OFFICIAL OPINION NO. 78-38, Corporate contributions on behalf of ballot questions

September 18, 1978

The Honorable Lorna B. Herseth
Secretary of State
State Capitol
Pierre, South Dakota 57501

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Corporate contributions on behalf of ballot questions

Dear Mrs. Herseth:

On behalf of the State Ethics Commission, you have asked:

QUESTION:

The State Ethics Commission would appreciate it if you would state whether you believe SDCL 12-25-2 is enforceable and valid in regard to corporations contributing to the support or defeat of ballot issues in light of the United States Supreme Court decision, April 26, 1978, re: *First National Bank of Boston v. Francis X. Bellotti*.

As you point out, the answer to your question has been drastically affected by the recent decision of the United States Supreme Court in the case of *First National Bank of Boston, et al., v. Francis X. Bellotti, et al.*, 98 S.Ct. 1407 (1978).

The Supreme Court held that corporations must be allowed to spend unlimited funds to support or oppose ballot issues, no matter what their subject. To ban such expenditures, it said, violates the corporations' First Amendment right to free speech. Because this opinion of the United States Supreme Court is contrary to SDCL 12-55-2, I will discuss a few of the highlights of the decision.

The United States Supreme Court on April 26, 1978, struck down a Massachusetts law that prohibited corporations from spending to influence the outcome of ballot initiatives.

In the five-four decision, the Court decided that state laws banning corporate spending in

this area are an unconstitutional restriction on the First Amendment guarantee of free speech. The Court opinion said:

It is the type of speech indispensable to decisionmaking in a democracy, and this is no less true because the speech comes from a corporation rather than an individual. The inherent worth of the speech in terms of its capacity for informing the public does not depend upon the identity of its source, whether corporation, association, union, or individual.

The high court reversed a 1977 decision by the Massachusetts Supreme Judicial Court upholding the constitutionality of the ban on corporate spending when it involves issues which do not “materially affect” the corporation's business income, property or assets. Only then, the state court said, may the corporation claim the right of free speech as exercised through the First and Fourteenth Amendments.

Left unanswered, however, is whether it is constitutional to ban corporate contributions aimed at electing candidates to public office. In a footnote, the court majority cautioned that its decision “implies no comparable right in the quite different context of participating in a political campaign for an election to public office.”

The court refused to “survey the outer boundaries of the First Amendment's protection of corporate speech, or address the abstract question whether corporations have the full measure of rights that individuals enjoy. . . .”

The Massachusetts law was challenged by a coalition of five corporations led by the First National Bank of Boston. They wanted the right to spend to defeat a referendum question that would have given the Legislature the right to impose a graduated income tax on state residents. State law prohibited such spending to ”influence” or “affect” the vote on a referendum question that is “solely” concerned with the taxation of individual income, property, or transactions.

Other plaintiffs in the case were New England Merchant's National Bank, the Gillette Company, the Digital Equipment Company, and the Wyman-Gordon Company.

In their dissent, Justices White, Brennan, and Marshall criticized the majority ruling as “a drastic departure from the Court's prior decisions” in the area of political activities by special interests such as corporations and unions. They added:

[C]orporate expenditures designed to further political causes lack the connection with

individual self-expression which is one of the principal justifications for the constitutional protection of speech provided by the First Amendment. Ideas which are not a product of individual choice are entitled to less First Amendment protection.

The dissent went on:

The question in the present case, as viewed by the Court, "is whether the corporate identity of the speaker deprives this proposed speech of what otherwise would be its clear entitlement to protection," which it answers in the negative. But the Court has previously held in *Buckley v. Valeo*, that the interest in preventing corruption is insufficient to justify restrictions upon individual expenditures relative to candidates for political office. If the corporate identity of the speaker makes no difference, all the Court has done is to reserve the formal interment of the Corrupt Practices Act in similar state statutes for another day.

In his separate dissent, Justice Rehnquist said, "The free flow of information is in no way diminished by the Commonwealth's decision to permit the operation of business corporations with limited rights of political expression. All natural persons, who owe their existence to a higher sovereign than the Commonwealth, remain as free as before to engage in political activity."

In oral argument before the United States Supreme Court, the State of Massachusetts justified the law on three separate grounds:

1. Preserving the integrity of the initiative process as the people's process.

2. Protecting the interest of the minority shareholders of a corporation involved who, for one reason or another, may oppose such expenditures.

3. Preventing even the appearance of impropriety by suggestions that the political process is dominated by business interest.

The Supreme Court ruled, however, that, "However weighty these interests may be in the context of partisan candidate elections, they either are not implicated in this case or are not served at all, or in other than a random manner [by the Massachusetts statute]. . . ."

As for the oft-stated fear that corporations are so wealthy that they "may drown out other points of view," the Court said:

If appellee's arguments were supported by record or legislative findings that corporate advocacy threatened imminently to undermine democratic processes, thereby denigrating rather than serving First Amendment interests, these arguments would merit our consideration. But there has been no showing that the relative voice of corporations has been overwhelming or even significant in influencing referenda in Massachusetts, or that there has been any threat to the confidence of the citizenry in government.

Nor does the law protect corporate shareholders, the Court said. It found the law too broad in that it would prohibit political initiative expenditures by a corporation "even if its shareholders unanimously authorize the contribution or expenditure." It is too narrow, too, the Court said, because it prohibits referendum spending while allowing spending to influence the passage or defeat of various proposals in the Legislature. Nor does it prohibit the use of corporate funds for speaking out on issues until and unless these issues become the subject of referenda, even though "the displeasure of disapproving shareholders is unlikely to be any less," the Court said.

The particular history of the Massachusetts law, moreover, "suggests . . . the legislature may have been concerned with silencing corporations on a particular subject."

The majority seemed to be strongly hinting that the law could be judged unconstitutional on equal protection grounds as well:

Excluded from its provisions . . . are entities or organized groups in which numbers of persons may hold an interest or membership, and which often have resources comparable to those of large corporations. Minorities in such groups or entities may have interests with respect to institutional speech quite comparable to those of minority shareholders in a corporation. Thus the exclusion of Massachusetts business trusts, real estate investment trusts, labor unions, and other associations undermines the plausibility of the State's purported concern for the persons who happen to be shareholders in the banks and corporations covered by [the law]. . . .

While it might be expedient for this office to take the position that *Bellotti* did not automatically strike down the ban on corporate expenditures on political questions in South Dakota and to hold that any change must be made either by the electorate, or by a decision of a court of proper jurisdiction holding that the South Dakota statute lacks a compelling state interest in accordance with the holding of the United States Supreme Court, or by the Legislature, it is my opinion that to ignore the ruling would be to disregard reality and we would again be inviting the judiciary to fulfill an obligation which is properly an

administrative duty of the State of South Dakota. In this case, the obligation rests solely on the Attorney General. In the absence of a judicial determination by our Court, the Attorney General has the responsibility of rendering his opinion on the law.

I am not unmindful of the many decisions that only a court has the power to declare a state statute unconstitutional; however, article VI of the United States Constitution declares without qualification that:

This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; . . . shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

When there is a conflict between this supreme law and the acts of Congress, the acts of the state legislatures and the constitutions of the states, the United States Constitution prevails. This position is one which is consistent with the previous Attorney General's opinions (1973-74 AGR 90.)

It is particularly important that a decision be made at this time in the light of the rapidly approaching general election, and due to the fact that the Legislature will not meet until January of 1979.

In my opinion, the effect of the Supreme Court's decision in *Bellotti*, beyond any doubt is to nullify the present South Dakota ban on corporate spending to influence ballot questions.

Respectfully submitted,

William J. Janklow
Attorney General

WJJ:RVJ:mam