

\$\$\$ Is Speech

Citizens United v. FEC

SUMMARY TABLE OF CONTENTS

Project Overview	2
Introduction	2
A Very Brief Explanation of Campaign Finance	2
Case Background	3
Model Legislature	4
Campaigning	14
Debate	20
Moot Court	27
Appendix	69
Glossary	70
Internet Resources	72
Campaign Finance Handout	73
Content Standards	75
Common Core	78

Some of the materials for *\$\$\$ Is Speech – Citizens United v. FEC* have been excerpted and adapted from several simulations available through our nonprofit corporation, Center for Economic and Civic Education (CESQD). For more information see our website: cesqd.org. Materials developed by Carla Young Garrett. The U.S. Supreme Court cases are public records.

Solely for use with their own classes, permission is hereby granted to teachers to photocopy the handouts and other ***student*** materials from this file and to download and print the PDFs and MS Word documents from our website. **Further distribution or resale of any of the materials in this file is strictly prohibited.**

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Overview of Moot Court

Getting There – The Appellate Courts

In the United States when one side loses or is unhappy with something about the outcome of their trial, they have a right to appeal.¹ The lawyer representing the party or parties appealing (called the **Appellant** or **Petitioner**) usually files a Notice of Intent to Appeal with the trial court. A transcript of the trial is prepared and sent to the appellate court.² The appellate lawyer files a brief (see sample with each case), laying out the legal³ errors made at trial and what law applies. The lawyers representing the other party (called the **Respondent** or **Appellee**) files a reply brief (see sample with each case).

Next comes oral argument (see the Appendix for sample and fill-in Courtroom Dialog forms), where both lawyers appear before a three-judge court to present their sides of the case (see the diagram Setting Up an Appellate Courtroom on page 3 of this guide). The appellate judges ask questions and then take the case under submission (reserve making a decision until a later date).

The judges have a conference to see where they stand on the cases they've heard. When two or three judges agree on the outcome (who wins), one of them volunteers to write the **opinion**, which lays out not only the **holdings**—or legal rulings—in the case, but also the legal rationale for their decision (including case citations). A judge who agrees with the outcome but has other or different reasons, can write a **concurring** opinion. A judge who disagrees with the outcome can write a **dissenting** opinion. Your students replicate this process.

Materials Provided in this Packet:

- Teacher's Guide
- Student Instructions
- Courtroom setup diagram
- Case materials
- Brief Writing Organizer and Oral Argument Notemaker (for each case)
- IRAC worksheet (sample and blank)
- Sample appellate forms
- Sample and fill-in courtroom dialog
- Assessment and Evaluation materials
- Standards

On the moot court page of our site (cesqd.org) are two MS Word files: a Brief Template and an IRAC format. You and/or your students can download these files and type right in them.

1 In a criminal case, only the defendant can appeal a conviction. The state cannot appeal an acquittal, as this would violate the Fifth Amendment's **double jeopardy** provision.

2 Appellate courts are required to hear all the appeals filed within their jurisdiction, whereas the USSC—and the state supreme courts—only hear the cases they want to.

3 Appeals deal only with legal issues, not factual ones. For example, in *Citizens United v. FEC*, the factual testimony about how much money a corporation donated to a campaign is not appealable. But whether this contribution violated the law is a legal issue, and therefore subject to appeal.

Case Background and Outcome¹

Introduction

This case involves the First Amendment and campaign contributions by corporations and labor unions. The Federal Elections Campaign Act (FECA) as amended by §203 of the Bipartisan Campaign Reform Act of 2002—BCRA, (aka McCain-Feingold after its two authors Senators John McCain (R) and Russ Feingold (D) prohibits corporations and unions from using their **general treasury** funds to make independent expenditures for speech that is an **electioneering communication** or for speech that expressly advocates the election or defeat of a candidate. An electioneering communication is any broadcast that “refers to a clearly identified candidate for Federal office” and is made within 30 days of a primary election, and that is publicly distributed. Instead, corporations and unions may establish a political action committee (PAC) for express advocacy or electioneering communications purposes.

Case Background

The case involves a conservative advocacy group called Citizens United which during the 2008 primary season, wanted to broadcast a piece called, *Hillary, The Movie* that was highly critical of then Senator Hillary Clinton who was running for president at that time. Concerned that the broadcast might violate the BCRA they sought a court ruling that the applicable section was a violation of the First Amendment.

This case was unusual in that 1) It was first argued during the USSC’s 2009 term (October 2008 to June 30, 2009), but Chief Justice ROBERTS with the concurrence of KENNEDY, SCALIA and ALITO, and THOMAS JJ.,² had the parties reargue the case during the Court’s 2010 term (October 2009 to June 30, 2010). 2) Rather than ruling on the narrowest ground possible as the Court usually does, Justice KENNEDY, writing for the majority stated that the Court could not decide the case on the **narrow grounds that the parties had argued**, but rather it had to look at much broader constitutional issues (which it did). The Court upheld the disclosure and reporting sections of the BCRA, but struck down the electioneering communications sections as it applied to corporations and labor unions.

Further, this case is difficult to read, not to mention understand, so rather than provide opinion excerpts as in the custom for Moot Court cases, see below for a link to a Wikipedia³ page with a good explanation of the issues. There are additional links on page 74 (Appendix – Resources).

USSC Opinion Line-up

Case No. 08–205 was argued March 24, 2009—Reargued September 9, 2009—Decided January 21, 2010.

There were a number of concurring in part, dissenting in part opinions, but in the main: KENNEDY, J., delivered the opinion of the Court, in which ROBERTS, C. J., SCALIA, ALITO, THOMAS, JJ., in striking down § 203 of the BCRA. STEVENS, GINSBURG, BREYER, and SOTOMAYOR, JJ., joined in the part upholding the disclosure and reporting sections. STEVENS wrote a dissenting opinion that was highly critical of the majority. He was joined by GINSBURG, BREYER, and SOTOMAYOR, JJ.

1 Here is some additional background to help you work on this activity with your class. The student materials do **not** tell the outcome of this case. We suggest that you refrain from telling them as well, as it is not relevant to the activity and gives both sides the sense that they could win.

2 J stands for justice, not a justice’s first initial. CJ is chief justice and JJ is justices.

3 http://en.wikipedia.org/wiki/Citizens_United_v._Federal_Election_Commission

Appellate Brief Format

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5

6 IN THE TWENTIETH CIRCUIT COURT OF APPEALS

7 IN AND FOR THE UNITED STATES OF AMERICA

8 CITIZENS UNITED,)
9)
Petitioner) NO. 12-456
10 vs.)
11) APPELLATE BRIEF
FEC,)
12 Respondent)
13 _____)

14 Introduction/Legal History/Facts

15 Petitioner Citizens United, an advocacy group wanted to exercise its First Amendment
16 rights to broadcast a movie about Hillary Clinton during her run for president in 2008
17 They were concerned that the Bipartisan Campaign Reform Act (aka BCRA) would prohibit
18 this so they sought a court ruling that the law was unconstitutional in that ...

19 Legal Argument

20 The section of the BCRA that prohibits “electioneering communications” by
21 corporations and labor unions in certain situations is an unconstitutional violation of the First
22 Amendment in that ...

23 Wherefore, Petitioner prays that the lower court’s ruling be reversed and that this court
24 overturn the ban.

25

26 Dated: October 15, 2012

27

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