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Opinion No. 10-30

Constitutionality of Tenn. Code Ann. § 2-19-132

QUESTION

Whether Tenn. Code Ann. § 2-19-132 is unconstitutional in light of the United States Supreme Court's decision in *Citizens United v. Fed. Election Comm'n*, 130 S.Ct. 876 (2010).

OPINION

In light of the Supreme Court's decision in *Citizens United,* concluding that there is no legitimate governmental interest that would justify a ban on independent corporate expenditures, a court likely would hold that Tenn. Code Ann. § 2-19-132 is unconstitutional to the extent that it prohibits corporations from making independent expenditures for the purpose of aiding either in the election or defeat in any primary or final election of a candidate for public office.

ANALYSIS

You have asked whether Tenn. Code Ann. § 2-19-132 is unconstitutional in light of the United States Supreme Court's recent decision in *Citizens United v. Fed. Election Comm'n*,130 S.Ct. 876 (2010). That case involved a challenge to 2 U.S.C. § 441b, as amended by Section 203 of the Bipartisan Campaign Reform Act of 2002 (BCRA), which prohibited corporations and unions from using their general treasury funds to make independent expenditures for speech that expressly advocates the election or defeat of a candidate or for speech that is an "electioneering communication". 2 U.S.C. § 441b. An electioneering communication is defined as "any broadcast, cable, or satellite communication" that "refers to a clearly identified candidate for Federal office" and is made within thirty (30) days of a primary election, 2 U.S.C. § 434(f)(3), and that is "publicly distributed." 11 CFR § 100.29(a)(2).

Citizens United, a non-profit corporation, issued in January 2008 a "documentary" entitled *Hillary: The Movie*, critical of then-Senator Hillary Clinton, a candidate for her party's presidential nomination. Citizens United wanted to make *Hillary: The Movie* available through video-on-demand and to promote the video by running advertisements on broadcast and cable television. 130 S.Ct. at 887. It feared, however, that both the film and the ads would be covered by § 441b's ban on corporate-funded independent expenditures. Accordingly, Citizens United brought suit in federal court seeking a declaratory judgment that § 441b was unconstitutional as applied to *Hillary: The Movie*. Citizens United also asserted that the disclaimer and disclosure requirements of Sections 201 and 311 of the BCRA were unconstitutional as applied to the movie and the three ads for the movie. *Id*. at 888. The lower court found that 2 U.S.C. § 441b did cover the film and that the act was constitutional. It further rejected Citizens United's challenge to the disclaimer and disclosure requirements of the BCRA. *Id*.

The Supreme Court reversed the decision of the lower court with regard to the ban on independent corporate expenditures. In doing so, it first noted that the prohibition on corporate independent expenditures was a ban on political speech and, therefore, subject to strict scrutiny. *Id*. at 898. The Court then reaffirmed that First Amendment protection extends to corporations and that political speech does not lose First Amendment protection "simply because its source is a corporation." *Id*. at 899-900 (citing *First Nat. Bank of Boston v. Belloti*, 435 U.S. 763, 784 (1978)). The Court then noted that in *Buckley v. Valeo*, 424 U.S.1 (1976), it had rejected statutory limits on so-called "independent expenditures" – money spent advocating a candidate's election or defeat independent of any campaign – when made by individuals, partly on the rationale that Congress was not at liberty to curb the speech of wealthy persons simply on account of their wealth. *Id*. at 908. Further, in *Belloti*, the Court had rejected a state-law prohibition on independent corporate expenditures related to a state referendum. *Id*. at 902. The Court then concluded that no legitimate governmental interest justified the ban on independent corporate expenditures. In the absence of any legitimate governmental interest, and relying heavily on its earlier decisions in *Buckley* and *Belloti*, the Supreme Court found that § 441b's ban on independent corporate expenditures was unconstitutional. *Id*. at 913.[1]

The Supreme Court did not strike down the disclaimer and disclosure provisions of the BCRA[2], finding that, since these provisions did not prevent anyone from speaking, they placed no significant burden on First Amendment rights. The Court further found that a strong governmental interest existed in providing the electorate with accurate information about the source of various campaign claims. *Id*. at 915-16.

[1] Citizens United only challenged the limits in 2 U.S.C. § 441b on its independent corporate expenditures. It did not challenge, and the Court did not address, the limits contained in 2 U.S.C. § 441b on corporate contributions. 130 S.Ct. at 909.

[2] Sections 201 and 311 of the BCRA require that any televised electioneering funded by someone other than the candidate must include a disclaimer that the candidate is not responsible for the ad and that the funder or funding organization must then identify its name and address.

Tenn. Code Ann. § 2-19-132 provides, in pertinent part, as follows:

> (a) It is unlawful for the executive officers or other representatives of any corporation doing business within this state, to use any of the funds, moneys, or credits of the corporation for the purpose of aiding either in the election or defeat in any primary or final election, of any candidate for the office, national, state, county or municipal, or in any way contributing to the campaign fund of any political party, for any purpose whatever.

This statute prohibits the use of corporate funds for the purpose of aiding either in the election or defeat in any primary or final election of a candidate for any state, county, or municipal office, which would include both direct contributions to a candidate and independent expenditures.[3] In light of the Supreme Court's decision in *Citizens United*, concluding that there is no legitimate governmental interest that would justify a ban on independent corporate expenditures, a court likely would hold that Tenn. Code Ann. § 2-19-132 is unconstitutional to the extent that it prohibits corporations from making independent expenditures for the purpose of aiding either in the election or defeat in any primary or final election of a candidate for public office.

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[3] This Office has previously opined that Tenn. Code Ann. § 2-19-132(a) is unconstitutional insofar as it conflicts with federal law regarding candidates for federal office. *See* Op. Tenn. Att'y Gen. 85-081 (Mar. 14, 1985) (copy attached).

Requested by:

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