for banning direct corporate contributions to political candidates, but held that the concern about corruption did not justify a ban on independent expenditures by a corporation.

The Court stated that *Austin* was “not well reasoned and that it provides no basis for allowing the Government to limit independent expenditures by corporations.” As a result of *Austin* being overruled, the Court also overruled part of its decision in *McConnell*, which upheld the McCain-Feingold Act’s extension of Section 441b’s restrictions on independent corporate expenditures for “electioneering communications.” Because the *McConnell* Court had relied on the antidistortion rationale in *Austin* to uphold a political speech restriction that was more severe than the restriction in *Austin*, the Court held that that portion of *McConnell* must also be overruled.

The Court stated that laws that burden political speech, including Section 441b, are subject to “strict scrutiny,” which requires the Government to prove that the restriction on the political speech “furthers a compelling governmental interest” and “is narrowly tailored to achieve that interest.” The Court found that no compelling governmental interest was furthered by the restrictions imposed by Section 441b. The Court even went so far as to state, “No sufficient governmental interest justifies limits on the political speech of nonprofit or for-profit corporations.”

In addition to challenging Section 441b, *Citizens United* also challenged certain disclaimer and disclosure requirements under the McCain-Feingold Act. However, the Court upheld these two requirements by an eight-to-one vote (with only Justice Thomas dissenting from this part of the Court’s decision). The disclosure provision requires that any corporation that spends more than \$10,000 in a year to produce or air certain types of political ads must file a report with the FEC disclosing the names and addresses of those that contributed over \$1,000 to the production or distribution of the ad. The disclaimer provision requires that a political ad not authorized by a candidate or a political committee must state who is responsible for the content of the ad.

### **Other Issues Raised By *Citizens United***

Justice Kennedy’s majority opinion in *Citizens United*, together with the concurring and dissenting opinions issued by other Justices, exceed 170 pages in length. The extensive analysis and consideration of numerous legal issues in *Citizens United* raised a number of questions, some of which may come before the Court in the future.

One significant issue raised in the *Citizens United* case is the extent to which corporations have rights under the Constitution. The majority opinion and Justice Stevens’s dissenting opinion each acknowledge that corporations do indeed have rights under the Constitution. However, the Justices have diverging views about the extent and nature of these rights. Justice Kennedy’s majority opinion cites numerous cases in which the Court has recognized that the First Amendment right to free speech extends to corporations. Citing prior Supreme Court precedence, Justice Kennedy reaffirms the First Amendment principle that the Government cannot restrict political speech based on the speaker’s corporate identity.

While *Citizens United* restored certain rights of corporations under the Constitution, there are a number of corporate restrictions under campaign finance law which were not changed in *Citizens United*. The following provisions of federal campaign finance law were not affected by the *Citizens United* decision.

- *Individual rights to contribute to a political candidate's campaign.* Individuals are still permitted to contribute up to \$2,400 to a candidate for federal office during the primary and \$2,400 during the general election. Individuals are also still permitted to give up to \$5,000 to any political action committee.<sup>1</sup>
- *Corporate (and union) contributions made directly to a political candidate's campaign.* Corporations (and unions) are still prohibited from contributing funds directly to a federal political candidate's campaign. Corporations have been prohibited from making direct campaign contributions since the enactment of the Tillman Act in 1907. Unions have been prohibited from making direct campaign contributions since 1947.
- *Organization of PACs.* Corporations are still permitted to organize political action committees and to notify their employees about the political action committees. Corporations are still prohibited from making contributions from their general treasury funds to any political action committee. While the rules regarding political action committees have not changed, one can expect to see less corporate involvement with political action committees since corporations are now permitted to express their political opinions more freely.
- *Disclaimer and disclosure obligations.* The disclaimer and disclosure requirements in the McCain-Feingold Act remain unchanged, despite *Citizens United's* challenge. The Court upheld these restrictions as valid and constitutional. While the disclaimer and disclosure requirements have not been altered by the *Citizens United* decision, Congress may seek to enact legislation to strengthen these requirements.

As a result of the *Citizens United* decision, corporations (and probably unions) may now engage in the following activities, which were previously illegal under the McCain-Feingold Act:

- A corporation may make expenditures from its general treasury funds to support, promote and expressly advocate for the election of a candidate for federal office (so long as the corporation does not coordinate any such activities with the candidate's campaign).
- A corporation may make expenditures from its general treasury funds to expressly advocate for the defeat of a candidate for federal office (so long as the corporation does not coordinate any such activity with the campaign of the candidate's opponent).
- A corporation can purchase on-air and print advertising to voice its support or opposition of a candidate for federal office, so long as no coordination with the candidate takes place and the applicable disclosure and disclaimer rules are observed.

### **How the *Citizens United* Decision May Affect Selected State Campaign Finance Laws**

A number of states have laws similar to Section 441b which restrict political spending and other political advocacy activities of corporations and labor unions. These laws will now be subject to challenge, and many of them were effectively invalidated by the Court's holding in *Citizens United*. Below, we briefly summarize some of the campaign finance laws in Ohio, Kentucky and Indiana, and describe how they might be affected by the *Citizens United* ruling.

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<sup>1</sup> The \$5,000 individual contribution limit is currently being challenged in the case of *SpeechNow.org v. Federal Elections Commission*. On January 27, 2010, the entire nine-judge D.C. Circuit Court of Appeals heard oral arguments on the preliminary injunction requested by SpeechNow.org, as well as the constitutional issues raised in the lawsuit filed by SpeechNow.org.

## Ohio Law

Chapter 35 of the Ohio Revised Code contains a number statutes which restrict corporations and labor organizations from participating in campaign financing activities. Many of these laws mirror the federal laws which govern the activity of corporations and labor organizations. With limited exceptions, Section 3599.03(A) of the Ohio Revised Code generally prohibits corporations (both non-profit and for-profit) and labor organizations from using treasury funds "for any partisan purpose." Under ORC § 3599.03(F), a corporation or labor organization is permitted to use its money or property to communicate information to support or oppose a political party or candidate for election only if: (1) the communication is sent to members, employees, officers, or trustees of the labor organization or the shareholders, employees, officers or directors of the corporation; and (2) the communication is not made by mass broadcast, such as by radio or television and is not made by advertising in a newspaper of general circulation. Following *Citizens United*, a court would probably find this provision of Ohio law to be an unconstitutional restriction of political speech.

ORC Section 3517.105(C)(2) allows a corporation to make an independent expenditure to support or oppose a certified ballot issue, provided that reporting form 30-B-2 is filed with the Ohio Secretary of State. As a result of *Citizens United*, this provision will probably be expanded to include political candidates. In fact, on January 25, 2010, Ohio State Senator Jon Husted sent a letter to Democratic House Speaker Armond Budish and Republican Senate President Bill Harris calling for new legislation to prevent "the influence of unlimited, undisclosed contributions from dominating the 2010 elections." In his letter, State Senator Husted states that he is drafting legislation that would require "that all corporate and union expenditures on campaigns must clearly identify who is paying for the advertising," and "that corporations and unions must report the amount of the expenditure and the individual corporate or union donors to the Secretary of State."

There are a number of reporting and disclosure requirements in Chapter 35 of the Ohio Revised Code and in Chapter 111 of the Ohio Administrative Code, including reporting requirements for "electioneering communications." Under *Citizens United*, requiring certain disclosures and disclaimers in connection with campaign financing and political advocacy is generally permissible, even if the corporation and labor organization reporting requirements are different than those applied to individuals and other associations.

Statutes and regulations such as ORC § 3599.03 are likely to be repealed by the Ohio General Assembly. And other statutes and regulations will need to be revised to account for the new legal rights of corporations and labor organizations. While provisions of Ohio law such as ORC § 3599.03 may be impermissible under *Citizens United*, reporting and disclosure requirements are generally acceptable. One can expect the Ohio General Assembly to focus on reporting and disclosure to limit the political influence of corporations and labor organizations to the extent possible under *Citizens United*.

## Kentucky Law

Section 121.035 of the Kentucky Revised Statutes contains provisions which restrict corporations from making contributions to political campaigns and political candidates. Although Kentucky does not have a statute which addresses "electioneering communications" or which closely resembles the federal law Section 441b, KRS § 121.035 could be read to prohibit for-profit corporations from making expenditures, independent from a political candidate's campaign, which serve to support a candidate's election to state office. KRS § 121.035 prohibits a for-profit corporation from disbursing or handling any funds of the corporation that are "to be used or employed in any way for the purpose of aiding, assisting, or advancing any candidate for public office in this state in any way whatever." Kentucky law does permit corporate contributions in support of public issues that may appear on the ballot. However, the broad prohibition against corporate expenditures in support of a political candidate could be applied to unconstitutionally restrict the political speech rights of a for-profit corporation under *Citizens United*.

KRS § 121.025 also contains a general prohibition against corporate contributions towards the election of political candidates. KRS § 121.025 provides that, "no corporation ... shall contribute, either directly or indirectly, any money, service, or other thing of value towards the nomination or election of any

state, county, city or district officer in this state..." This statute could also be construed to prohibit independent expenditures from corporations made in support of a candidate for Kentucky office.

Kentucky's campaign finance law does allow nonprofit corporations to make independent expenditures in support of political candidates, provided that all independent expenditures in excess of \$500 are reported to the Kentucky Registry of Election Finance. In addition to this disclosure requirement, Kentucky law requires disclaimers on political advocacy communications. KRS § 121.190 requires that all newspaper or magazine advertisements, posters, circulars, billboards and paid-for television and radio announcements which expressly advocate the election or defeat of a clearly identified candidate to any public office be identified by the words "paid for by" followed by the name and address of the individual or committee which paid for the communication.

Regardless of whether the Kentucky legislature responds to the *Citizens United* decision, the Court's ruling will limit the extent to which KRS §§ 121.035 and 121.025 can be enforced against for-profit corporations that independently support political candidates. We can also expect disclosure laws to be amended to apply to corporations and unions.

### **Indiana Law**

Under Indiana law, corporations (both for-profit and nonprofit) and labor organizations are permitted to make contributions directly to political candidates and their campaigns. However, contributions from for-profit corporations and labor organizations are subject to limitations on the amounts which may be contributed for each political office, as well as an aggregate contribution limit of \$5,000. The specific contribution limitations are set forth in Section 3-9-2-4 of the Indiana Code. A corporation or labor organization which exceeds any of the contribution limits in IC § 3-9-2-4 is subject to a civil penalty up to a maximum of three times the amount that the contribution exceeds the prescribed limit. A corporation or labor union which recklessly exceeds the contribution limits under IC § 3-9-2-4 may also be subject to criminal penalties.

Under Indiana law, non-profit corporations and business organizations other than corporations (i.e. partnerships, limited liability companies, and limited liability partnerships) may make an unlimited amount of contributions to candidates, political parties, and campaign finance committees. These entities are not subject to the contribution limits under IC § 3-9-2-4.

Indiana law does require that certain disclosures and disclaimers be made in connection with advertisements advocating the election or defeat of a political candidate. These disclosure and disclaimer requirements apply when any expenditure is made for the purpose of financing communications expressly advocating the election or defeat of a clearly identified candidate through a newspaper, magazine, public signage, direct mailing or any other type of general public political advertising. Generally, the required disclaimer must contain the name of the party responsible for the communication and a statement as to whether the communication was authorized by the political candidate identified.

The disclosure and disclaimer requirements described above are the only restrictions Indiana has placed on political advertisements made independently from a political candidate's campaign. As such, the Supreme Court's ruling in *Citizens United* is unlikely to have a significant affect on Indiana campaign finance and election law. In this respect, Indiana is an example of what can be expected in other states.

### **Conclusion**

In sum, the Court's holding in *Citizen's United* is significant in that it not only struck down significant portions of the McCain-Feingold Act banning corporate and union expenditures on political speech, but the decision also effectively invalidated similar restrictions imposed by a number of states. The decision also brings to the forefront the question of what role corporations and unions should play in the political and electoral process. The judicial and legislative fallout from *Citizens United* remains to be seen. While the Court's holding opens the door for corporations and unions to have greater influence in

the electoral process, there are a significant number of public policymakers who will be using the Court's decision as a 'call to action' to reign in corporate and union involvement in politics.

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