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What Does the Recent Supreme Court Campaign Finance Decision Mean for Your Organization?

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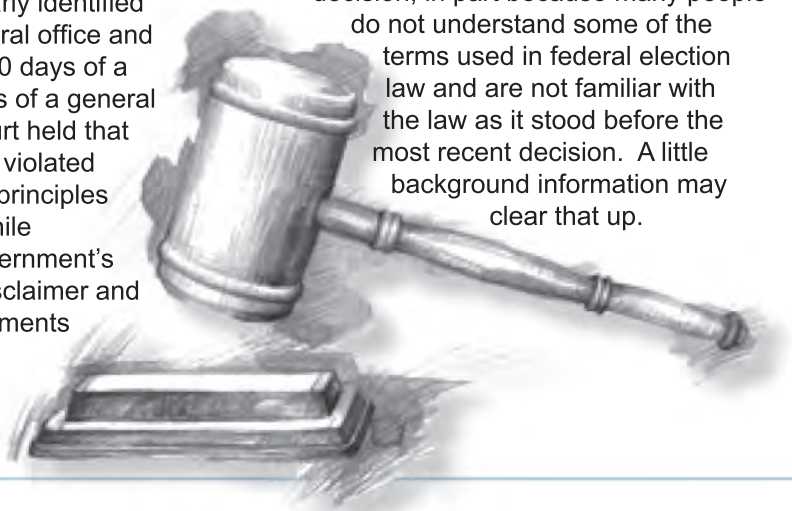
Make no mistake about it - in the recent *Citizens United* decision,[1] the Supreme Court radically changed the rules of the road for for-profit and **some** nonprofit corporations looking to influence elections.

In short, it removed the prohibition on corporations and unions spending their own money for communications that expressly advocate the election or defeat of a clearly identified federal candidate, so long as the communication is made "independently" – i.e., without the involvement of the candidate or his or her campaign. The decision also struck down the "electioneering communication" provision in the Bipartisan Campaign Reform Act of 2002 (also known as McCain-Feingold), which prohibited corporations and unions from using their general treasury funds for broadcast, cable, or satellite communications that refer to a clearly identified candidate for federal office and are made within 30 days of a primary or 60 days of a general election. The Court held that those prohibitions violated First Amendment principles of free speech, while upholding the government's right to impose disclaimer and disclosure requirements on corporate political speech.

But, at least for the moment, *Citizens United* does not change the Internal Revenue Code's longstanding prohibition on 501(c)(3) nonprofit corporations participating or intervening in political campaigns for or against any candidate for public office.[2] Thus, for nonprofit Community Action Agencies (CAAs), all of which are 501(c)(3)s, the decision is interesting and may signal future legal challenges, but should not change their avoidance of participation as organizations in election campaigns. The decision could, however, open the door for more involvement by non-501(c)(3) organizations in the Community Action network, such as state associations, in political campaigns.

A Little Legal Background

There has been some confusion about the impact of the *Citizens United* decision, in part because many people do not understand some of the terms used in federal election law and are not familiar with the law as it stood before the most recent decision. A little background information may clear that up.



First, longstanding federal election law prohibits corporations (both for-profit and nonprofit) and unions from making contributions from their general treasury funds directly to the election campaigns of candidates for federal office.[3] They also may not make expenditures expressly advocating the election or defeat of a federal candidate if the expenditure is coordinated with, or made with the involvement of, the candidate or his or her campaign. These prohibitions were not at issue in *Citizens United* and this decision does not invalidate or alter them.

Second, federal election law permits corporations and unions to set up separate segregated funds (SSFs), often referred to as political action committees (PACs), to solicit contributions from a restricted class of affiliated individuals.[4] These SSFs may then make contributions to federal campaigns (as well as make "independent expenditures," but more on that later).

Continued on page 7

A continuing series of reports on current legal issues of interest to Community Action Agencies

INSIDE

Citizens United *(Continued from cover)*

This provision is likewise unchanged by *Citizens United*.

Third, one of the issues addressed by the Supreme Court in *Citizens United* was the constitutionality of federal election law prohibitions on "independent expenditures" by corporations and unions from their general treasury funds in connection with federal elections. "Independent expenditures" refer to expenditures for communications that expressly advocate the election or defeat of a clearly identified candidate but are made without the cooperation, consent, request, or suggestion of, or in consultation with, a candidate's committee.[5] The term also includes "electioneering communications," i.e. broadcast, cable, or satellite communications that refer to a clearly identified candidate for federal office and are made within 30 days of a primary or 60 days of a general election, if such communications are not coordinated with the candidate.[6] Prior to *Citizens United*, the Supreme Court had narrowed that ban to apply only to those communications that were the functional equivalent of express advocacy.[7] Direct contributions to a candidate's campaign or expenditures that are coordinated with the campaign are not considered "independent expenditures."

Fourth, federal election law already carved out an exception to the corporate independent expenditure ban for 501(c)(4) advocacy nonprofits that did not receive any for-profit corporate funds and did not engage in business activities.[8]

The Facts

The 2008 presidential election may seem like a distant memory now, but that is the setting for the dispute that led to this decision. In January 2008, Citizens United, a nonprofit corporation that receives most of its funds from individual donations but also a small portion from for-profit corporations, released a film entitled *Hillary: The Movie.* The 90-minute documentary about then-Senator Hillary Clinton, who was a candidate in the Democratic Party's presidential primary election, is "in essence, [] a feature-length negative advertisement that urges viewers to vote against Senator Clinton for President."[9] The movie was released in theaters and on DVD, but Citizens United wanted to increase distribution by making it available to viewers free of charge through video-on-demand within 30 days of the primary elections. Citizens United wanted to promote the film through advertisements on broadcast and cable television; the ads were similarly negative towards Senator Clinton.

Because it feared that both the film and the ads would run afoul of federal election law and result in civil and criminal penalties, Citizens United filed a lawsuit against the Federal Election Commission (FEC) asking that federal election law prohibiting corporate-funded independent expenditures, as well as disclaimer and disclosure requirements, be held unconstitutional as applied to *Hillary*. A three-judge panel of the federal district court ruled in favor of the FEC. Citizens United then appealed the decision directly to the Supreme Court.

The Supreme Court Opinion

Citizens United had not asked the Court to strike down the federal election law as unconstitutional on its face or to overturn Supreme Court precedent upholding the law. Rather, it had argued that the law was unconstitutional as applied to the facts of this case and therefore sought a decision holding that it could not be applied in this particular situation. Nonetheless, after the initial round of briefing and oral argument, the Supreme Court, in an unusual move, asked the parties to file supplemental briefs addressing whether it should overrule prior Supreme Court decisions upholding the law and to reargue the case. Thus, despite language in the majority opinion, written by Justice Kennedy, and a concurring opinion by Chief Justice Roberts, stating that the Court was asked to reconsider its own prior decisions (the 1990 *Austin v. Michigan Chamber of Commerce* decision and portions of the 2003 *McConnell v. FEC* decision), in fact the Court, or at least a majority of the Court, had decided to look at overruling recent precedent on its own initiative.[10] So much for judicial restraint.

"So much for judicial restraint."

The key factors on which the majority opinion is based are the following:

- In the majority's view, deciding the case on narrower grounds, such as carving out an exception for nonprofit corporate political speech funded overwhelmingly by individuals, rather than striking down the ban across the board, would require case-by-case determinations, that would chill political speech, an activity at the core of the First Amendment protections.
- According to the majority, the federal election law is an outright **ban** on corporate political speech, rather than just a permissible restriction on the time, place, or manner of speech, notwithstanding the fact that corporations may set up a PAC. PACs are separate organizations and are burdensome and expensive to administer and therefore are not constitutionally equivalent to direct speech by a corporation.
- In the minds of the Court majority, bans on speech are problematic not only because they restrict the rights of speakers, but perhaps more importantly because they interfere with the open marketplace of ideas protected by the First Amendment by limiting the right of citizens to hear and use information from a wide variety of speakers that is necessary to make informed choices among candidates for office. The majority viewed the law as unconstitutional censorship.
- Corporations are people too. First Amendment protections extend equally to corporations as to individuals.

Continued on page 8

Citizens United (Continued from page 7)

- It makes sense to prohibit direct corporate contributions to candidates' campaigns as a necessary means to prevent corruption – it could easily constitute or be seen as a *quid pro quo* for action taken by the contributor. But, according to the majority, independent expenditures do not create this risk of corruption. Even if these expenditures give access to the elected officials, that is what is expected by all voters and apparently does not raise any concern for the majority: "The fact that speakers may have influence over or access to elected officials does not mean that these officials are corrupt."[11]
- The majority rejected the argument, which had been the basis for Supreme Court precedent, that the ban on corporate independent expenditures was necessary to "diminish the corrosive and distorting effects of immense aggregations of wealth that are accumulated with the help of the corporate form and that have little or no correlation to the public's support for the corporation's political ideas."[12]

The losing side of the Court did not shy away from making its discontent with the majority opinion clear. In a sharply worded dissent joined by Justices Ginsburg, Breyer, and Sotomayor, Justice Stevens attacked the basic premise of the majority opinion by stating that there was a long history of distinguishing between the speech rights of a corporation and an individual in the political sphere and there was no reason to change that now. Justice Stevens wrote: "[u]nlike our colleagues [on the Court, the Framers of the Constitution] had little trouble distinguishing corporations from human beings, and when they constitutionalized the right to free speech in the First Amendment, it was the free speech of individual Americans that they had in mind."[13] He also found fault with the majority's claim that the prohibition on corporate independent expenditures amounted to a ban on corporate speech. He pointed out that corporations were free to speak using PAC money contributed by individuals. The dissent also vigorously challenged the majority's apparent lack of concern over the potential corruptive influence of corporate spending in the political arena.

Implications for Community Action

Citizens United may open the doors for nonprofit corporations, **other than 501(c)(3) tax-exempt organizations**, to spend unlimited amount of funds on ads and other communications that directly or indirectly support or oppose political candidates, as long as they do not contribute directly to a campaign or coordinate the communications with the campaign. They will no longer need to set up PACs to make "independent expenditures," although they may need to report to the FEC, include disclaimers in the communications, and/or pay taxes on the expenditures. They will also need to retain PACs to make contributions to federal election campaigns and spend money in coordination with campaigns. In the wake of *Citizens United*, there will likely be challenges ahead for state laws as well that limit corporate independent expenditures for state elections. To retain their tax exemption, however, 501(c)(4) and 501(c)(6) organizations need to take care that their tax-exempt purposes, and not political campaign activity, remain their primary activity. They also need to refrain from using federal funds for influencing federal elections or legislative lobbying and should be familiar with federal elections laws limiting fundraising for federal candidate PACs to a restricted class of individuals. Before engaging in any of these new activities permitted under *Citizens United*, we recommend consulting with an attorney knowledgeable in this area of the law.

Most importantly, remember that at this time, *Citizens United* has no impact on 501(c)(3) organizations, including CAAs. The Internal Revenue Code ban on activity in support of or in opposition to candidates for political office means that 501(c)(3)s still may not engage in any activity intended to influence elections, such as the newly unencumbered "independent expenditures" and the direct contributions to campaigns or expenditures in support of and coordinated with campaigns, which are still banned under federal election law for all corporations. As always, individuals associated with 501(c)(3)s may engage in most political activities on their own time, with their own resources, and without the direct or indirect backing of the CAA. However for certain employees of organizations receiving CSBG or Head Start funds, the Hatch Act imposes additional restrictions, such as prohibiting supervisors from requesting campaign contributions from employees working under them.

1. *Citizens United v. Federal Election Commission*, 130 S. Ct. 876 (2010).
2. 26 U.S.C. § 501(c)(3).
3. U.S.C. § 441b(a); 11 C.F.R. § 114.2(b).
4. This class includes a corporation's shareholders and their families, a corporation or union's executive or administrative personnel and their families, and twice a year, other employees of the corporation and union. 2 U.S.C. § 441b(b)(4). Under some circumstances, corporations may also solicit the restricted class of affiliated corporations. For membership organizations' SSFs, the restricted class also includes individual (noncorporate) members, as defined in the regulations. And trade associations' SSFs may also solicit contributions from stockholders and executive or administrative personnel of member corporations if certain requirements are met. Id.
5. 2 U.S.C. § 431 (17); 11 C.F.R. § 109.1(a).
6. 2 U.S.C. 434(f)(3).
7. *McConnell v. FEC*, 540 US 93, 206 (2003).
8. 11 C.F.R. 114.10(c). *FEC v. Massachusetts Citizens for Life*, 479 U.S. 238 (1986).
9. 130 S. Ct. at 890.
10. *Austin v. Michigan Chamber of Commerce*, 494 U. S. 652 (1990); *McConnell*, 540 U. S.at 203–209.
11. 130 S. Ct. at 910.
12. 130 S. Ct. at 923.
13. 130 S. Ct. at 950.