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RULES OF THE GAME

Citizens United Sparks Pitched Battle

OUTSIDE GROUPS ARE STRAINING THE COURT SYSTEM IN THEIR ATTEMPTS TO INFLUENCE WHAT COULD BE A LANDMARK CAMPAIGN FINANCE CASE

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by Eliza Newlin Carney

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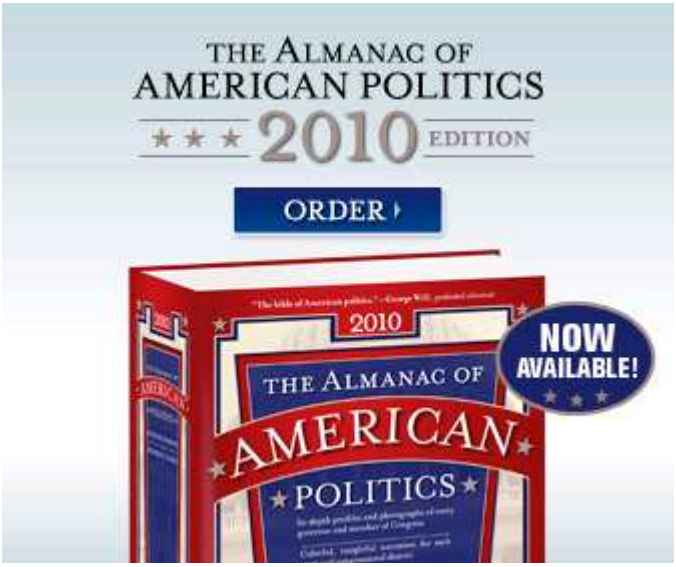

As the Supreme Court gears up for its Sept. 9 oral argument of a major First Amendment challenge to campaign finance rules, the case known as *Citizens United v. FEC* has sparked what may be an unprecedented lobbying and public advocacy war.

The high court's justices and their clerks are awash in more than 2,000 pages worth of arguments from no fewer than 53 amicus briefs in the case, according to a recent analysis by the First Amendment Center. Add in supplemental and reply briefs, and the total hits 59. (By contrast, the high court's landmark 2003 *McConnell v. Federal Election Commission* case drew only 22 amicus briefs.)

"This is, at least in the First Amendment/free expression context, the most that we've ever seen," said **Ronald K.L. Collins**, a scholar at the First Amendment Center, an educational nonprofit run by the Freedom Forum. The flood of briefs, which represents a trend not limited to *Citizens United*, could actually hinder the judicial process more than help it, Collins argues.

"The purpose of amicus briefs is not a statement of solidarity, it's not to petition for grievances," Collins noted. "And insofar as these amicus briefs become that, I feel the process is being abused."

> The case has generated a virtual cottage industry of opinion articles, blog postings, public briefings and even grassroots organizing around the issue of corporations' role in political campaigns.

In *Citizens United v. FEC*, the briefs that challenge the campaign finance rules outnumber those defending the status quo by about 2 to 1, according to the First Amendment Center's analysis. A conservative nonprofit corporation, Citizens United initially challenged provisions in the 2002 Bipartisan Campaign Reform Act that would force it to disclose who paid for its movie attacking **Hillary Rodham Clinton** during last year's presidential campaign.

The Supreme Court argued the case in March but took the unusual step of asking for additional arguments on whether it should overturn its landmark 1990 ruling, *Austin v. Michigan State Chamber of Commerce*. That case upheld the constitutionality of banning independent corporate campaign expenditures.

The court's action set the stage for a pitched battle over decades-old restraints on corporate and union

spending in political campaigns. Briefs have poured in from advocacy groups such as the League of Women Voters and the National Rifle Association; from high-profile political scientists and academics; from business associations, journalists, political parties and labor unions; and even from officials in 26 states that restrict corporate campaign finance expenditures.

The case has attracted a parade of heavyweight election lawyers. Solicitor General **Elena Kagan**, representing the Obama administration, has teamed up with former Solicitor General **Seth Waxman** to defend the existing campaign finance rules. Waxman is representing the sponsors of the BCRA, which include Sens. **John McCain**, R-Ariz., and **Russell Feingold**, D-Wis., as well as former Reps. **Martin Meehan**, D-Mass., and **Christopher Shays**, R-Conn.

Another former solicitor general, **Theodore B. Olson**, is representing Citizens United. During an extended oral argument on Sept. 9, the high court has agreed to hear from lawyers for both McCain and for Senate Minority Leader **Mitch McConnell**, R-Ky., a staunch First Amendment champion who sides with Citizens United.

Beyond the official briefs filed with the Supreme Court, the case has generated a virtual cottage industry of opinion articles, blog postings, public briefings and even grassroots organizing around the issue of corporations' role in political campaigns.

Both the Cato Institute and the American Constitution Society will hold press briefings in early September. Public Citizen has launched a "Don't Get Rolled" campaign that includes a Web site and plans for a public protest on the day of the Sept. 9 argument, to defend the existing restrictions.

It's an open question whether any of this will have the slightest effect on the Supreme Court, which has shown itself increasingly willing to roll back campaign finance restrictions under Chief Justice **John Roberts**.

Citizens United will be the first case heard by incoming Justice **Sonia Sotomayor**, but her arrival on the court appears unlikely to shift the balance dramatically when it comes to campaign finance issues. (She replaces **David Souter**, who tended to favor campaign finance regulations.)

"It's hard to imagine that any justice or clerk in any of the chambers will read all of these briefs," declared Collins, of the First Amendment Center. As the center's recent analysis notes, some, such as federal judge **Richard Posner**, have called the increase in amicus briefs "a real burden on the court system," while others, such as Justice **Samuel Alito**, have said they add to the debate.

Whatever the case, the number of briefs is unquestionably rising. Citing political science professor **Paul M. Collins**' book *Friends of the Supreme Court*, the First Amendment Center analysis notes that the number of briefs has grown from a mere 0.5 briefs per case in the 1950s to 2 briefs per case in the 1970s to almost 6 briefs per case in the 1990s to the present.

Collins goes so far as to suggest that the Supreme Court might at some point consider "reasonable constraints" on the number of briefs that may be filed for any one case.

In the meantime, the justices and clerks preparing for the Citizens United argument have their work cut out for them between now and Sept. 9.

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