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| **SUMMARY OF CITIZENS UNITED**  **V.**  **FEDERAL ELECTION COMMISSION** |
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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.

**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effect is unclear, experts predict it is only a matter of time before these laws will be challenged in court or repealed by state legislatures.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 alsostruck 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.