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## ETHICS ADVISORY OPINION NO. \_\_\_\_

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*February 11, 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 made by corporations and labor organizations, and whether the Texas Ethics Commission can enforce the requirements to include certain disclosures on political advertising. (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).<sup>1</sup> In part, the decision held that certain federal statutory restrictions on “corporate independent expenditures” were 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 whether, in light of *Citizens United*, we can enforce laws under our jurisdiction that prohibit direct campaign expenditures made by corporations and labor organizations, and whether the laws under our jurisdiction requiring certain disclosures on political advertising were impacted by the decision.

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

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

independent expenditures violated the First Amendment of the United States Constitution and was therefore unconstitutional. *Citizens United*, at 50.

As a general rule, Texas law prohibits corporations<sup>2</sup> and labor organizations from making political contributions<sup>3</sup> or political expenditures.<sup>4</sup> Elec. Code § 253.094. There are several statutory exceptions to this prohibition.<sup>5</sup> 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 a person from knowingly making or authorizing a direct campaign expenditure, but also provides several exceptions. *Id.* § 253.002.

Texas campaign finance law does not use the term “independent expenditure” that has occurred in federal campaign finance law. 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

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<sup>2</sup> 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.

<sup>3</sup> 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).

<sup>4</sup> 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).

<sup>5</sup> 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.

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, we think that the terms are interchangeable for purposes 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 individuals or other associations. *See, e.g.*, *Citizens United* 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*, 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 an individual or other association 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. There is no indication that the decision of *Citizens United* impedes us from enforcing the restrictions under our jurisdiction that prohibit a corporation or labor organization from making a political contribution to a candidate or officeholder. Thus, we are required to continue enforcing such restrictions.

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*, at 55-6. We find no indication that the Court’s decision impedes us from enforcing the political advertising disclosure requirements under chapter 255 of the Election Code. Thus, we are required to continue enforcing such requirements.

## **SUMMARY**

For the reasons stated in the United States Supreme Court decision of *Citizens United*, 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 an individual or other association 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.