



# Virginia Association of Broadcasters Legal Review



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## SPECIAL REPORT

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### SUPREME COURT INVALIDATES RESTRICTIONS ON CORPORATE POLITICAL SPEECH

Last week, the United States Supreme Court ruled in *Citizens United v. Federal Election Commission* that corporations and labor unions may make unlimited expenditures to advocate the election or defeat of a federal candidate at any point in the election cycle. The crux of the Court's decision is that the First Amendment prohibits Congress from banning certain types of political speech based on the corporate identity of the speaker. The decision opens the way for greatly increased participation by corporations—large and small, for-profit and non-profit—in the election process and has significant implications for broadcasters. For example, the decision allows corporations, trade associations, and labor unions to purchase television, radio, or Internet ads and expend funds to directly advocate the defeat or election of a federal candidate. The decision does not, however, allow corporations to donate directly to a federal candidate or to the candidate's campaign committee.

The Court's decision means that, now, any business entity—for-profit corporations, trade associations, partnerships, LLCs, and tax-exempt organizations—may lawfully engage in political speech under the First Amendment. However, there may be tax implications for different types of entities that engage in political speech; our tax attorneys are examining what, if any, tax consequences may flow for organizations (particularly tax-exempt organizations) who engage in direct political expenditures. Accordingly, all business entities should confer with their tax advisors *before* engaging in political advocacy to make certain the activity does not adversely affect the entity's tax status under federal and state tax laws.

Although the decision involved a *federal* election law statute, the Court's holding will also apply to similar *state* election law statutes.

## **I. Background**

Prior to yesterday's decision, federal law, as amended by the Bipartisan Campaign Reform Act of 2002 ("BCRA," informally referred to as the McCain-Feingold law), prohibited corporations and labor unions from purchasing ads that *either* expressly advocate the election or defeat of a federal candidate *or* amount to an "electioneering communication"—that is, a communication that (1) "refers to a clearly identified candidate for federal office," (2) is made within 30 days of a primary election or within 60 days of a general election, and (3) is publicly distributed. Since the law was enacted, corporations and labor unions have been permitted to engage in express advocacy and electioneering communications only through their political action committees (PACs).

The Supreme Court upheld the statutory ban on corporate electioneering communications in 2003 in *McConnell v. Federal Election Commission*, relying on its holding in an earlier case that restrictions on corporate political speech are permissible in light of the Government's interest in preventing "the corrosive and distorting effects of immense aggregations of wealth" by corporations.

In January 2008, Citizens United, a non-profit corporation, released a documentary film entitled "*Hillary: The Movie*" about then-Senator Hillary Clinton, a candidate in the Democratic Party's 2008 Presidential primary. Citizens United wished to make the documentary available through video-on-demand service within 30 days of the 2008 primary elections but feared that the film (and a series of three advertisements encouraging viewers to purchase the film through the on-demand service) would trigger the BCRA ban on electioneering communications because the film and ads "referred to" a Presidential candidate. Citizens United sued in federal court seeking a declaration that the BCRA ban on electioneering communications is unconstitutional. After a three-judge panel of the federal district court denied Citizens United's requests for relief, Citizens United sought review in the Supreme Court.

## **II. The Supreme Court's Decision**

The Supreme Court, in a 5-4 decision, last week held that "[t]he Government may regulate corporate political speech through disclaimer and disclosure requirements, but it may not suppress that speech altogether." The Court overruled an earlier decision (which allowed the Government to restrict corporate political speech) and invalidated BCRA's ban on electioneering communications. The decision reflects the Court's adherence to the principle that the Government cannot suppress political speech based on the speaker's *corporate* identity.

Beginning with the premise that BCRA erects an outright ban on core political speech by corporations and unions, the Court applied "strict scrutiny" to the ban, requiring the Government to demonstrate that the law furthers a compelling interest. The BCRA ban did not withstand that scrutiny: The Court found "no basis for the proposition that, in the context of political speech, the Government may impose restrictions on certain disfavored speakers," including corporations.

The Court addressed and rejected all three “interests” proposed by the Government to support the electioneering communications ban: (1) the “anti-distortion” theory, (2) an interest in preventing corruption, and (3) an interest in protecting “dissenting shareholders.” The Court first declared that First Amendment protections cannot turn on a speaker’s financial ability (that is, “immense aggregations” of corporate wealth) to engage in political speech. On that point, the majority was particularly troubled by the prospect that the anti-distortion *rationale* for the BCRA ban could be used to prohibit political speech by media corporations, which are currently exempted from the ban on electioneering communications. The Court likewise rejected the anti-corruption rationale because independent expenditures simply do not present the same risk of *quid pro quo* corruption (or the appearance of corruption) as do direct contributions to candidates and parties. And it rejected the shareholder protection rationale—that shareholders should not be compelled to fund corporate political speech with which they disagree—as both underinclusive (because the statute only bans *some* corporate speech at certain times) and overinclusive (because it applies even to single-shareholder corporations). And again, the Court was troubled that the shareholder protection theory would allow a ban on the core political speech of media corporations upon the objection of a single, disgruntled shareholder.

The Court concluded that “the First Amendment does not permit Congress to make categorical distinctions based on the corporate identity of the speaker and the content of the political speech.” Accordingly, the Court rejected the ban on corporate independent expenditures (for both electioneering communications *and* for express advocacy), because the law’s “purpose and effect are to silence entities whose voices the Government deems to be suspect.” Given the primacy of political speech in our representative democracy, the Court said, “political speech must prevail against laws that would suppress it.”

The Court did not go so far as to strike down the BCRA disclaimer and disclosure requirements (which obligate corporations that spend more than \$10,000 on electioneering communications per year to submit detailed statements to the Federal Election Commission and mandate the clear identification of the person or entity responsible for electioneering communications other than those made or authorized by candidates themselves). In the Court’s view, while more political speech enhances the political process, that speech should be transparent, so that the public can better evaluate the political message and the potential bias of the speaker. (We note that the Court’s discussion of the disclaimer requirements includes one inaccuracy: The opinion suggests that the Section 441d(d)(2) spoken disclaimer requirement applies to all radio or television electioneering communications “funded by anyone other than a candidate.” In fact, Section 441d(d)(2) applies only to communications described in Section 441d(a)(3)—that is, communications that are *neither* funded by candidates *nor* funded by others but authorized by candidates. We are bringing the issue to the attention of the Court.)

### **III.**

#### **Implications of the Supreme Court’s Decision for Political Advertising**

The *Citizens United* decision is breathtaking in scope.

*First*, the *content* of political expenditures by corporations and unions is no longer at issue, because corporations and unions are no longer limited to engaging in so-called “issue advocacy.” Rather, they may now purchase advertising that includes a direct appeal to vote for or against a federal candidate. The distinction between “issue” and “express” advocacy by corporations and unions—which has muddled campaign finance law—is dissolved.

*Second*, the *timing* of political expenditures by corporations and unions is no longer at issue. After the Supreme Court held that corporate and union political expenditures are no longer limited to issue advocacy, it also struck down the BCRA prohibition on “electioneering communications”—and, with it, the 30- and 60-day windows that governed corporate political ads. As a result, the Supreme Court’s test for distinguishing between permissible and prohibited electioneering communications articulated in 2007 in *Federal Election Commission v. Wisconsin Right to Life* is already a relic of campaign finance law.

*Third*, the *number* of entities that may potentially benefit from the decision is enormous. The decision applies to all corporations and unions regardless of size or tax status. This means that both traditional for-profit corporations and tax-exempt political organizations—*e.g.*, Section 527 organizations such as Moveon.org and Club for Growth—may make unlimited political expenditures to expressly advocate for the election or defeat of a federal candidate.

*Fourth*, the Court’s reasoning calls into question similar campaign finance laws enacted by nearly half the States.

Yesterday’s ruling *does not*, however, alter the longstanding bar on direct corporate contributions to federal political candidates. Corporations and unions continue to be prohibited from making contributions to federal candidates from their general treasuries.

### **IV.**

#### **Implications of the Supreme Court’s Decision for Broadcasters**

The Court’s decision will affect broadcasting in several significant ways.

To begin with, it is almost certain that the sheer *number* of political advertisements aired during the weeks leading up to an election will increase, simply because corporations, partnerships, LLCs, and unions of all kinds are now able to purchase such ads, just like political campaigns and political parties. Freed from the restrictions on “electioneering communications” during the 30- and 60-day windows before an election, corporations and unions now have the ability to spend money on “express advocacy” advertisements at any time during the election cycle in an attempt to influence the outcome of an election—and at least some will no doubt seize upon that opportunity.

Just *how many* corporations, business organizations, and unions will seize that opportunity is a more difficult question. While some political tax-exempt corporations (like Moveon.org and Club for Growth) are geared toward participating in political advertising, it is unclear how business organizations and labor unions will respond to the new political speech freedoms. Many corporations, which answer to large and diverse groups of shareholders and Boards, may be less able to “pick” a candidate and mount an aggressive, public political campaign without fear of political repercussions both internally and externally. Corporations might look to their national trade associations—such as the U.S. Chamber of Commerce, the National Association of Manufacturers, and others—to take the lead in promoting or opposing political candidates so that corporations need not put their names or images front-and-center.

Perhaps the biggest relief for broadcasters will be a regulatory one: Because there is no longer any relevant distinction between “issue” and “express” advocacy, radio and television stations are relieved of the need to determine whether a particular advertisement by a corporation, union, or tax-exempt organization crosses the line between “issue” advocacy and “express” advocacy. Nor will broadcasters have to determine whether a political ad is a “permissible” or “prohibited” electioneering communication in the days leading up to an election. Because the Supreme Court’s decision removes any restriction on the *content* of corporate or union advertisements, broadcasters can avoid being put in the middle of finger-pointing by political opponents who are clamoring for stations to either air—or reject—advertisements based on FEC regulations.

The uptick in political advertisements, however, means that stations may well face more work in screening advertisements for defamatory content as well as for the proper sponsorship identification requirements, including the specific “stand-by-your-ad” disclosure requirements for certain federal advertisements that the Supreme Court’s decision left in place.

Stations also are likely to face greater exposure to defamation claims. As the number of third-party advertisements increases, so too may the tenor of the debate—especially as corporations and unions may make direct appeals to a candidate’s fitness or character for office. Such appeals will no doubt raise the tempers of those who are the subject of the advertisements, and stations will have to exercise particular caution in reviewing spots for potential defamatory content.

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The Supreme Court’s decision ushers in a new era. That new era promises both to lessen certain regulatory burdens on broadcasters, to create new opportunities for advertisers, and to raise new challenges.

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If you should have any questions concerning the information discussed above, please contact any of the undersigned.

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