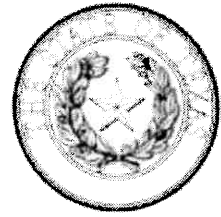


TEXAS ETHICS COMMISSION



ETHICS ADVISORY OPINION NO. 489

April 21, 2010

Whether, in light of the United States Supreme Court ruling in Citizens United v. Federal Election Commission, the Texas Ethics Commission can enforce the prohibition on direct campaign expenditures, whether the Texas Ethics Commission can enforce the requirements to include certain disclosures on political advertising, and whether disclosure of certain direct campaign expenditures is required. (SP-10)

On January 21, 2010, the United States Supreme Court issued an opinion in the case of *Citizens United v. Federal Election Commission* (hereafter, *Citizens United*), in which it considered the constitutionality of certain federal statutes. *Citizens United v. FEC*, 558 U.S. ____ (2010).¹ In part, the decision held that a certain federal statutory restriction on "corporate independent expenditures" was unconstitutional. *Id.* at 50. The Court also found no constitutional impediment to the application of federal statutory requirements to include disclosures in "electioneering communications." *Id.* at 55-6. In this opinion, we will consider, in light of *Citizens United* and the Texas Legislature's intent that statutes be enforced constitutionally, whether certain laws under our jurisdiction prohibit direct campaign expenditures and whether the laws under our jurisdiction requiring certain disclosures on political advertising were impacted by the decision. In addition, we will consider whether the laws under our jurisdiction require disclosure of certain direct campaign expenditures.

The Court in *Citizens United* addressed a federal law that, in part, prohibited a corporation from making direct contributions to candidates or independent expenditures that expressly advocate the election or defeat of a candidate in connection with an election to a federal political office. *Id.* at 3 (citing 2 U.S.C. § 441b). Under the federal law considered by the Court, the term "independent expenditure" was defined as an expenditure by a person expressly advocating the election or defeat of a clearly identified candidate and that is not made in concert or cooperation with or at the request or suggestion of such candidate, the candidate's authorized political committee, or their agents, or a political party committee or its agents. 2 U.S.C. § 431(17). The Court held that the federal prohibition on corporations making independent expenditures violated the First Amendment of the United States Constitution and was therefore unconstitutional. *Citizens United*, 558 U.S. at 50.

Prohibition on Direct Campaign Expenditures

As a general rule, Texas campaign finance law, located in title 15 of the Election Code, prohibits corporations² and labor organizations from making political contributions³ or political expenditures.⁴ Elec. Code §253.094. There are several statutory exceptions to this prohibition.⁵ See, e.g., *Id.* § 253.097 (corporation or labor organization may make direct campaign expenditures in connection with election on measure), 253.098 (corporation or labor organization may make direct campaign expenditures to communicate directly with its stockholders or members, as applicable, or their families), and 253.100 (corporation or labor organization may make political expenditures to

finance the establishment or administration of a general-purpose committee and to solicit political contributions to the committee from its employees, stockholders, or members, as applicable, and their families). Section 253.002 of the Election Code prohibits any person from knowingly making or authorizing a direct campaign expenditure, but also provides several exceptions. *Id.* §253.002.⁶

Texas campaign finance law does not use the term "independent expenditure," as used in federal campaign finance law and that was considered in *Citizens United*. However, the term "direct campaign expenditure" is used in Texas law to describe a campaign expenditure that does not constitute a campaign contribution by the person making the expenditure. *Id.* § 251.001(8). In contrast, a campaign expenditure made with the prior consent or approval of the candidate benefitted is not a direct campaign expenditure, but is a contribution to the candidate. 1 T.A.C. § 20.1(5); Ethics Advisory Opinion No. 331 (1996). For example, a person who pays for a billboard supporting a candidate by making a payment directly to the owner of the billboard, without obtaining prior consent or approval from the candidate, would make a direct campaign expenditure. If the candidate gives prior consent or approval to the offer to pay for the billboard, the person has made (and the candidate has accepted) a campaign contribution to the candidate. *See* Ethics Advisory Opinion No. 331 (1996). Although there may be differences between the terms "independent expenditure" and "direct campaign expenditure," as well as between the definitions of those terms in their respective bodies of law, the terms are interchangeable for the limited purpose of determining the effects of *Citizens United* upon title 15 of the Election Code.

Although a federal statute was at issue in *Citizens United*, its holding raises the question of whether it renders unconstitutional the state prohibition on corporations making direct campaign expenditures to support or oppose a candidate for elective office. As we have previously stated, we believe the Texas Legislature intended the laws under our jurisdiction to prohibit political expenditures made by corporations to the full extent allowed by the United States Constitution, as interpreted by the United States Supreme Court. *See* Ethics Advisory Opinion No. 198 (1994). *See also*, Gov't Code § 311.021 (1) (providing that, in enacting a statute, it is presumed that compliance with the constitutions of this state and the United States is intended). It is clear that under *Citizens United*, sections 253.094 and 253.002 of the Election Code cannot be enforced to prohibit direct campaign expenditures by corporations or labor organizations. Furthermore, based on *Citizens United*, section 253.002 of the Election Code cannot be enforced to prohibit direct campaign expenditures by any other person. *See, e.g., Citizens United*, 558 U.S. at 39-45 (stating that limits on independent expenditures have a chilling effect on political speech and that restrictions based on anti-distortion or anti-corruption rationales are not justified). *See also, id.* at 26 (noting a previous Court decision that rejected the argument that political speech of corporations or other associations should be treated differently under the First Amendment simply because such associations are not "natural persons"). Thus, for the reasons stated in *Citizens United*, and in accordance with the legislature's intent that statutes be enforced in compliance with the constitutions of this state and the United States, we cannot enforce sections 253.094 or 253.002 of the Election Code to prohibit a corporation or labor organization from making a direct campaign expenditure or enforce section 253.002 of the Election Code to prohibit any other person from making a direct campaign expenditure.

We note, however, that the Court cited previous rulings that upheld federal statutory prohibitions on "direct contributions to candidates," but did not render any further opinion regarding the constitutionality of such prohibitions. *Id.* at 29 and 40-1 (citing *Buckley v. Valeo*, 424 U.S. 1 (1976)), 43 (citing *FEC v. National Right to Work Comm.*, 459 U.S. 197 (1982)). In Texas law, title 15 provides no statutory authority for a corporation or labor organization to make a political contribution to a candidate or officeholder. *See generally*, Subchapter D, Chapter 253, Election Code. The decision of *Citizens United* does not impact the restrictions under our jurisdiction that prohibit a corporation or labor organization from making a political contribution to a candidate or

officeholder. Thus, we will continue enforcing the restrictions that prohibit a corporation or labor organization from making a political contribution to a candidate or officeholder.

Political Advertising Disclosure Statements

Chapter 255 of the Election Code also requires certain forms of political advertising to include a disclosure statement. Elec. Code § 255.001, .008. The Court in *Citizens United* specifically upheld federal statutory disclaimer provisions that required certain "electioneering communications" to identify the person responsible for the communication and to include additional information in the communication. *Citizens United*, 558 U.S. at 55-6. The Court's decision does not impact the political advertising disclosure requirements under chapter 255 of the Election Code. Thus, we will continue enforcing such requirements.

Required Disclosure of Certain Direct Campaign Expenditures

Citizens United also prompts us to consider whether a direct campaign expenditure made to support or oppose a candidate is required by title 15 to be disclosed in a campaign finance report. Section 253.002 of the Election Code has included a general prohibition on direct campaign expenditures since it was most recently adopted by the legislature in 1987.⁷

Under the plain language of title 15, only certain persons are permitted to make direct campaign expenditures. *See supra* note 6. In the case of an individual, corporation, or labor organization, a direct campaign expenditure is permissible only if it is authorized by subchapter C of the Election Code for an individual or subchapter D of the Election Code for a corporation or labor organization. In the case of certain other persons who are not authorized by title 15 to make direct campaign expenditures, such as a partnership or limited liability company, a direct campaign expenditure is prohibited.

Section 253.062, in subchapter C, requires an individual to file a campaign finance report in some circumstances. It states:

Except as otherwise provided by law, an individual not acting in concert with another person may make one or more direct campaign expenditures in an election from the individual's own property that exceed \$100 on any one or more candidates or measures if:

- (1) the individual complies with Chapter 254 as if the individual were a campaign treasurer of a political committee; and
- (2) the individual receives no reimbursement for the expenditures.

Elec. Code § 253.062(a).⁸

Section 253.097, in subchapter D, requires a corporation or labor organization to file a campaign finance report in certain circumstances. It states:

A corporation or labor organization not acting in concert with another person may make one or more direct campaign expenditures from its own property in connection with an election on a measure if the corporation or labor organization makes the expenditures in accordance with Section 253.061 or 253.062 as if the corporation or labor organization were an individual.

Id. § 253.097.

Sections 253.062 and 253.097 separately authorize an individual or a corporation or labor organization, respectively, to make certain direct campaign expenditures provided that they file campaign finance reports as necessary to disclose the expenditures. Section 253.062 imposes a filing requirement on an individual making direct expenditures that exceed \$100 on candidates or measures. However, section 253.097 requires a corporation or labor organization to disclose direct campaign expenditures that exceed \$100 on measures and does not address direct campaign expenditures made to support or oppose a candidate.

Title 15 does not explicitly state that a corporation, labor organization, or certain other persons⁹ must file reports to disclose direct campaign expenditures made to support or oppose a candidate. However, it does not necessarily follow from this that the legislature intended that such expenditures be permitted without public disclosure if the prohibition on the expenditures were found unconstitutional in such a case as *Citizens United*. Title 15, including sections 253.002, 253.061, 253.062, and 253.097, was enacted prior to *Citizens United* and had strictly forbidden corporations, labor organizations, and certain other persons from making such expenditures.¹⁰ Thus, title 15 did not specifically require disclosure of such expenditures because it simultaneously prohibited them. *Citizens United* removed our ability to restrict direct campaign expenditures by corporations, labor organizations, and other persons. This result has created a gap or ambiguity in title 15 that prompts us to address whether the absence of statutory language specifically addressing these direct campaign expenditures made to support or oppose candidates reflects the legislature's intent that title 15, in the circumstances following *Citizens United*, require such expenditures to be disclosed.

In interpreting a statute, we must determine the legislature's intent. The legislature's intent is primarily discerned from the plain meaning of the words in the statute¹¹ and, in determining whether or not a statute is considered ambiguous on its face, we may also consider other matters, including the object sought to be attained, circumstances under which the statute was enacted, legislative history, former statutory provisions, administrative construction of the statute, and the consequences of a particular construction.¹² In addition, in enacting a statute, it is presumed that compliance with the constitutions of this state and the United States is intended, a just and reasonable result is intended, a result feasible of execution is intended, and public interest is favored over any private interest.¹³

The Texas Ethics Commission was created by constitutional amendment in 1991.¹⁴ Chapter 571 of the Government Code is the commission's enabling legislation that sets forth the duties, purposes, and authority of the commission. Section 571.001 states:

It is the policy of the legislature to protect the constitutional privilege of free suffrage by regulating elections and prohibiting undue influence while also protecting the constitutional right of the governed to apply to their government for the redress of grievances. This chapter is intended to achieve those purposes *and shall be construed to achieve the following objectives:*

...

- (3) *to disclose fully information related to expenditures and contributions for elections* and for petitioning the government; . . . and
- (5) to ensure the public's confidence and trust in its government.

Gov't Code § 571.001 (emphasis added). Chapter 571 also authorized the commission to issue advisory opinions and rules to carry out its duties.¹⁵

Requiring the disclosure of direct campaign expenditures by corporations, labor organizations, and other persons would favor the public interest by providing information to the public regarding efforts to influence elections through spending and would follow the directives set forth in the commission's enabling legislation. In addition, requiring disclosure is feasible of execution because the Ethics Commission is already available to provide forms and receive reports that would be filed for that purpose. Furthermore, requiring disclosure for corporations, labor organizations, and other persons would be consistent with *Citizens United*, which placed corporations, individuals, and other persons on equal footing for purposes of the constitutional right to make direct campaign expenditures.

Considering title 15 of the Election Code, the impact of *Citizens United*, and the additional factors stated previously, our opinion is that the legislature intended title 15 to require a corporation, labor organization, or other person that makes one or more direct campaign expenditures from its own property in connection with an election of a candidate to comply with section 253.062 as if it were an individual. Therefore, a corporation, labor organization, or other person that makes such expenditures must comply with the disclosure requirements that apply to an individual under section 253.062.¹⁶ This opinion is consistent with the policy goals set forth in our enabling legislation.

SUMMARY

For the reasons stated in this opinion, the Texas Ethics Commission cannot enforce sections 253.094 or 253.002 of the Election Code to prohibit a corporation or labor organization from making a direct campaign expenditure. In addition, the Texas Ethics Commission cannot enforce section 253.002 of the Election Code to prohibit a person from making a direct campaign expenditure. *Citizens United* does not, however, impede us from continuing to enforce the restrictions on corporations or labor organizations making political contributions to candidates or officeholders. Furthermore, *Citizens United* does not impede us from continuing to enforce the political advertising disclosure requirements under chapter 255 of the Election Code. In addition, title 15 requires a corporation, labor organization, or other person that makes one or more direct campaign expenditures from its own property in connection with an election of a candidate to comply with the reporting requirements that apply to an individual as set out in section 253.062 of the Election Code.

¹ Page numbers in citations to *Citizens United* refer to the slip opinion, No. 08-205 (U.S. Jan 21, 2010).

² The term "corporation" includes corporations that are organized under the Texas Business Corporation Act, the Texas Non-Profit Corporation Act, the Texas For-Profit Corporation Law, the Texas Nonprofit Corporation Law, federal law, or law of another state or nation, and includes other specified associations. *Id.* §§ 253.091, .093.

³ Political contributions include campaign contributions. *Id.* § 251.001(5). A campaign contribution is a transfer of any thing of value to a candidate or political committee that is offered or given with the intent that it be used in connection with a campaign for elective office or on a measure. *Id.* § 251.001(2), (3).

⁴ Political expenditures include campaign expenditures. *Id.* § 251.001(10). A campaign expenditure is a payment, by any person, of money or any other thing of value and includes an agreement made or other obligation incurred, whether legally enforceable or not, to make a payment in connection with a campaign for an elective office or on a measure. *Id.* § 251.001 (6), (7).

⁵ No statute in title 15 of the Election Code creates an exception that would permit a corporation or labor organization to make a political contribution to a candidate or officeholder.

⁶ Section 253.002 states:

- (a) A person may not knowingly make or authorize a direct campaign expenditure.
(b) This section does not apply to:

- (1) an individual making an expenditure authorized by Subchapter C;
- (2) a corporation or labor organization making an expenditure authorized by Subchapter D;
- (3) a candidate making or authorizing an expenditure for the candidate's own election;
- (4) a political committee; or
- (5) a campaign treasurer or assistant campaign treasurer acting in an official capacity.

⁷ Acts 1987, 70th Leg., ch. 899, § 1, eff. Sept. 1, 1987. Texas law has imposed various restrictions on campaign contributions and campaign expenditures by corporations and labor organizations since 1903.

⁸ An individual not acting in concert with another person who makes direct campaign expenditures in an election from the individual's own property is not required to file a report under section 253.062 if the total expenditures do not exceed \$100 and the individual receives no reimbursement for the expenditures. *Id.* § 253.061.

⁹ Persons such as candidates, officeholders, individuals, and campaign treasurers of a political committee are required to file reports in accordance with chapter 254 of the Election Code. However, title 15 does not address the filing obligations of other persons.

¹⁰ An unlawful political expenditure by a corporation or labor organization is a third degree felony offense. Elec. Code § 253.094.

¹¹ *State v. Shumake*, 199 S.W.3d 279, 284 (Tex. 2006).

¹² Gov't Code § 311.023.

¹³ *Id.* § 311.021.

¹⁴ Tex. Const. art. III, § 24a.

¹⁵ *See* Gov't Code §§ 571.061, .091.

¹⁶ Section 253.062 requires compliance with chapter 254 of the Election Code, which includes recordkeeping, notice, and other disclosure requirements. *See generally*, chapter 254, Elec. Code.