ARNOLD & PORTER LLP

ADVISORY

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Political Law Alert Series

LANDMARK DEVELOPMENT: THE US SUPREME COURT STRIKES DOWN LIMITS ON CORPORATE AND UNION INDEPENDENT EXPENDITURES

In a far-reaching decision, on January 21, 2010, the US Supreme Court overturned decades-old precedent in *Citizens United* v. *Federal Election Commission* and ruled that the First Amendment protects corporate speech as vigorously as it protects individual speech. The practical result is that corporations and labor unions may now make unlimited "independent expenditures" and "electioneering communications" regarding federal candidates. This means that corporations may either expressly advocate an election or defeat of clearly identified candidates, or simply mention candidates in the course of discussing political issues or policy, even within the last days before an election. This constitutional protection applies to both for-profit and nonprofit corporations, such as incorporated 501(c) organizations, although tax law restrictions remain on nonprofit groups.

Some key notes on the decision include the following:

- **No Coordination:** The Court extended constitutional protections to independent expenditures, meaning that corporations may not "coordinate" their spending with any candidates. Thus, ensuring lack of coordination (a term that the Federal Election Commission (FEC) has defined heretofore quite broadly) with candidates will be a critical requirement for corporations wishing to place campaign ads.
- **Protects All Communications/Speech:** This historic decision not only protects broadcast ads by corporations, but also any type of communications, including print ads, the Internet, On-Demand video, pamphlets and leaflets.
- **Direct Contributions and Coordinated Expenditures Still Banned:** The Court kept intact the law's limits on direct contributions to candidates—including in-kind ones. Therefore, corporate and labor union PACs will still have a role in the political process.
- **Foreign Contributions Ban Intact:** The Court found that there was no need to reach the question of whether there was a compelling interest in preventing foreign influence on the US political process, thus maintaining the ban on state and federal contributions and expenditures by foreign nationals.

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- **Party Soft Money Ban Intact:** Similarly, the McCain-Feingold (or Bipartisan Campaign Reform Act (BCRA)) prohibitions on political party soft money are still in effect.
- **Hard Money Ban Not Affected:** The contribution limits that apply to hard money remain untouched by the Supreme Court's decision.
- **Disclosure Still Required:** Disclosure, including the names of donors, is still required for corporations engaging in certain political speech.
- **State Laws in Peril:** The decision referenced the 26 state laws that do not restrict corporate independent expenditures, intimating that the remaining states will be responding to this decision, thus prompting a fury of state and local legislative activity on this issue.
- **Unknown Effect on Other Businesses Such as Non-Corporate Federal Contractors:** The Court's ruling was limited to corporate and labor union spending in campaigns. It did not touch upon, for example, the restrictions imposed on federal contractors that are not incorporated entities, such as partnerships and unincorporated associations, which are governed by separate provisions of the law. Whether and how this will be resolved is unclear. On one hand, the decision stood for the proposition that the government cannot restrict speech based on the speaker's identity. And treating federal contractors distinctly would contradict this principle. On the other hand, there arguably is a different compelling government interest in restricting communications by those with federal government contracts, as there is with foreign contributors. If the latter rationale is employed, however, fairness would dictate that corporate entities that are federal contractors also be subject to these restrictions, which the *Citizens United* decision would clearly not permit. Because the Court was silent on this issue, it is possible that Congressional action, not simply FEC regulations, may be required to address this inconsistency.
- **Charitable Nonprofits Will Still Be Constrained by Federal Tax Laws:** While the FEC restrictions on corporate spending will no longer apply to nonprofits, the Internal Revenue Code provisions remain the law. In effect, 501(c)(3) organizations and foundations will not benefit greatly, if at all, from this ruling.
- **Other Nonprofits Will Be Freed from Campaign Speech Restraints:** While the headlines prophesize a fury of corporate and union spending on campaign ads, the fact remains that interest groups organized in the form of 527, 501(c)(4) corporations, and 501(c)(6) trade associations also will be able to spend treasury funds now on ads that not only suggest a candidate preference, but clearly state one.

These, and many other issues and unanswered questions, will need to be resolved by the FEC, and perhaps the Congress, which has already promised to step into the debate to somehow counteract the decision. And, as noted above, the states may be brought into the fray with respect to their own campaign finance laws.

We therefore urge you to consult with counsel before exercising your newly validated rights to campaign speech.

We hope that you have found this advisory useful. If you have additional questions, please contact your Arnold & Porter attorney or:

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