

U.S. Supreme Court to rule soon on momentous campaign finance case



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COMMENTARY

It is expected this week that the U.S. Supreme Court will issue a potentially far-reaching opinion in *Citizens United v. Federal Election Commission* (FEC). The Court's decision could have a broad impact on campaign

finance rules nationally while likely leaving New Jersey's laws unscathed.

At issue is the FEC's attempt to impose federal campaign finance restrictions on a documentary about Hillary Rodham Clinton that was produced by Citizens United, a non-profit corporation.

Section 203 of the Bipartisan Campaign Reform Act (BCRA) — best known as McCain-Feingold — bars political advertising by corporations and unions within 60 days of a general election and 30 days of a primary. It also places disclosure requirements on these entities if they make independent expenditures outside of these periods.

Citizens United believes the law should not apply to a documentary movie and is protected by the First Amendment.

Initially the Court intended to rule solely on whether Section 203 applies to documentaries. Now it appears to have broadened its scope.

Specifically, the Court had asked for supplemental briefs to be submitted addressing Section 203 and one of its earlier 1990 decisions, *Austin v. Michigan Chamber of Commerce*.

In *Austin*, the Court upheld Congressional authority for regulating campaign spending by corporations.

It is thought that the Court may rule on the constitutionality of Section 203 and modify, or even strike down, Congressional authority to regulate campaign spending by corporations and unions.

Indeed, the Supreme Court in 2003 did uphold the constitutionality of BCRA in general, but recent decisions have betrayed a desire to weaken the federal law.

In the 2007 decision in *FEC v. Wisconsin Right to Life* it modified restrictions contained in Section 203 rather than ban broadcasts prior to election by corporations. The Court narrowed the provision's scope by ruling that it applies only to communications where the ad pretty much uses the words "vote for or against."

A second case wherein the Court invoked First Amendment protections came in 2008 in *Davis v. FEC*, which struck down the "Millionaires' Amendment."

The Millionaires' Amendment attempted to level the playing field between self-funded candidates and other congressional candidates.

Under certain circumstances when self-funded candidates spent more than \$350,000 in personal funds, contribution limits would be tripled for their opponents. But the court decided the amendment created two sets of rules for the candidates.

Thus, the Court has been very protective of the First Amendment, particularly as it pertains to political speech. It is a good guess that the Court may find for *Citizens United*, and perhaps go farther in applying those rights to corporate political advertising in general.

What the court will decide is unknown. But it is reasonable to believe that the Supreme Court may go far in the direction of extending political speech rights to corporations and unions.

What would this mean for state regulation of corporate and union campaign spending in general, and for New Jersey specifically?

The jury is still out. Nineteen states ban corporate contributions. Those states, of which New Jersey is not one, would probably feel an impact, particularly if the court undoes *Austin*.

In addition, five other states require corporations to file campaign reports, particularly when spending is in the context of a referendum. These laws may be affected as well.

New Jersey prohibits campaign giving only by state-regulated industries such as banks, utilities, casinos, and insurance companies. Otherwise, it does allow corporations and unions to contribute and to spend independently. Direct contributions are disclosed by candidates and parties, etc. while independent expenditures are disclosed by the corporations and unions.

In addition, New Jersey has pay-to-play laws which restrict, but don't prohibit altogether, contributions by contractors while negotiating or performing contracts.

Though a federal court decision found that New Jersey could not extend its pay-to-play regulations to federal contracts, a New Jersey appeals court found it to be a compelling interest of the state, upholding the law as it pertains to state and local contracting.

New Jersey statutory law seems to be in no imminent danger from a Supreme Court decision that may loosen the rules applicable to corporations and unions.

New Jersey has strong disclosure laws and imposes reasonable restrictions on campaign financial activity, including that of corporations and unions.

Even, on the outside chance, New Jersey laws are challenged, they should withstand constitutional scrutiny. Nevertheless, the legal staff of the New Jersey Election Law Enforcement Commission will review the pending decision to determine if any vulnerability exists.

Jeff Brindle is the Executive Director of the New Jersey Election Law Enforcement Commission.

The opinions presented here are his own and not necessarily those of the Commission.