



High-Stakes Case at High Court

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The newly constituted Supreme Court will rehear oral arguments this week in what could become a landmark campaign finance decision.

Although not expected for months, the ruling could loosen federal restrictions on downtown trade associations and unions in the 2010 midterms, allowing the U.S. Chamber of Commerce, the AFL-CIO and other groups to play a role similar to party committees in the weeks before Election Day.

The high court on Wednesday will again consider *Citizens United v. Federal Election Commission*, a case challenging, in part, prohibitions against certain television and radio spots in the weeks before a federal election.

Before the 2008 elections, the conservative *Citizens United* group asked the court to allow it to distribute and promote its made-for-television production "Hillary: The Movie" during the mandatory blackout periods preceding last year's primaries.

Before leaving this summer, the Supreme Court asked to rehear the case, which was originally argued in June. The unusual rehearing will mark Sonia Sotomayor's first appearance on the Supreme Court, which is expected to rule in the case before Jan. 1 — in time for the 2010 primary season that begins next winter.

Under current law, "Hillary: The Movie" was considered prohibited "electioneering communications" because it was considered the "functional equivalent" of prohibited "express advocacy" by outside groups. Corporations, unions and most trade associations are prohibited from bankrolling broadcast political ad campaigns — either directly or through outside groups — in the 30 days before a primary and 60 days before a general election.

Although the case addresses numerous campaign finance precedents, the *Citizens United* case is expected to test a nearly 20-year-old Supreme Court decision, *Austin v. Michigan State Chamber of Commerce*, which upheld a ban on "independent expenditures" by corporations and trade associations, including television ads that either endorse or attack candidates. In 2003, the Supreme Court decided that unions were subject to the same restrictions as corporations and trade associations.

Such ads must now be paid for by the trade group, union or company's political action committee, which must comply with federal campaign contribution limits. If the Supreme Court overturns the 1990 case, union and trade organization lawyers argue that their groups could employ "independent expenditure" divisions that would compete for airtime with the Democratic Congressional Campaign Committee, the Republican National Committee and other party committees in the waning hours before Election Day.

"If the Supreme Court throws out the *Austin* case, then a corporation could run an ad that says, 'Vote against Sen. John Doe' or 'Vote for Sen. John Doe' and it could use corporate money to do that, which is a huge sea change," said Rob Kelner, who runs the election law practice at Covington & Burling. "Your typical union or corporation would be firing with both barrels: using their PAC for direct contributions and using their corporate funds for independent expenditures."

Perhaps sensing a business opportunity, trade groups representing television broadcasters in 10 states filed a friend-of-the-court brief in the *Citizens United* case, asking the high court to strike down the 30- and 60-day bans

that lawmakers included in the 2002 Bipartisan Campaign Reform Act.

“In doing so, BCRA disenfranchises certain speakers from expressing political opinion in a manner of their own choosing,” the broadcasters’ lawyers wrote on July 31.

Jan Baran, a partner at Wiley Rein, wrote the friend-of-the-court brief on behalf of the U.S. Chamber of Commerce in the Citizens United case. Like other campaign finance lawyers interviewed about the case, Baran said overturning the 1990 ruling is unlikely to bring more money into the electoral system, although it could change how unions and trade groups spend tens of millions of dollars each election cycle.

“There are 26 states that allow corporations and unions to spend money any way they want to, including making contributions. So what do corporations, trade associations and unions do in those states? The answer is: not much,” Baran said. “Overturning the Austin case would allow organizations like the chamber to presumably spend the same amounts of money, but will give them the option to say things a little more directly and clearly.”

Laurence Gold, a campaign finance lawyer with the labor federation AFL-CIO, agreed that a high court decision to strike down Austin may mean more tools in the chest for organized labor and other groups during the election season. If trade groups and unions decided to establish “independent expenditure” operations, he said, they still could not coordinate their activities with candidates and political committees.

And if the ban on ads is struck down, pricey independent expenditure campaigns by trade groups and unions likely would be used in only the most competitive political contests, such as last year’s Senate races in North Carolina and Minnesota, where the chamber spent millions of dollars last cycle attempting to preserve Republicans’ ability to filibuster.

“If there are no legal prohibitions anymore then these organizations have to make decisions about what is politically palatable and what they can afford to do,” Gold said. “Would they? That’s a different question.”

Neil Reiff, a lawyer at Sandler, Reiff & Young, said overturning Austin would likely end the days of political ads by many outside groups and corporations that straddle a legal line between “issue advocacy” and “direct electoral advocacy.”

And if the Austin case is overturned, Reiff also speculated that the party committees may be forced to compete for voters’ attention late in the election season.

“The outside groups are going to get into the game of late ads even more,” he said.