

ISSUE BRIEF: CITIZENS UNITED V. FEC

The U.S. Supreme Court recently issued an opinion on *Citizens United v. FEC*. The 5-4 ruling overturned a longstanding federal ban on independent expenditures in election campaigns from corporations. There is now no basis for the government to limit corporate independent expenditures, as had been the case since *Austin v. Michigan Chamber of Commerce* (1990).

North Carolina is one of at least twenty states that ban corporate entities from independent expenditures. (N.C. Gen. Stat § 163-278.82). The State Board of Elections has said that this law is now unenforceable.

A FEW CONSIDERATIONS:

- *Citizens United* did not address direct corporate contributions to election campaigns. For the time being, North Carolina's ban on such activity § 163-278.15, -278.19 remains intact.
- The Court expressly upheld the permissibility of disclosure requirements for entities making independent expenditures (8-1. Thomas, C. dissenting).
- The Court left open whether more narrowly tailored bans on spending from foreign-owned corporations, corporations with government contracts, or corporations receiving TARP money would be upheld.
- Although not expressly mentioned in the case, it is presumed that labor unions are now permitted to make independent expenditures in the same manner as corporations.

POSSIBLE LEGISLATIVE RESPONSES:

- **Enact robust public financing law.** North Carolina's public financing programs are serving as a model for other states and federal legislation. While public financing will not prevent independent expenditures, it provides candidates with an alternative as well as some protection if an independent expenditure is made in their race. The General Assembly should expand existing programs and consider a pilot program for the General Assembly.
- **Increase disclosure requirements.** Immediate disclosure of expenditures as well as contributions would help the public make an informed judgment about the nature of a communication and the entities responsible. The State should provide that information online (expedited reporting mechanism in § 163-278.99A could serve as a model). In order to ensure no 'chilling effect' on speech, law should include a mechanism for a group to show a " 'reasonable probability' " that disclosing its contributors' names would " 'subject them to threats, harassment, or reprisals from either Government officials or private parties.' "
- **Clarify 'Coordination.'** Of chief concern is that independent expenditures are not truly independent. North Carolina needs clarity in this area (See, E.g. H1145, Clarifying Coordination: Martin, Goodwin, Harrison, Cotham 2009).
- **Other Options.** Requiring prior express approval from shareholders before an independent expenditure can be made or altering the tax structure so corporations do not receive a de facto incentive for making independent expenditures are two possible responses being debated nationally. The state of Iowa just passed legislation which requires comprehensive disclosure, explicit shareholder approval of all expenditures, and a disclaimer "Stand By Your Ad" requirement for corporate CEOs. Other states, including Maryland, Wisconsin, and Minnesota are considering similar legislation. While North Carolina might consider these options, these novel approaches will most certainly be litigated.