

MEMORANDUM

TO: Friends / Colleagues

FROM: Mike Wittenwyler / Brady Williamson
Godfrey & Kahn, S.C.

DATE: January 21, 2010

SUBJECT: *Citizens United v. FEC*

Corporate spending on independent expenditures (express advocacy) permitted

Just a few hours ago, the U.S. Supreme Court issued its long-awaited decision in *Citizens United v. FEC* (No. 08-205). The wait was worth it. In a lengthy opinion authored by Justice Kennedy, the 5-4 majority overruled *Austin v. Michigan Chamber of Commerce* and, in doing so, now permits corporate sponsorship of independent expenditures – express advocacy communications.¹ Even more so, the Supreme Court made very clear today that any attempts to restrict or limit political speech by any speaker – individuals, corporations, labor organizations, tribes – would be highly disfavored.

“[P]olitical speech must prevail against laws that would suppress it, whether by design or inadvertence.” (p. 23)

“Speech restrictions based on the identity of the speaker are all too often simply a means to control content.” (p. 24)

“The First Amendment protects speech and speaker, and the ideas that flow from each.” (p. 24)

“When 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. This is unlawful. The First Amendment confirms the freedom to think for ourselves.” (p. 40)

“An outright ban on corporate political speech during the critical preelection period is not a permissible remedy.” (p. 45)

¹ Joining in Justice Kennedy’s majority opinion are Chief Justice Roberts and Justices Scalia, Thomas and Alito. A dissenting opinion was authored by Justice Stevens and joined by Justices Ginsburg, Breyer and Sotomayor.

Corporate spending on issue advocacy communications cannot be restricted

It is also important to note that today's decision in *Citizens United* builds on the First Amendment principles set forth in *Wisconsin Right to Life v. FEC* two years ago and reaffirms as well government's inability to restrict or limit corporate spending on issue advocacy at any time, including the time period before an election. Just like a campaign finance regulation on independent expenditures, any electioneering communication or issue advocacy regulation must be carefully crafted in a manner that permits corporate speech.

Disclaimers and disclosure requirements are permissible for independent expenditures and issue advocacy communications

While the decision today will make it very difficult for government to prohibit or at all limit the content or source of political speech, the Court was equally clear that disclaimer and disclosure requirements are permissible. These, of course, first must be imposed – if at all – by state or federal law.

“The Government may regulate corporate political speech through disclaimer and disclosure requirements, but it may not suppress that speech altogether.” (pp. 1-2)

“Disclaimer and disclosure requirements may burden the ability to speak, but they ‘impose no ceiling on campaign-related activities and do not prevent anyone from speaking.’” (p. 51) (citations omitted)

“The First Amendment protects political speech; and disclosure permits citizens and shareholders to react to the speech of corporate entities in a proper way. This transparency enables the electorate to make informed decisions and give proper weight to different speakers and messages.” (p. 55)

Moreover, the Court is also clear that such disclaimer and disclosure requirements could apply to independent expenditures as well as to issue advocacy communications. “[W]e reject *Citizens United*'s contention that the disclosure requirements must be limited to speech that is the functional equivalent of express advocacy.” (p. 54)

It is clear from this decision that *any* government regulatory structure for political speech can embrace disclosure but not a prohibition – either by source or content. The U.S. Supreme Court has reaffirmed that the right to speak about candidates, public officials and public policy is virtually beyond regulation but that the public has the right to evaluate that speech based, in part, on the disclosure of its source.

Direct corporate campaign contributions still may be prohibited

It is also important to note that today's decision only addresses corporate spending for independent expenditures and *not* corporate contributions to candidates and other political committees. In those jurisdictions where direct corporate campaign *contributions* are prohibited,

they will remain prohibited. *Citizens United* does nothing to upset those bans and, instead, suggests that such prohibitions will continue to be upheld.

Conclusion

As expected, *Citizens United* is a landmark campaign finance decision that will have direct implications on political speech in 2010 and beyond. In the next few weeks, regulators will need to decide how to try to address unconstitutional regulations while legislators will need to try to address unconstitutional state laws that conflict with today's holding. Government bodies that do not act quickly are likely to face litigation challenging speech restrictions that remain in place.

We will, of course, continue to study and evaluate the broad effects of *Citizens United* on state or federal campaign finance law as well as other areas of political speech. As always, if you have specific questions or need additional information, please let us know.

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