



November 9, 2016

## HOW WE CAN WIN CAMPAIGN FINANCE REFORM CASES BEFORE THE SUPREME COURT

### A Post-Election Summary of Free Speech For People's New Jurisprudence Work on Money in Politics

#### Introduction

In 2015, prior to Justice Antonin Scalia's passing, Free Speech For People began developing a legal strategy to bring new test cases that could win at the Supreme Court, even under the Roberts Court as it existed at that time. These test cases were not targeted at a new post-Scalia Justice; they were built under the assumption that we would need to get Justice Anthony Kennedy and/or Chief Justice John Roberts on our side to prevail. In fact, our Legal Director Ron Fein had outlined some of the elements of this strategy in an American Constitution Society [blog post](#) in January 2015—a month before Justice Scalia's death.

For the past few months, of course, it looked like we might have a new justice who would be more favorable to campaign finance reform, possibly rendering Justice Kennedy's or Roberts's votes superfluous to victory. But the core strategy of these cases remains the same—legal arguments designed to persuade one of the justices from the *Citizens United* majority—and they are even more vital to pursue today.

Here is a brief summary of our three main legal advocacy projects, and why we think we can win under the current Supreme Court or a Supreme Court with a new ninth Justice nominated by President-Elect Donald Trump and confirmed by the United States Senate.

#### 1. Challenging super PACs

We are working to end super PACs by overturning the court decision that created them. Contrary to popular belief, super PACs were not created by *Citizens United v. FEC*, but rather by a lower court decision, *SpeechNow.org v. FEC*, which was decided by the U.S. Court of Appeals for the D.C. Circuit. The Department of Justice declined to appeal *SpeechNow* to the Supreme Court, and the issue has never been reviewed by the Court.

Back in November 2015, Professor Laurence Tribe of Harvard Law School explained ([video](#); [Newsweek op-ed](#)) that the legal basis for the *SpeechNow* decision was wrong on the day it was decided, and that, in his view, at least one Justice from the *Citizens United* majority would welcome a face-saving opportunity to rein in super PACs without needing to revisit *Citizens United* itself. That's the premise of our case, [filed in federal court on November 4, 2016](#): a narrow argument, crafted to appeal to Justice Kennedy or Chief Justice Roberts, that contributions to super PACs can create a risk of "quid pro quo" corruption.

We think Chief Justice Roberts and/or Justice Kennedy would respond favorably to this challenge for two reasons.

**Chief Justice Roberts** is widely noted to be concerned about the Supreme Court's overall legitimacy with the public. And, in a little-noted passage in a blockbuster campaign finance case, he has already subtly undermined a key premise of the *SpeechNow* decision. To understand it, we need to review this background:

The *Citizens United* decision concerned whether corporations can be banned from spending money to influence elections, and held that they could not. That much is clear. But after reaching that decision, the *Citizens United* opinion added a throwaway line about how independent expenditures are essentially worthless to candidates anyway. *SpeechNow* took that throwaway line (or, in lawyerly terms, “dictum”), treated it as the holding of the case, and extended it to contributions to political committees that only make so-called independent expenditures. In other words, *SpeechNow* started from the premise that the Supreme Court really meant it when they said that independent expenditures cannot possibly create a risk of corruption because they are basically worthless to candidates, and then built from there.

That brings us to a little-noticed passage by Chief Justice Roberts in the 2014 *McCutcheon v. FEC* decision. In the context of discussing circumvention of contribution limits, Chief Justice Roberts [noted](#):

We have said in the context of independent expenditures that “[t]he absence of prearrangement and coordination of an expenditure with the candidate or his agent . . . undermines the value of the expenditure to the candidate.” *Citizens United*, 558 U. S., at 357 (quoting *Buckley*, *supra*, at 47). **But probably not by 95 percent.**

In other words, while the Supreme Court has long held (going back to its 1976 decision in *Buckley v. Valeo*) that independent expenditures are worth *less* to candidates, Chief Justice Roberts does not believe they are *worthless* to candidates. In fact, he believes that an independent expenditure is probably worth *at least 5% as much to candidates as a direct contribution of the same amount*. That undermines the loose language of *Citizens United* upon which the federal appeals court in *SpeechNow* so directly relied.

**Justice Kennedy** has hinted that what he thought he was doing in *Citizens United* was overturning a ban on a particular type of “speaker” (corporations) spending money in elections, rather than essentially eliminating contribution limits. In October 2015—one month before Free Speech For People’s Harvard Law School [panel](#) on “Ending SuperPACs: Is the SpeechNow Ruling Vulnerable?”—Justice Kennedy visited Harvard Law School and had the following exchange, as reported by the [National Law Journal](#):

Kennedy, also in response to a student’s question, said he stands by his 2010 decision in the still controversial *Citizens United* campaign finance case.

**“In my own view, what happens with money in politics is not good,”** he said. “Remember: the government of the United States stood in front our court and said it was lawful and necessary under the [McCain-Feingold] Act to ban a book written about Hillary Clinton in the prohibited period of six, three months before the election. That can’t be right.

“I wasn’t surprised The New York Times was incensed their little monopoly to affect our thinking was taken away. I was surprised how virulent their attitude was. Last time I looked, The New York Times was a corporation. This meant the Sierra Club, the chamber of commerce in a small town couldn’t take out an ad.”

Two things from this quote are notable: First, crucially, Justice Kennedy signifies that he is unhappy about the current situation of money in politics. But second, in defending *Citizens United*, he focuses on its core holding (ban on political spending by particular entities) rather than the throwaway line (which was the entire basis for *SpeechNow*) about independent expenditures being incapable of corruption. That daylight between what he was trying to do in *Citizens United*—strike down a ban on corporate spending—and what the D.C. Circuit did in *SpeechNow* by unleashing super PACs to accept and spend unlimited political contributions, presents an opening to persuade Justice Kennedy to join a majority of Justices in overturning *SpeechNow*.

***Nothing has changed for our challenge to super PACs.*** We formulated the legal theory and the pathways to challenging it (through affirmative federal and state litigation, and passage of new legislation) while Justice Scalia sat on the Court, and never assumed a different ninth Justice. If President-elect Trump appoints a new justice who is similar in judicial approach to Justice Scalia, we will be precisely where we were when we launched our “ending super PACs” strategy.

## 2. Challenging big money in judicial elections

In 2015, we also began developing a federal constitutional challenge to privately-funded judicial elections (which we plan to file in 2017.) We plan to argue that privately-funded judicial elections violate the federal Due Process Clause rights of civil litigants and criminal defendants because that funding (whether in direct contributions or outside spending) creates an unconstitutional risk of actual bias or the appearance of bias.

There is every reason to think that Justice Kennedy and/or Chief Justice Roberts are reachable on this issue, because both have written opinions treating the issue of money in politics differently in the judicial elections context. In 2009, **Justice Kennedy** wrote the *Caperton v. A.T. Massey Coal Co.* decision. That case involved a West Virginia Supreme Court Justice who had been elected thanks to direct contributions and massive outside spending by a party to a pending case. When the newly-elected state supreme court justice refused to recuse himself from the case, the U.S. Supreme Court held that this failure to recuse violated the federal Due Process Clause by creating a risk of bias.

In 2015, **Chief Justice Roberts** wrote the *Williams-Yulee v. Florida Bar* decision. He upheld a Florida rule that prohibited judicial candidates from personally soliciting campaign contributions. In writing for the majority, Chief Justice Roberts upheld the rule based on the public interest in preserving and promoting “public confidence in the integrity of the judiciary.” As he saw it, the sight of judges seeking political contributions could damage that public confidence.

***Nothing has changed for our challenge to privately-funded judicial elections.*** We began preparing the case assuming that Justice Kennedy and/or Chief Justice Roberts were potential swing justices who view campaign financing differently in the judicial elections context. If President-elect Trump appoints a new justice who is similar in judicial approach to Justice Scalia, we will be precisely where we were when we launched our strategy of challenging private funding of judicial elections.

## 3. Challenging political spending by foreign-influenced corporations

We formulated this idea — which we are currently pioneering in St. Petersburg, FL, but plan to take elsewhere as well — to open a crack in *Citizens United*. And it is tailored to appeal to a justice on the *Citizens United* majority.

Foreign political spending is a concern to at least two of the justices on the *Citizens United* majority. In *Citizens United* itself, **Justice Kennedy** noted that the Court’s decision would not affect laws

“preventing foreign individuals or associations from influencing our Nation’s political process.” And when President Obama warned in his 2010 State of the Union address that the decision could open the door to foreign political influence, **Justice Samuel Alito** famously mouthed “Not true.” (We also know from Justice Alito’s *Hobby Lobby* decision that he views large and/or publicly-traded corporations differently from closely-held, family-owned corporations in certain contexts.)

Crucially, at least one (maybe more) of the *Citizens United* justices voted to uphold a campaign finance law in a little-reported 2012 Supreme Court decision called *Bluman v. FEC*. In *Bluman*, the Court upheld a longstanding federal ban on “foreign nationals” contributing to, or spending any amount of money in federal, state, or local elections. While the Court’s opinion didn’t report who voted how, the composition of the *Bluman* Court was exactly the same as the *Citizens United* Court. In other words, at least one of the justices on the *Citizens United* majority voted to *strike down* a ban on *corporate* political spending, but to *uphold* a ban on *foreign* political spending.

Limiting political spending by corporations with substantial foreign ownership is an idea well-tailored to President-elect Trump’s potential Court nominees. As Charles Fried (a professor at Harvard Law School and former Solicitor General under President Ronald Reagan) notes in a [letter](#) he submitted in support of the St. Petersburg ordinance, *Citizens United* simply did not address this danger, and even a relatively small percentage of shareholders can dominate corporate governance in certain situations.

***Nothing has changed for our challenge to political spending by foreign-influenced corporations.*** This was designed to leverage a constitutional principle already upheld by the same justices who voted for *Citizens United* (allowing prohibitions on political spending by foreign nationals) to prevent those same foreign nationals from using the corporate form to influence elections through corporate political spending. We think that Justice Kennedy, Chief Justice Roberts, and possibly even Justice Alito are in play.

## **Conclusion**

Our legal strategy for change at the Supreme Court, formulated largely in 2015, is as viable as ever. This strategy is designed to secure swing votes from justices in the *Citizens United* majority by not asking them to overturn *Citizens United* itself: challenging super PACs requires only overturning a lower court decision that has been subtly undermined by Justice Kennedy and Chief Justice Roberts; challenging privately-funded judicial elections is based on the exceptional nature of judicial elections already recognized by Justice Kennedy and Chief Justice Roberts; and challenging political spending by foreign-influenced corporations leverages an important exception to *Citizens United* (and even *Buckley v. Valeo*) already upheld by the Roberts Court, putting Kennedy, Roberts, and perhaps Justice Alito into contention.

While we might have hoped for a different Supreme Court, this strategy offers a path forward to achieve real progress, chip away at the foundations of *Citizens United* now, and lay building blocks for a future Court to overturn *Citizens United* itself.