



Government Relations Bulletin



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Supreme Court Strikes Restrictions on the Use of Corporate Funds in Political Speech

In a landmark decision issued on January 21, 2010, the United States Supreme Court struck down §441b of the Bipartisan Campaign Reform Act (BCRA) as violating the First Amendment. *Citizens United v. Federal Election Commission*, 588 U.S. ____ (2010). The decision affirms that corporations, trade associations, and labor unions may use general treasury funds to make independent communications that expressly advocate the election or defeat of a political candidate or to fund independent electioneering communications. Overturning years of precedent, the Court ruled that corporations have the same right as individuals to engage in independent political speech, a decision that will have a ripple effect on similar laws, including those in Ohio.

Independent Corporate Expenditures

The nonprofit corporation Citizens United created *Hillary: The Movie* and brought the case challenging BCRA's ban on "electioneering communications." Electioneering communications are a type of independent expenditure that is not coordinated with a candidate, and is broadcast shortly before a federal election that references a federal candidate, whether or not a direct message to vote for or against the candidate may be involved. In addition, the Opinion addressed other independent expenditures by corporations, such as more direct corporate messages urging a certain vote or messages disseminated through other means.

Since *Hillary: The Movie* was produced using corporate funds, the BCRA prohibited its playing immediately prior to the 2008 federal election. Citizens United argued on narrow grounds that the ban did not apply on statutory grounds. The Supreme Court rejected the narrow statutory argument, instead taking a broader stance to find

the federal law and its sweeping ban on all independent corporate expenditures to be unconstitutional.

The Court reiterated previous case holdings that corporations enjoy First Amendment protection in various contexts and extended those protections to corporate political speech. In doing so, the Court overruled an earlier precedent which held that a corporation's unique character and access to large amounts of money allowed and even required corporations to be treated differently in regard to political speech. "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." 588 U.S. ____ (2010), p. 34.

Justice Kennedy, writing for a majority of the Court, described §441b as an unconstitutional prior restraint on speech, holding that: "When the Government seeks to use its full power, including the criminal law, to command where a person may get his or her information or what distrusted source he or she may not hear, it uses censorship to control thought." *Id.*, p. 40.

As a result of the Opinion, federal laws that prohibit independent expenditures by corporations are now unenforceable. Independent expenditures are not, and cannot be, subject to campaign finance limits. Thus, corporations, trade associations, and unions may now make independent expenditures without limitation related to federal elections.

Like the federal BCRA laws, Ohio law prohibits independent corporate political expenditures. While *Citizens United* applies strictly to federal law, the strength and breadth of the Opinion puts

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the enforceability of Ohio law on corporate independent expenditures into serious doubt. While Ohio's ban on independent expenditures by corporations may remain on the books until addressed by the General Assembly, the ban cannot be effectively enforced against trade associations, or corporations.

Disclaimers and Reporting Requirements

The *Citizens United* Opinion did not strike BCRA or the federal campaign finance laws in their entirety. BCRA requires the use of disclaimers on independent communications and electioneering communications. Federal law also requires that expenditures be disclosed in various campaign finance reports, and places restrictions and reporting requirements on federal political action committees. Those provisions were upheld in *Citizens United*.

Thus, requirements for disclaimers showing the name of the entity sponsoring the communication are upheld. In addition, laws requiring that independent expenditures over certain threshold amounts must be publicly disclosed and list who paid for the communication, which election the communication referenced, and the names of all contributors.

The *Citizens United* Court affirmatively upheld the reporting and disclosure requirements associated with electioneering communications, explaining, "The Government may regulate corporate political speech through disclaimer and disclosure requirements, but it may not suppress that speech altogether."

Ohio law contains similar reporting and disclosure requirements. *Citizens United* lends additional support for finding provisions that regulate disclosure and reporting related to Ohio corporate independent expenditures are similarly constitutional.

Direct Corporate Contributions

While the federal ban on corporate independent expenditures is clearly addressed and stricken, the *Citizens United* Court did not rule upon the constitutionality of direct corporate contributions. Direct contributions from a corporate treasury to a political candidate or party are prohibited by federal law, as well as Ohio law. The constitutionality of that prohibition is now in question.

Without distinguishing between direct contributions and independent expenditures, the majority decision made clear that "No sufficient governmental interest justifies limits on the political speech of nonprofit or for-profit corporations." Id. p. 50. Also, the Court gave a critical review of the "onerous restriction"

placed on the political action committee process used currently by corporations to have some limited political involvement, generally commenting that "the option to form PACs does not alleviate the First Amendment burden."

The breadth of this holding allows for direct corporate participation in political campaigns in Ohio. Clearly, direct corporate contributions may be subject to monetary limitations and may be subject to disclaimer and reporting requirements. However, the constitutionality of Ohio's complete ban on direct corporate contributions seems to be in significant jeopardy.

Unlike federal law, Ohio law already treats unions differently than corporations, allowing them to make direct contributions as a "political contributing entity" or "PCE."

Ohio law defines a PCE as "any entity, including a corporation or labor organization, that may lawfully make contributions and expenditures . . ." R.C. 3517.01(B)(25). Until the *Citizens United* decision was rendered, corporations were ineligible to make any direct political contributions. In light of the *Citizens United* Opinion, it appears that corporations that wish to make direct contributions in Ohio may now fall within the definition of a PCE.

As a result, while corporations, trade associations, and unions are now presumably free to make independent expenditures related to the political process, restrictions in Ohio law related to direct contributions by PCEs may now extend to corporations as well. Reporting and disclosure requirements, which already apply to PCEs under Ohio law, will also apply. As a result of *Citizens United*, Ohio law contains several provisions which seem to conflict, not the least of which is the Ohio law prohibiting corporate contributions in their entirety.

Conclusion

The *Citizens United* Opinion will undoubtedly impact the campaign finance landscape in Ohio and across the country. The full extent of that impact remains to be seen, as legislators and elections commissions react and enact new regulations in response to the Opinion. At a minimum, this landmark decision creates new opportunities for corporations, unions, and trade associations to become more directly involved in the political process.

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