

# Campaigns & Elections

## Another letdown for Citizens United critics?

Why the High Court is unlikely to reconsider its landmark decision....



A full court press is on to overturn Citizens United. But opponents of the landmark ruling are likely to be disappointed by the outcome.

Citizens United v. FEC was decided by the U.S. Supreme Court in January, 2010. The controversial decision lifted the ban on independent spending by corporations and unions and found the electioneering communication blackout period to be unconstitutional. However, the Court left in place the ban on direct monetary contributions to candidates and parties and strongly endorsed disclosure.

The attempt to have the Supreme Court reconsider Citizens United stems from a conservative group's challenge of a Montana law that bans corporate spending in Montana elections.

In *American Tradition Partnership, Inc., (ATP) and Western Tradition Partnership, Inc. v. Steve Bullock, Attorney General of Montana*, the Petitioners seek to overturn the Montana Corrupt Practices Act, which dates to 1912.

After being clarified by the Legislature in 1979, the law requires that corporations "make campaign contributions and expenditures by accounting for and disclosing them through a separate, segregated fund of voluntarily solicited contributions from shareholders, employees, and members."

In other words, if corporations want to participate in Montana elections, they have to do so through political action committees that disclose their fundraising activities.

The challenge to the law was first taken up by the Montana District Court which found the law to be unconstitutional. Subsequently, the Montana Supreme Court reversed the District Court's ruling and upheld the Corrupt Practices Act. American Tradition Partnership, et seq. is now petitioning the U.S. Supreme Court to hear the case on appeal.

Recently, it was announced that the Campaign Legal Center and several other groups, including representatives of 22 states and the District of Columbia, have filed Amici Briefs supporting Montana's law. The briefs ask the Court to either deny the appeal or reconsider its decision in Citizens United.

Arizona Senator John McCain, a long-time champion of more disclosure by independent campaign committees since one once hurt his presidential primary ambitions, is also filing an Amicus Brief supporting Montana's law.

While the intent of these groups may well be good, it is doubtful the High Court will take either course of action. If the Court refuses to review the Montana case by denying certiorari, it will be undermining its own precedent in Citizens United and add confusion at a time when campaign finance law already is topsy-turvy. It is even more unlikely that the Court will opt to reconsider and reverse its two-year-old decision in Citizens United.

Attention is being focused on Justice Kennedy as the swing vote. But this may be a fool's errand. Justice Kennedy has long been a foe of restrictions on campaign spending by corporations, having written the dissent in *Austin v. Chamber of Commerce* in 1990. That high court ruling refused to let the Michigan Chamber pay for a political ad directly from its corporate treasury and instead required the use of its PAC funds. Kennedy's early dissent became law when he wrote the majority opinion in *Citizens United*, which discarded the precedent set in *Austin*.

In his brief in opposition to the challenge to the Montana statute, Attorney General and candidate for Governor Steve Bullock suggests that the separate, segregated fund—a PAC—is indistinguishable from the corporation. Secondly, he argues that independent spending can corrupt through the influence that money can bring to bear on the outcome of an election.

He states: "The [Montana Supreme] Court concluded that the distance between the accountable and transparent Montana politics of today and the dark days of Copper Kings confirmed rather than rebutted the People's compelling interest in the Corrupt Practices Act, and that the state's compelling interest remain."

Thirdly, he argues that the ATP desires to operate in a stealth way through non-disclosure of its donors and spending. Bullock notes: "ATP's undisputed purpose is to use the non-profit corporate form primarily to evade disclosure of funding sources that are themselves out-of-state (potentially off-shore) business corporations that seek to influence Montana elections anonymously."

None of these arguments, however, are likely to sway the five conservative judges on the U.S. Supreme Court into reversing *Citizens United*. The argument that the PAC account is indistinguishable from a corporation may lack credence under existing law and is at odds with the Court's interpretation of corporation in *Citizens United*.

The argument alleging a connection between spending and corruption is likely to be dismissed as well. Historically, the Court has ruled that First Amendment rights can only be abridged when there is a real threat of quid pro quo corruption, such as an agreement to accept a contribution in exchange for a vote on legislation or a contract. Contributions directly to candidates pose a greater risk of this threat and consequently are subject to tight regulation.

Since the *Buckley v. Valeo* ruling in 1981 and even more emphatically in *Citizens United*, the court has declared that the more indirect threat posed by independent political spending is not serious enough to curtail First Amendment rights through steps like contribution limits.

Finally, regarding stealth activity, the Court can simply respond that the remedy lies within *Citizens United* itself, which allows disclosure of donors to independent groups as well as expenditures. The Montana Legislature, in other words, can pass legislation to require registration and disclosure by these outside groups.

There is one small opening available to those who are hoping to see the Montana Corrupt Practices Act of 1912 upheld. It involves the Tenth Amendment and the right of states to regulate campaign financing vis-à-vis elections for state and local offices as they see fit. The Court could take this way out in the ATP case, stating that *Citizens United* applies to federal elections only, giving states greater latitude in regulating campaign financing.

However, the same possibility existed in *McComish v. Bennett* in June 2011, a case challenging Arizona's public financing law, and the Supreme Court simply declared a key section of the program unconstitutional. So the chances of this happening seem pretty slim.

As long as the composition of the Court remains the same, laws like Montana's Corrupt Practices Act are likely to be found unconstitutional and inconsistent with *Citizens United*.

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