

COURT OF APPEALS, STATE OF COLORADO
2 East 14th Avenue
Denver, Colorado 80203

Appeal from Secretary of State Agency Decision
Honorable Judge Robert N. Spencer
Office of Administrative Courts
Case No. OS2008-0028

Petitioner-Appellant/ Cross-Appellee:
COLORADO ETHICS WATCH

v.

Respondent-Appellee/ Cross-Appellant:
SENATE MAJORITY FUND, LLC

Respondents-Appellees: COLORADO
LEADERSHIP FUND, LLC and OFFICE OF
ADMINISTRATIVE COURTS

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Case Number: 08CA2689

JOINT SUPPLEMENTAL BRIEF

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I hereby certify that this brief complies with all requirements of C.A.R. 28 and C.A.R. 32, including all formatting requirements set forth in these rules. Specifically, the undersigned also certifies that:

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s/ Scott E. Gessler
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Introduction

This *Supplementary Brief* is jointly submitted by both the Senate Majority Fund and the Colorado Leadership Fund (collectively referred to as “SMF and CLF”).

In its *Opening Brief*, Colorado Ethics Watch (“CEW”) relied heavily on the district court decision in *Citizens United v. Federal Commission*,¹ which was reversed by the United States Supreme Court.² (SMF and CLF will refer to the Supreme Court opinion as *Citizens United*.) *Citizens United* refutes CEW’s arguments in three ways. First, it refutes CEW’s argument that the communications in *Citizens United* were regulated as express advocacy. Second, it firmly rejects the shifting, ambiguous standards that CEW seeks to read into Colorado law. Third, it removes CEW’s public policy argument that corporate spending will “eviscerate” and “make a mockery of” Colorado’s campaign finance laws.³

Argument

A. The communications in *Citizens United* were not express advocacy.

In its *Opening Brief*, CEW relied upon the district court decision in *Citizens*

¹ *Citizens United v. Fed. Election Comm’n*, 530 F.Supp.2d 274 (D.D.C. 2008).

² *Citizens United v. Fed. Election Comm’n*, No. 08-205 (U.S. Jan 21, 2010).

³ *Opening Brief* at 21.

United to argue that SMF and CLF’s ads were express advocacy. Although the definition of express advocacy is the core issue in this case, CEW carefully avoided using the term “express advocacy” in its discussion of the district court decision. Rather, it argued that the communications at issue were not “issue speech” and therefore must be “express advocacy.” Specifically, CEW stated that the communications in *Citizens United* were not “issue speech” and therefore the plaintiffs in that case “did not have a reasonable likelihood of success on the merits.”⁴

The Supreme Court decision, however, makes clear that the communications at issue were not “express advocacy” under federal law. Throughout the opinion, the Court treated the communications as electioneering communications. Indeed, the court used the exact same framework that SMF and CLF has repeatedly stressed throughout this case – that electioneering communications (which a state may regulate as the functional equivalent of express advocacy) are not the same as express advocacy. Accordingly, in *Citizens United* the communications were the functional equivalent of express advocacy,⁵ but not express advocacy.

⁴ *Id.* at 23.

⁵ *Citizens United*, slip op. at 7 (“Under this test, Hillary is the equivalent of express advocacy.”)

In the very first sentence in *Citizens United*, the Court recognized the federal prohibition on the use of corporate funds to make “independent expenditures for speech defined as an ‘electioneering communication’ or for speech expressly advocating the election or defeat of a candidates.”⁶ Thus the Court analyzed the communications in the framework of “electioneering communications”⁷ and never considered whether the communications constituted “express advocacy” under 11 C.F.R. §100.22(b). And the dissent also recognized that the Court “declared §203 of BCRA to be facially unconstitutional.”⁸ Section 203 of BCRA is plainly titled *Prohibition of Corporate and Labor Disbursements for Electioneering Communications*.⁹ It does not discuss or regulate “express advocacy.”

In short, *Citizens United* recognized that the plaintiff’s communications were both the functional equivalent of express advocacy and electioneering communications. But the plaintiff’s communications did *not* constitute express advocacy.

⁶ *Citizens United*, slip op. at 1 (emphasis added).

⁷ *Citizens United*, slip op. at 5-8 (Citizens United contends that §441b does not cover Hillary, as a matter of statutory interpretation, because the film does not qualify as an ‘electioneering communication.’).

⁸ *Citizens United*, slip op. at 4. (Stevens, J. dissenting).

⁹ Prohibition of Corporate and Labor Disbursements for Electioneering Communications, 2002, Pub. L. No.107–155, 116 Stat. 83, 91(2002).

B. *Citizens United* rejected the type of shifting, ambiguous standards that CEW seeks to inject into Colorado law.

CEW advocates an ever-shifting definition of “express advocacy” that relies on every authority *except* Colorado courts’ interpretation of Colorado law. In the court below, CEW argued that the use of “express advocacy” in Article XXVIII was a “signal” that allowed Colorado to regulate all political communications to the maximum extent possible.¹⁰ In its *Opening Brief*, CEW argued that express advocacy was everything outside of issue speech.¹¹ And in its *Answer-Reply Brief*, CEW argued that this Court should adopt a “functional test,” seemingly modeled on the exemption to electioneering communications outlined by the Supreme Court in *Wisconsin Right to Life*.¹² In all instances, CEW has asked the courts to ignore the careful and thorough analysis of “express advocacy,” in Colorado, contained in *League of Women Voters v. Davidson*.¹³

Not only does CEW advocate different positions throughout this litigation, but it also argues that Colorado’s definition of “express advocacy” under Article XXVIII should change, based upon new decisions in *federal* courts. Thus, CEW

¹⁰ R. 181.

¹¹ *Opening Brief* at 24.

¹² *Answer-Reply Brief* at 11.

¹³ *League of Women voters of Colo. v. Davidson*, 23 P.3d 1266 (Colo. App. 2001).

claims that in 2007 the definition of “express advocacy” again changed in Colorado when the Supreme Court in *Wisconsin Right to Life* limited the reach of the federal definition of “electioneering communications” as applied to a particular plaintiff.¹⁴ Specifically, CEW claims that *WRTL* “in essence” adopted the standard for express advocacy in Section 100.22(b),¹⁵ and therefore Colorado must now follow a “functional” approach. When viewed as a whole, CEW seeks a state definition of express advocacy that constantly shifts.

The Court in *Citizens United* rejected CEW’s approach. Repeating its earlier opinion in *WRTL*, the Court in *Citizens United* held that the First Amendment must “eschew the open-ended rough-and-tumble factors which invite complex argument in a trial court and a virtually inevitable appeal.”¹⁶ Part of the complexity in *Citizens United* stemmed from the eleven-part test adopted by the Federal Election Commission to implement the “functional equivalent of express advocacy” standard adopted by the Court in *WRTL*.¹⁷ That is the same standard upon which CEW now rests its argument.

¹⁴ *Fed. Election Comm’n v. Wis. Right to Life, Inc.*, 551 U.S. 449 (2007).

¹⁵ *Opening Brief* at 15-16.

¹⁶ *Citizens United*, slip op. at 19 (quotations and citations omitted).

¹⁷ *Id.* at 18.

Likewise the Court placed great emphasis on the fact that the government's position itself created great uncertainty, because in *Citizens United* the government refused to articulate a standard that provided clarity.¹⁸ By presenting multiple, shifting standards, CEW also creates great uncertainty.

Accordingly, the complexity and uncertainty urged upon the Court by CEW -- like the complexity and uncertainty confronting the Court in *Citizens United* -- effectively serves as a prior restraint by requiring speakers to first obtain official guidance in order to insulate themselves from lawsuits and appeals.¹⁹ This Court should refuse to subject political participants to this level of uncertainty and complexity.

This case itself embodies the dangers highlighted in *Citizens United*. SMF and CLF carefully crafted its ads to avoid expressly advocating the election or defeat of a candidate. In doing so, it followed the standards set forth in *League of Women Voters*. Even though there is no dispute in this case that SMF and CLF's communications were properly regulated as electioneering communications, CEW nonetheless filed a lawsuit, subjecting SMF and CLF to substantial legal fees and negative publicity. CEW asks this Court to reject *League of Women Voters* in its

¹⁸ *Citizens United*, slip op. at 17.

¹⁹ *Id.*

entirety, even though that case already addressed these issues and even though Colorado voters enacted Article XXVIII one year after *League of Women Voters*. SMF and CLF has paid a heavy price for merely following the law, and even now CEW seeks to change well-established standards in order to punish those exercising their First Amendment Rights.

C. *Citizens United* rejected the “antidistortion” rationale as a basis for expansively reading the phrase “express advocacy.”

CEW places great emphasis on the purposes underlying Colorado’s campaign finance laws – that “wealthy interests, corporations, special interest groups . . . exercise a disproportionate level of influence over the political process.”²⁰ CEW further repeats that corporations are banned from making independent expenditures²¹ and denounces the lower court’s ruling, claiming that it will “eviscerate” Colorado’s “system of campaign finance laws”²² and “make a mockery of” Amendment 27’s purposes by allowing SMF and CLF to “exercis[e] a disproportionate level of influence over the political process.”²³

²⁰ *Opening Brief* at 19, quoting Colo. Const. art. XXVIII, §1.

²¹ *Id.* at 20.

²² *Id.*

²³ *Id.* at 21.

The *Citizens United* opinion explicitly rejected each and every one of these arguments. First, the Court belittled the entire “antidistortion” justification for campaign finance regulations. “As for [the] antidistortion rationale, the Government does little to defend it. And with good reason, for the rationale cannot support [the ban on corporate funding for electioneering communications.]”²⁴ The Court also relied upon earlier cases, which held “the concept that government may restrict the speech of some elements of our society in order to enhance the relative voice of others is wholly foreign to the First Amendment.”²⁵ In short, the “antidistortion” rationale is no longer good law.

Second, *Citizens United* flatly overturned Federal law that prohibits corporations from engaging in electioneering communications or express advocacy, holding that “[n]o sufficient governmental interest justifies limits on the political speech of nonprofit or for-profit corporations.”²⁶ Even though corporate contributions have never been at issue in this case, CEW’s efforts to inject that element into this case are particularly ill-advised, in light of *Citizens United*.

²⁴ *Id.* at 33.

²⁵ *Id.*

²⁶ *Id.* at 50.

Third, *Citizens United* recognized that the option to form or participate in a political committee does not “alleviate the First Amendment problems with [federal law]”²⁷ because establishing a political committees is an expensive and time-consuming process, political committees are expensive to maintain, and the onerous requirements limit the ability to establish a political committee in time to participate in a current campaign.

Finally, *Citizens United* called into serious doubt the very premise that Colorado may limit contributions to a political committee. CEW takes great pains to detail what it apparently considers large and “distorting” contributions to SMF and CLF.²⁸ But these contributions cannot, by themselves, corrupt or create the appearance of corruption, which is the only valid basis for regulating campaign finance contributions. Bluntly put, the contributions were made to the SMF and CLF – an organization that does not hold public office, does not exercise political authority, and does not dispense political favors. Accordingly, SMF and CLF cannot provide any political favors in exchange for the contributions it receives.

In addition to rejecting the “antidistortion” justification underlying some campaign finance regulations, *Citizens United* carefully analyzed the “corruption”

²⁷ *Id.* at 21.

²⁸ *Opening Brief* at 6.

and “appearance of corruption” interest. “That interest was limited to *quid pro quo* corruption. . . . dollars for political favors.”²⁹ *Citizens United* refused to extend this corruption rationale to independent spending,³⁰ because:

“the absence of prearrangement and coordination of an expenditure with the candidate or his agent not only undermines the value of the expenditure to the candidate, but *also alleviates the danger that expenditures will be given as quid pro quo for improper commitments from the candidate.*”³¹

Here, CEW does not allege any prearrangement or coordination between SMF and CLF and any candidate. Indeed, CEW’s entire case is premised upon the “distortion” caused by corporate spending. CEW’s case was exceedingly weak at the outset, by relying on everything *except* Colorado law to interpret the meaning of “expressly advocate.” But CEW has now lost its remaining argument – that the public policies and statutory “purposes” underlying the antidistortion rationale somehow justify an exceedingly broad interpretation of “expressly advocate.”

CEW’s broad interpretation has no basis under Colorado law, Federal law, statutory purpose, or public policy. “Express advocacy” means the same thing now that it meant in *League of Women Voters*.

²⁹ *Citizens United*, slip op. at 43.

³⁰ *Id.* at 41.

³¹ *Id.* (emphasis added).

Respectfully submitted this 10th day of February, 2010.

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CERTIFICATE OF SERVICE

I certify that on this 10th day of February, 2010, the foregoing **JOINT SUPPLEMENTAL BRIEF** was E-filed and served via LexisNexis to all parties and other interested persons as follows:

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