

“Don’t Un-PAC Yet”

Citizens United v. Federal Election Commission

I. SUMMARY

On Thursday, January 21, 2010, in *Citizens United v. Federal Election Commission*, No. 08-205, slip. op., 558 U.S. -- (2010), the Supreme Court overturned federal statutory prohibitions on a corporation using its general treasury funds to pay for two forms of campaign advertisements: “independent expenditures” and “electioneering communications.” For a 5-4 majority, Justice Anthony Kennedy held those prohibitions violated the non-profit plaintiff corporation’s First Amendment guarantee of freedom of political speech. Those prohibitions, among others, are codified at 2 U.S.C. § 441b. While *Citizens United* is a corporation, the force of the Court’s reasoning should extend to labor organizations, which are subject to the same prohibitions at issues in this case.

Significantly, the ruling expressly overturns *Austin v. Michigan Chamber of Commerce*, 494 U.S. 652 (1990), which upheld Michigan’s ban on corporate independent expenditures. In *Austin*, the Court found that the unique state-conferred corporate structure that facilitates the amassing of large treasuries that could

be used to distort the political process warranted the limits on corporate independent expenditures. The Court, in *Austin*, held that political speech may be banned based on the speaker’s corporate identity. *Citizens United* squarely rejects *Austin*’s rationale. The ruling, however, does not overturn the federal statutory prohibition, also contained in 2 U.S.C. § 441b,

on direct contributions to candidates from corporations and labor organizations.

In most general terms, an “independent expenditure” is an outlay of funds, generally for campaign-related advertising expressly advocating the election or defeat of a clearly identified federal candidate, that is created and aired without “coordination” with a

candidate or his or her agents. 2 U.S.C. § 431(17). Through the years, and following a series of court decisions, the Federal Election Commission has created an extensive multi-part regulatory definition of “coordination.” The federal prohibition on corporate independent expenditures is many decades old.

An “electioneering communication” is a statutory category of more recent vintage. It was created as part of the Bi-Partisan Campaign Reform Act of 2002, Pub.

“The First Amendment does not permit Congress to make these categorical distinctions based on the corporate identity of the speaker and the content of the political speech.”

Citizens United, No. 08-205, slip op. at 49. (Kennedy, J., for the Court)

L. No. 107-55, 116 Stat. 81 (2002) (“BCRA”). Such a communication is “any broadcast, cable, or satellite communication” that “refers to a clearly identified candidate for Federal office” and is made within 30 days of a primary election or 60 days of a general election, and that is publicly distributed. 2 U.S.C. § 434(f)(3). Following the Supreme Court’s decision in *Federal Election Commission v. Wisconsin Right to Life*, 551 U.S. 449 (2007) (“*WRTL*”), the term electioneering communication was narrowed to exclude what are commonly known as “issue ads,” which may identify a public official (who happens to be a federal candidate) and criticizes or applauds the official’s position on an issue, rather than expressly advocating the official’s election or defeat as a candidate.

Following *Citizens United*, a corporation may pay for such an expenditure or communication using treasury funds, provided the corporation acts independent

from the candidate on whose behalf the outlay is made. A corporation might also pay for another entity (e.g., another corporation, certain non-profit tax-exempt entities, or a political committee) to make such an expenditure provided the recipient entity has not coordinated the expenditure or communication with the candidate.

Citizens United stems from a 2008 movie, *Hillary*, released by appellant Citizens United, a non-profit corporation, that was critical of then-Senator Hillary Clinton and her candidacy for the Democratic nomi-

nation for President. At issue was the *Hillary* movie itself, as well as promotional materials advertising it on pay-per-view television. In the lower court, Citizens United litigated the constitutionality of the expenditure and electioneering communication, along with ancillary disclosure and disclaimer requirements, as they applied to *Hillary* and its promotional materials.

In examining the law’s burden on speech, the Court considered Section 441b’s facial validity, even though this was a minor issue at the district court level. The

“The rule that political speech cannot be limited based on a speaker’s wealth is a necessary consequence of the premise that the First Amendment generally prohibits the suppression of political speech based on the speaker’s identity.”

Citizens United, No. 08-205, slip op.at 34. (Kennedy, J., for the Court)

Court proceeded to facial review after rejecting all of Citizens United’s (and even some of the Government’s) arguments that Section 441b did not apply to *Hillary* and related promotional material because they were not “express advocacy or its functional equivalent” under *WRTL*, or because they were to be shown through video-on-demand – a delivery system, petitioners argued, that had “a lower risk of

distorting the political process than television ads.” *Citizens United* at 9.

The Court ruled that although the Section 441b regulatory scheme may not be a prior restraint “in the strict sense,” the “complexity” of the regulatory scheme and the “deference courts show to administrative opinions,” function as the equivalent of a prior restraint, giving the FEC power analogous to the type of government practices that the First Amendment was drawn to prohibit. *Citizens United* at 18. This “chill on speech,” the Court concluded, “makes it neces-

sary . . . to invoke the earlier precedents that a statute which chills speech can and must be invalidated where its facial invalidity has been demonstrated.” *Id.* at 19.

Finally, also of note, the Court, by an 8-1 vote, upheld the challenged disclaimer and disclosure requirements. Citing *Buckley v. Valeo*, 424 U.S. 1, 64 (1976), the Court differentiated the disclaimer and disclosure requirements from corporate independent expenditures in that although they may burden the ability to speak, “they impose no ceiling on campaign-related activity.” *Citizens United* at 51.

II. “DON’T UN-PAC YET”

Citizens United has expanded the range of activity a corporation can undertake in its own name – but the question remains: is it advisable for a corporation (or a labor organization) to terminate its PAC and conduct all its political activity directly? Our best guidance is: not so fast.

Despite the Court’s decision allowing corporations – both for profit and nonprofit – to use general treasury funds to make independent expenditures that expressly advocate the election or defeat of a candidate, through any form of media, consideration of the application of U.S. tax laws remains. In general, a for-profit corporation (and any other taxpayer) is not permitted to deduct amounts paid or incurred in connection with (i) participation in, or intervention in, any political campaign on behalf of (or in opposition to) any candidate for public office, or (ii) any attempt to influence the

general public, or segments thereof, with respect to elections, legislative matters or referendums.

Similarly, nonprofit corporations (and unincorporated associations, including labor organizations), which are otherwise tax exempt, are generally prohibited from, or limited in, participating or intervening in political campaigns on behalf of (or in opposition to) any candidate for public office. Depending on the circumstances, their expenditures are subject to tax and, in some circumstances, their exempt status can

be put at risk. [The courts have already determined that qualification for exempt status and taxes on political expenditures are constitutionally permissible.]

Thus, before jumping into the fray directly, each corporation or labor organization should consider the tax effects of any planned expenditures which prior to the Court’s decision were prohibited by the campaign finance laws.

In addition, in many instances, unincorporated associations were established to avoid the prohibi-

tions of the campaign finance laws. That approach left open the possibility of personal liability of the stakeholders in the association for actions of the association. With the Court’s *Citizens United* decision, those unincorporated associations might consider whether incorporation presents worthwhile protections without now affecting their approach to political activities.

The Court did not strike down the prohibitions relating to political contributions and expenditures by foreign

“The Court operates with a sledgehammer rather than a scalpel when it strikes down one of Congress’ most significant efforts to regulate the role that corporations and unions play in electoral politics. It compounds the offense by implicitly striking down a great many state laws as well.”

Citizens United, No. 08-205, slip op. at 7 (Stevens, J., dissenting).

nationals and foreign corporations. Accordingly, foreign interests should carefully consider the law before relying on the Court's decision to undertake political activities through domestic affiliates.

Finally, there remains a question about whether a for-profit corporation's expenditures to support or oppose particular candidates are subject to challenge by the corporation's shareholders. Until now, that has not been an issue a corporation or its board of directors has generally faced. But certainly with increasing shareholder activism and the likelihood of greater corporate political activism, one might anticipate such a challenge if a corporation engages in previously prohibited political activities.

III. REMAINING RESTRICTIONS

Despite *Citizens United's* seemingly sweeping reach, many significant restrictions on corporate political activity remain. For example, under federal law, as explained above, a corporation may not make a direct contribution to a federal candidate or political party. Nor may a corporation make an "in-kind" contribution to such an entity.

"Corporate facilitation," or the use of corporate resources or facilities to engage in fundraising activities in connection with a federal election, represents one important type of in-kind, and therefore prohibited, corporate contribution. Specifically, a corporation

cannot direct subordinates to help plan a federal campaign fundraising event, use corporate lists (*i.e.*, customer or vendor lists) for such fundraising, permit a federal candidate to use a corporate facility that is not otherwise customarily made available to clubs, civic or community organizations or other groups, or cater fundraising events that are not "prepaid" by the campaign.

Nor does *Citizens United* disturb the prohibition on a corporation (or any person, for that matter), reimbursing a federal political contribution of an employee, officer or other person through a bonus, expense account, or other form of direct or indirect compensation. Such reimbursement defeats the federal statutory interest in accurate disclosure of who actually made the contribution in addition to violating any applicable prohibitions on corporate contributions.

Finally, as noted above, all federal prohibitions on political activity by foreign nationals in connection with any federal, state or local election also remain in force.

IV. THE FUTURE OF CORPORATE CONTRIBUTIONS

a. Corporate Contribution Prohibitions

While the Court in *Citizens United* was not asked to adjudge the constitutionality of the bar on direct corporate and labor contributions, the reasoning employed in *Citizens United* can logically be extended

[S]tare decisis is neither an "inexorable command," nor "a mechanical formula of adherence to the latest decision," especially in constitutional cases. If it were, segregation would be legal, minimum wage laws would be unconstitutional, and the Government could wiretap ordinary criminal suspects without first obtaining warrants."

Citizens United, No. 08-205, slip op. at 6 (Roberts, C.J., concurring).

to such contributions. In *Buckley v. Valeo*, 424 U.S. 1 (1976), the Supreme Court upheld federal limits on contributions by individuals. Under the reasoning employed in *Citizens United*, however, it seems difficult to draw a distinction, in terms of the potential for corruption or its appearance (defined as a *quid pro quo*, as the majority opinion does) between a permissible \$2400 contribution by an individual to a federal candidate and a like-sized contribution by a corporation. The principal bulwark against such a decision appears to be existing precedent (*stare decisis*). Both the opinions by Justice Kennedy for the court, and Chief Justice Roberts' concurrence, were careful to explain the Court was ruling narrowly as to *Austin* in harmonizing its decision with *stare decisis* principles.

b. States

Many states restrict political activity by corporations. Those states' laws that do limit or prohibit corporate independent expenditures, as well as those that similarly restrict labor organizations will in general be subject to *Citizens United*. In addition, certain other provisions of state campaign finance law that have been justified in terms of precluding the potentially distorting use of corporate funds in connection with elections may also be vulnerable.

c. Federal legislation

While Republicans have, in general, applauded the decision in *Citizens United*, Democrats have condemned it, and pledged a legislative response. House Majority Leader Steny Hoyer (D-MD) made his position clear stating that "Congress no choice but to act." Press Release, Office of the Majority Leader (January 21, 2010). Except for Justice Stevens who authored the dissent, the remaining eight justices split along the party lines of the presidents who appointed them.

"Congress may not abridge the 'right to anonymous speech' based on the 'simple interest in providing voters with additional relevant information.'"

Citizens United, No. 08-205, slip op. at 1 (Thomas, J., dissenting) (citing *McIntyre v. Ohio Elections Comm'n*, 514 U.S. 334, 348 (1995)).

Absent a change in the composition of the Court and a subsequent reconsideration of *Citizens United*, it is not yet clear what sort of law could replace those that were stricken without impermissibly singling out corporations and potentially labor organizations. One possible approach might be to require some form of shareholder approval or notification for certain corporate political

activities as part of federal legislative efforts relating to corporate governance.