Sponsors: McConnell/Reif

RESOLUTION 2012-15

A RESOLUTION OF THE CITY AND BOROUGH OF SITKA TO SUPPORT AMENDING THE UNITED STATES CONSTITUTION TO RESTORE THE PEOPLE'S POWER TO LIMIT CORPORATE INFLUENCE IN ELECTIONS AND POLICYMAKING

WHEREAS, Due to the incorrect interpretation of the Constitution and the adverse impact on the rights of people in our democracy in the U.S. Supreme Court decision in *Citizens United vs. Federal Election Commission (FEC),* local, state, and federal elected officials must take action to restore the authority of the American people to restrict the undue influence of corporations on our elections and public policy; and

WHEREAS, the Supreme Court's 5-4 decision in Citizens United v. FEC broke away from the legal precedents that acknowledged the power of citizens through their elected representatives to limit corporate influence in elections because the interests of corporations do not always correspond with the public interest and therefore, the political influence of corporations should be limited; and

WHEREAS, the Supreme Court's radical rewrite of the First Amendment's protections will permit even greater corporate influence over our political process by allowing unlimited spending from corporate profits to favor or oppose candidates; and

WHEREAS, the Supreme Court's decision will allow the free speech rights of a corporation to dilute and outweigh the free speech rights of ordinary citizens, because of the vast financial resources corporations have for spending money to influence elections compared with regular people; and

WHEREAS, the Supreme Court's elevation of corporate "rights" may have constitutional repercussions that go far beyond this one case and will undermine the ability of the people to regulate corporations in numerous policy areas affecting people's health, wealth and opportunities; and

WHEREAS, THE American people, through their local, state, and federal governments must reclaim their rightful place as sovereigns in our democracy and protect the electoral process from corporate domination; and

WHEREAS, fair elections are fundamental to the health and well-being of our democracy; and

WHEREAS, the City and Borough of Sitka Assembly stands in agreement that corporations are not entitled to the same first amendment rights in our elections as people and further urge our state legislators to adopt and send to the United States Congress a resolution in support of amending the Constitution to restore the ability of the American people to limit corporate spending in our elections.

NOW, THEREFORE, BE IT RESOLVED BY THE ELECTED OFFICIALS OF THE CITY AND BOROUGH OF SITKA THAT:

The City and Borough of Sitka, strongly condemns the Supreme Court's ruling in *Citizens United vs. FEC* and supports amending the U.S. Constitution to limit corporate influence and restore democracy in our elections for the benefit of the American people.

PASSED and APPROVED this 19th day of July, 2012.

ATTEST

_____
Colleen Ingman, MMC
Municipal Clerk

_____
Cheryl Westover, Mayor

Location:
CAMPAIGNS - FINANCE; ELECTIONS;

OLR RESEARCH REPORT

March 2, 2010 2010-R-0124

SUMMARY OF CITIZENS UNITED V. FEDERAL ELECTION COMMISSION

By: Kristin Sullivan, Principal Analyst

Terrance Adams, Legislative Analyst II

You asked for (1) a summary of *Citizens United v. Federal Election Commission*, No. 08-205 (U.S. Jan. 21, 2010) and (2) its impact on state law, including Connecticut's.

This office is not authorized to provide legal opinions and this report should not be considered one.

SUMMARY

In a 5-4 decision, the U.S. Supreme Court ruled that corporations and unions have the same political speech rights as individuals under the First Amendment. It found no compelling government interest for prohibiting corporations and unions from using their general treasury funds to make election-related independent expenditures. Thus, it struck down a federal law banning this practice and also overruled two of its prior decisions. Additionally, in an 8-1 decision, the Court ruled that the disclaimer and disclosure requirements associated with electioneering communications are constitutional.

The Court's decision in *Citizens United* likely calls into question laws in 24 states, including Connecticut, prohibiting corporations from making independent expenditures from their general treasury. While the ruling's immediate effect is unclear, experts predict it is only a matter of time before these laws will be challenged in court or repealed by state legislatures. Experts also predict that, since the laws are vulnerable, they will be difficult for state election officials to

enforce. In Connecticut, CGS §§ 9-613(a) and 9-614(a) prohibit independent expenditures by businesses and unions, respectively.

The decision's impact on Connecticut's lobbyist and contractor contribution and solicitation bans and the Citizens' Election Program (CEP) is less clear. The U.S. Court of Appeals for the 2nd Circuit asked the parties in *Green Party of Connecticut, et al. v. Garfield, et al.*, 648 F. Supp. 2d 298 (D. Conn. 2009) to file supplemental briefs addressing these issues. The state contends there is little, if any, effect while the Green Party asserts the opposite.

FACTS AND PROCEDURAL HISTORY

In January 2008, Citizens United, a nonprofit corporation, released a 90 minute documentary entitled *Hillary: The Movie* (hereinafter *Hillary*). The movie expressed opinions about whether then-senator Hillary Clinton, a candidate for the Democratic presidential nomination, was fit for the presidency. Citizens United distributed the movie in theaters and on DVD, but also wanted to make it available through video-on-demand. It produced advertisements promoting the film and wanted to show them on broadcast and cable television. To pay for the video-on-demand distribution and the advertisements, Citizens United planned to use its general treasury funds.

As amended by § 203 of the Bipartisan Campaign Reform Act of 2002 (BCRA), federal law prohibits corporations and unions from spending their general treasury funds on "electioneering communications" or for speech that expressly advocates the election or defeat of a candidate. An "electioneering communication" is any broadcast, cable, or satellite communication that (1) refers to a clearly identified candidate for federal office, (2) is made within 30 days of a primary election or 60 days of a general election, (2 U.S.C. § 441b), and (3) is publicly distributed (11 CFR § 100.29(a)(2)).

Citizens United, fearing that *Hillary* would be covered under § 441b, sought an injunction in December 2007 against the Federal Elections Commission (FEC) in federal district court, arguing that § 441b is unconstitutional as applied to *Hillary*. The district court denied this motion and granted summary judgment to the FEC.

Additionally, Citizens United argued that BCRA's disclaimer and disclosure requirements are unconstitutional as applied to *Hillary* and the advertisements promoting *Hillary*. Under BCRA § 311, televised electioneering communications funded by anyone other than a candidate for office must include a clear, readable disclaimer displayed on the screen for at least four seconds. The disclaimer must identify the person or organization responsible for the advertisement, that person or organization's address or website, and a statement that the advertisement "is not authorized by any candidate or candidate's committee" (§ 441d(a)(3)).

Further, under BCRA § 201, any person who spends more than $10,000 on electioneering communications during a calendar year must file a disclosure statement with the FEC (§ 434(f)(1)). The statement must identify the person making the expenditure, the amount, the election to which the communication was

directed, and the names of certain contributors (§ 434(f)(2)). Again, the district court ruled against Citizens United and granted summary judgment to the FEC. Citizens United appealed to the U.S. Supreme Court.

ISSUES ON APPEAL

The issues on appeal were whether, as applied to *Hillary,* (1) § 441b's prohibition on corporate independent election expenditures was constitutional and (2) BCRA's disclaimer, disclosure, and reporting requirements were constitutional.

After oral arguments in March 2009, the Court ordered a reargument for September that same year. It asked the parties whether it should overrule two prior campaign finance cases (1) *Austin* v. *Michigan Chamber of Commerce,* 494, U.S. 652 (1990), which held that political speech may be banned based on the speaker's corporate identity and (2) *McConnell v. Federal Election Comm'n,* 540 U.S. 93, 203–209 (2003), which upheld a facial challenge to limits on electioneering communications. Deciding that the issue of § 441b's application to *Hillary* could not be resolved on narrower ground, the Court began its analysis with the sustainability of *Austin.*

HOLDING AND ANALYSIS

Independent Expenditures by Corporations

The Court overruled *Austin,* striking down § 441b's ban on corporate independent expenditures. It also struck down the part of *McConnell* that upheld BCRA § 203's extension of § 441b's restrictions on independent corporate expenditures. The Court held that the "government may not suppress political speech on the basis of the

speaker's corporate identity. No sufficient governmental interest justifies limits on the political speech of nonprofit or for-profit corporations." An analysis of this holding follows.

As Applied Challenge. First, the Court held that the case could not be resolved on an as applied basis without chilling political speech. Under an "as applied" challenge, the Court's review of the law's constitutionality is limited to the set of facts in the case before it. The Court therefore broadened the case from Citizens United's initial narrower arguments, focusing only on *Hillary,* to reconsider both the validity of its prior decisions in *Austin* and *McConnell* and the facial validity of § 441b.

In reaching this decision, the Court reasoned that among other things:

1. Citizen United's narrower arguments, including that *Hillary* is not an "electioneering communication," are not sustainable under a fair reading of § 441b, and

2. it must therefore consider the statute's facial validity or risk prolonging its substantial chilling effect.

Facial Challenge to § 441b. In considering the facial challenge, the Court applied strict scrutiny; thus requiring the government to demonstrate that the statute served a compelling interest and was narrowly tailored to meet that interest. A "facial challenge" requires the Court to look at the law and determine if it is unconstitutional as written.

In noting the need for strict scrutiny, the Court stated that a ban on independent expenditures is a ban on speech. In its analysis, the Court found that prior to *Austin*, the First Amendment applied to corporations (*First Nat'l Bank of Boston v. Bellotti*, 435 U.S. 765) and the protection was extended to the context of free speech (*NAACP v. Button*, 371 U.S 415).

In *Austin*, the Court held that antidistortion was a compelling government interest that justified a ban on independent election expenditures by corporations and unions. It ruled that large aggregations of wealth, accumulated with the help of the corporate form, may have corrosive or distorting effects, thus justifying a ban on corporate independent expenditures. The *Citizens United* Court reasoned that "differential treatment of media corporations and other corporations cannot be squared with the First Amendment and there is no support for the view that the Amendment's original meaning would permit suppressing media corporations' free speech." *Austin*, it found, interferes with the "open marketplace" of ideas protected by the First Amendment. As a result of this reasoning, the Court was not persuaded by the government's arguments on (1) anticorruption and (2) shareholder protection.

Anticorruption. The Court addressed the government's anticorruption argument and ruled that independent expenditures "do not give rise to corruption or the appearance of corruption." The Court reasoned:

1. Although *Buckley* identified a sufficiently important governmental interest in preventing corruption or the appearance of corruption, that interest was limited to *quid pro quo* corruption.

2. This interest justifies restrictions on direct contributions to candidates, but not on independent expenditures.

3. Influence over and access to elected officials does not mean that those officials are corrupt and the appearance of influence or access "will not cause the electorate to lose faith in our democracy."

4. Twenty six states do not ban corporate independent expenditures, and the government did not argue that the absence of a ban in these states has led to increased corruption.

Shareholder Protection. Lastly, the Court rejected the government's argument that shareholders should be protected from being compelled to fund corporate speech. The Court reasoned:

1. Under a shareholder protection interest, if shareholders of a media corporation disagreed with its political views, the government would have the authority to restrict the media corporation's political speech.

2. If Congress had been interested in protecting shareholders, it would not have limited the ban on corporate independent expenditures to the 30 and 60 day windows preceding an election.

3. The ban is overinclusive because it includes corporations that only have a single shareholder.

Disclaimer and Disclosure Requirements

The Court ruled that BCRA's disclaimer and disclosure requirements are constitutional as applied to both *Hillary* and advertisements for it. Citing *Buckley* and *McConnell,* the Court found that disclaimers and disclosure requirements may burden the ability to speak, but they impose no ceiling on campaign-related activities or prevent anyone from speaking. However, the Court acknowledged that these could be challenged if a plaintiff could show a reasonable probability that disclosing contributors' names would subject them to threats, harassment, or reprisal.

In rejecting Citizens United's as-applied challenge, the Court held that

1. the advertisements for *Hillary* are "electioneering communications;"

2. disclosure requirements do not need to be limited to "speech that is the functional equivalent of express advocacy;"

3. "the public has an interest in knowing who is speaking about a candidate shortly before an election;" and

4. Citizens United presented no evidence that its donors have faced any threats, harassment, or reprisals.

IMPACT OF CITIZENS UNITED

The Supreme Court's decision in *Citizens United* likely calls into question laws in 24 states, including Connecticut. According to the Center for Competitive Politics, an organization tracking First Amendment issues, state responses thus far have varied. Some, like Ohio and Pennsylvania, are reviewing the case and have not yet decided how to proceed. At least one, Montana, has said its ban will remain until it is successfully challenged in court. Most have introduced bills that, among other things, repeal the independent expenditure ban; require stockholder approval prior to an independent expenditure; or establish corporate disclosure requirements for independent expenditures. Table 1 summarizes state responses to date.

Table 1: State Responses to Citizens United

Alaska	The chair of the Senate Judiciary Committee wants the committee to introduce a bill that would require disclosure of corporate spending on ads.
Arizona	SB 1444, introduced on February 16, 2010, would require corporations and labor unions that make independent expenditures in candidate campaigns to register and file disclosure reports.
Colorado	Governor Bill Ritter has asked the state's Supreme Court to evaluate the constitutionality of two provisions of the state's constitution that appear to be directly affected by Citizens United. Also, the state Republican Party has announced its intention to file suit against Colorado's law. It is possible that the suit could challenge a broader scope of the law than the two sections that are affected by Citizens United.
Iowa	The director of the Ethics and Campaign Disclosure Board has sent an e-mail to legislators telling them that Citizens United effectively overturns Iowa law. SF 2354, introduced on February 15, 2010, requires corporations to obtain permission from a majority of their shareholders prior to making an independent expenditure, requires corporations to report their independent expenditures to the Ethics and Campaign Finance Disclosure Board, prohibits coordination between candidates and corporations, and requires certain attributions on corporate-funded advertisements.
Maryland	HB 616, introduced on February 3, 2010, would require stockholder approval and public disclosure of corporate independent expenditures in excess of $10,000. HB 690 and SB 691 would prohibit government contractors from making independent expenditures. HB 986 and SB 570 would require board of director and stockholder approval for corporate independent expenditures, and would prohibit the distribution of false material. HB 1029 and SB 543 would establish disclosure requirements for corporate independent expenditures. SB 601 would prohibit corporate contributions to candidates and corporate-funded independent expenditures.
Michigan	The secretary of state has posted a detailed description of how Citizens United affects the state, including an FAQ section.
Minnesota	SF 2353, introduced on February 4, 2010, would repeal the ban on independent expenditures by corporations.
Montana	The attorney general has said the state's ban on corporate expenditures will stay in place until it is challenged.
North Carolina	The executive director of the State Board of elections has said that the law appears to be unenforceable, but they are still working to understand the full meaning of the decision.

Oklahoma	The Ethics Commission is working on amendments to change and remove the relevant portions of state rules.
South Dakota	SB 165, introduced on February 1, 2010, would prohibit corporations from making political expenditures without shareholder approval.
Wisconsin	The Senate passed SB 43 just two days before the release of the Citizens United decision. This bill would ban corporate and union funding of electioneering bans and require greater disclosure. The bill's sponsors say they are hoping to salvage the disclosure portions of the bill. Also, the Government Accountability Board is considering rules that would require greater disclosure. SB 540, introduced February 17, 2010, repeals Wisconsin's ban on corporate independent expenditures. It also requires corporations to file documentation of a vote of shareholders taken within the past two years approving campaign expenditures before making such an expenditure.
Wyoming	HB 68, which would repeal the ban on independent expenditures by corporations, is pending in the Legislature.

Source: Center for Competitive Politics

Connecticut

Bans on Contributions by Business Entities and Unions. *Citizens United* conflicts with two Connecticut statutes: (1) CGS § 9-613, which prohibits business entities from making contributions or expenditures to, or for the benefit of, a candidate in a primary or general election, or to promote the success or defeat of a political party and (2) CGS § 9-614, which prohibits unions from making contributions or expenditures without first forming a PAC. These provisions may therefore be in jeopardy and possibly unenforceable if challenged. (The bans do not apply to contributions or expenditures to promote the success or defeat of an referendum question).

Current law does not establish disclosure or attribution requirements for corporations or unions since it prohibits independent expenditures. If the law changes to allow these expenditures, the state would likely also adjust its disclosure and attribution requirements, subjecting businesses and unions to the same reporting requirements as individuals and PACs.

Green Party of Connecticut v. Garfield. The decision's impact is less clear with respect to Connecticut's (1) lobbyist and contractor contribution and solicitation bans and (2) the CEP. As a result of the decision, the U.S. Court of Appeals for the 2nd Circuit asked the parties in *Green Party of Connecticut v. Garfield* to file supplemental briefs addressing these issues. Connecticut contends that there is little, if any effect. The Green Party argues the opposite.

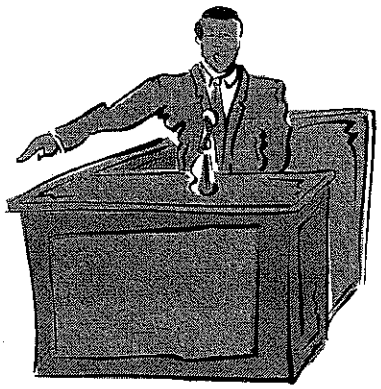
Concerning the contractor and lobbyist bans, the state argues in its brief that *Citizens United* concerns expenditures by corporations, not campaign contributions as *Green Party v. Garfield* does. The contractor and lobbyist bans do not involve any limits on independent expenditures; rather, they relate only to contributions. And, nothing in *Citizens United* weakens the ability to restrict direct contributions or solicitations for contributions by particular groups.

The state contends that *Citizens United* has little relevance to the CEP because it addresses nothing relating to public financing or alleged discrimination against minor parties. In fact, the state argues the decision supports the CEP's validity. According to the state's brief, the U.S. Court of Appeals for the 2nd Circuit held the CEP unconstitutional in part because its grants and matching funds were, "so generous that they amounted to a subsidy for participating candidates without imposing any countervailing disadvantage because the CEP expenditure limits were so high as to be illusory." Given the *Citizens United* decision, participating candidates may find themselves facing significant independent spending, which could constitute a countervailing disadvantage. To the extent that *Citizens United* causes unlimited independent spending, it creates a compelling state interest to provide increased matching grants, incentivizing participation and enabling participating candidates to respond to corporate expenditures.

In its brief, the Green Party argues that, "*Citizens United* reaffirms Buckley's central premise that campaign finance laws cannot be deployed in the service of leveling the playing field or promoting competition if it is achieved by restricting the political speech of some speakers in an effort to maintain or elevate the relative strength of other speakers." Specifically, it contents that the lobbyist and contractor contribution and solicitation bans single out particular speakers and it notes that the *Citizens* Court established that "in the context of political speech the government cannot impose restrictions on certain disfavored speakers." It argues that *Citizens* categorically rejects the statute's speaker-based judgment (i.e., the idea that lobbyists and contractors funnel large amounts of money into political campaigns to purchase influence.)

With respect the CEP, the Green Party argues that *Citizens United* reinforces the lower court's holding that the program's trigger provisions burden speech. It contends that the decision immediately effects the case and that the CEP's trigger provision forces non-participating candidates and non-candidates making independent expenditures (e.g., PACs) to choose whether to forgo additional expenditures on speech or see an opponent or disfavored candidate receive additional public funding (CGS § 9-714).

KS:ts



PERSONS TO BE HEARD

ANY MATTER

ON OR OFF AGENDA

(Not to exceed 3 minutes for any individual).

EXECUTIVE SESSION

I MOVE TO GO INTO EXECUTIVE SESSION to discuss confidential legal advice and direction with the Municipal Attorney, outside legal counsel, and Municipal Administrator with regard to Mike Litman and Jeff Farvour lawsuit with the City and Borough of Sitka, which has legal and financial consequences for the City and Borough of Sitka or involve matters that are required by law to be confidential.

Executive Session Defined: " A meeting or a portion of a meeting in which the proceedings are secret and the only attendees are members and invited quests. Deliberations of an executive session are secret and all attendees are honor bound to maintain confidentiality." -- Robert's Rules of Order