



Hawaii's Act 11 and *Citizens United*: What's the Connection?

Tom Garrett

Hawaii's [Act 11](#) has been described by supporters as a response to *Citizens United v. FEC*, the 2010 Supreme Court decision that protected the right of corporations, including nonprofit corporations, and unions to independently speak to voters and urge them to vote for or against candidates (“independently” meaning that the groups’ speech could not be coordinated with a campaign or party).

But Act 11 presents a First Amendment question that extends beyond the parameters of *Citizens United*. Namely, the new law raises the issue of whether Hawaii can use its corporate laws to prevent nonprofits, unions, trade associations, civic groups, and other organizations—even unincorporated associations of people—from advocating for or against candidates, political parties, and ballot measures.

What was *Citizens United* actually about?

First, let's examine *Citizens United*. Despite over 15 years of political rhetoric to the contrary, *Citizens United* was not a case about a large, for-profit corporation trying to “buy an election.”

Instead, the case involved a nonprofit organization that wanted to distribute a documentary about Hillary Clinton during her 2008 presidential campaign. The Supreme Court described the “movie, in essence, [as] a feature-length negative advertisement that urges viewers to vote against Senator Clinton for President.”

Federal campaign finance law prohibited corporations and unions, including most nonprofit corporations, from using their general funds for such advocacy against a candidate. The government argued that it could prohibit *Citizens United* from distributing *Hillary: The Movie*. The nonprofit argued that prohibiting or punishing the movie's distribution was an obvious First Amendment violation.

During the case, the government went even further. It [conceded](#) that, under the same law, “a corporation could be barred from using its general treasury funds to publish [a] book,” even if the advocacy for or against a candidate were limited to a single line in a 500-page book.

The Supreme Court rejected that argument. The Court held that the First Amendment does not allow the government to prohibit independent speech urging the election or defeat of a candidate because the speaker is organized as a corporation, union, or nonprofit.

Did *Citizens United* allow corporations to give money directly to candidates?

No.

One of the most common misconceptions about *Citizens United* is that it allowed corporations or unions to contribute directly to candidates. It did not.

The federal government and many states prohibit corporate and union contributions to candidates. Many states allow such contributions, and a few place no limits on the amount. But *Citizens United* had nothing to do with that.

Citizens United did not change the government's ability to prohibit corporate or union contributions to candidates, it did not eliminate contribution limits, and it did not eliminate campaign finance disclosure laws.

What *Citizens United* held was that the government could not prohibit independent speech about candidates.

What does Hawaii's Act 11 do?

Act 11 claims to prohibit political speech in a different way.

Rather than prohibiting campaign speech by corporations, nonprofits, unions, and other organizations in the state's campaign finance code, it rewrites the code for every corporation, partnership, and business entity in the state—including unincorporated nonprofit associations—to prohibit them from speaking about so-called “election activity” and “ballot-issue activity.”

By saying that organizations do not have the power to speak about political issues and candidates, and that organizations can be punished for attempting to exercise that power, supporters claim the state will not run afoul of Supreme Court cases—including *Citizens United*—saying that corporations have a right to speak about candidates and ballot questions.

That means many organizations could face severe penalties if they spend money or anything of value to advocate for or against candidates, political parties, or ballot measures. Those penalties can include suspension of an organization's authority to operate, revocation of tax exemptions, and even involuntary dissolution.

Why does Act 11 affect more than large corporations?

Despite what advocates may say or imply, Act 11 does not target large businesses or Fortune 500 companies alone. Large corporations have a right to speak, and they can provide information that the public needs or wants to hear, including information from large news corporations. But there are millions of corporations in the United States—almost six million filed tax returns in 2006. And of those that are business corporations, most are small and lack immense financial resources.

But the law's very broad reach extends to many of the organizations ordinary people use to participate in public life, including nonprofits, unions, trade associations, advocacy organizations, and civic groups.

That matters because most individuals cannot afford to run a public education campaign, advertise about a ballot measure, or reach voters across the state on their own. People often speak most effectively by joining together through organizations that help them and like-minded allies speak out on matters of public concern.

For example, a small local advocacy group might urge voters to cast votes for or against a ballot measure on taxes, housing, government accountability, or local policy. Under Act 11, that organization could be prohibited from using its resources to advocate for or against the measure once it is formally before voters.

That is not just a restriction on the organization. It is a restriction on the ability of ordinary people to pool their resources, organize around shared views, and speak effectively in public debate.

How is Act 11 connected to *Citizens United*?

Act 11 is connected to the case because supporters of the law have openly described it as an alternative approach to canceling the impact of *Citizens United*.

The theory behind Act 11 is that, since Hawaii can define the powers of corporations and other organizations under state law, the state can then deny those organizations the “power” to engage in political advocacy.

But constitutional rights cannot be withheld through wordplay: a state may define corporate powers, but it cannot completely forbid a group from engaging in political speech or other protected conduct as a condition of receiving the benefits of legal organization.

The First Amendment protects people when they speak alone, and it protects people when they join together and speak

through nonprofits, corporations, unions, associations, and other organizations.

Is Act 11 only about corporate “powers,” not constitutional rights?

Supporters of Act 11 argue that the law does not violate the First Amendment because it merely defines the powers Hawaii grants to corporations and other legal entities. Under this theory, the state may simply decline to give organizations the legal power to engage in political or ballot-measure advocacy.

That argument focuses on labels rather than practical effect.

A state may define the powers of corporations, nonprofits, unions, and other organizations. But it may not condition legal status on the surrender of constitutional rights. The government could not say that corporations must waive Fourth Amendment protections, give up their right to just compensation for taken property, or surrender their right to speak as the price of doing business in the state.

The same principle applies here. Hawaii cannot avoid the First Amendment simply by saying that organizations lack the “power” to speak. If the practical effect of the law is to prohibit nonprofits, corporations, unions, advocacy groups, and civic organizations from using their resources to speak about candidates or ballot measures, the First Amendment is plainly implicated.

And if Hawaii could silence corporations by purporting to withdraw their power to speak, it could shut down newspapers, publishers, broadcasters—all corporations. That Act 11 chooses to exempt some corporations from engaging in some speech doesn’t change the fact that it transforms the First Amendment freedom to speak, into a state-issued favor, selectively granted.

Does Act 11 leave individual speech untouched?

Supporters also argue that Act 11 does not restrict any “natural person’s” rights because individuals remain free to speak on their own. But the First Amendment also protects “the right of the people peaceably to assemble.”

Most people do not participate meaningfully in public debate alone. They join with others as envisioned by the First Amendment. They form, join, or contribute to nonprofit corporations, unions, civic groups, trade associations, neighborhood groups, and advocacy organizations that reflect their views and help them speak more effectively.

That is especially true for ballot measures. A single resident may not have the resources to educate voters about a proposed tax increase, housing measure, county charter amendment, or constitutional amendment. But residents can pool their time, money, and effort through an organization.

Act 11 would prohibit much of that collective speech. The new law tells people they may speak alone, but not through many of the organizations they normally use to make their voices heard. The First Amendment protects both individual speech and the right of people to associate with others to speak effectively.

The supporters of Act 11 claim that the law protects ordinary voices from being drowned out, but the law’s effect is the opposite: ironically, Act 11 silences most of the groups ordinary residents would use to speak for them. Large, well-funded organizations can afford high-cost attorneys to design workarounds.

Does Act 11 contain any exemptions that spare *some* kinds of entities from its restrictions?

Yes.

Act 11 exempts certain institutional media activity, including bona fide news stories, commentaries, and editorials distributed through newspapers, broadcasters, magazines, blogs, and other periodical publications.

That also creates a serious First Amendment problem. The government can’t decide that some incorporated speakers, such as media corporations, may speak about candidates and ballot questions while other speakers, such as nonprofits, non-media

corporations, unions, or civic groups, may not.

The First Amendment does not give government the power to choose which speakers are acceptable. Moreover, citizens should think about what the next possible uses of such power might be. Today's "acceptable" speaker might be silenced tomorrow if the government has the ability to decide who may speak.

Why should Hawaii residents—even residents who aren't affiliated with a group affected by Act 11—care about this law?

Act 11 affects both speakers and listeners.

Public debate works best when Hawaii residents can hear a wide range of views and decide for themselves which arguments are persuasive. When the government silences organizations, it also limits the information and viewpoints available to the public.

That's especially important for ballot measures. Voters frequently make decisions about taxes, housing, constitutional amendments, county charters, and other issues that directly affect their communities. Nonprofits, corporations, unions, civic groups, and advocacy organizations often help explain those issues and present arguments for or against them. Speech from such organizations is very important to educate voters.

When groups are free to speak about these issues, residents can read, watch, and listen (or choose not to), making up their own minds about which views are persuasive. Act 11 silences most of these groups. That's bad for democracy and bad for robust political debate. As always, if speech we don't like exists, the answer should be more speech, not government censorship.

Is Act 11 just ordinary campaign finance regulation?

No.

Traditional campaign finance laws often involve contribution limits, registration requirements, or disclosure rules. Act 11 goes much further by denying most organizations the ability to engage in certain kinds of candidate and ballot-measure advocacy at all.

That's why Act 11 raises serious constitutional concerns. It threatens to silence organizations not because their speech is false or fraudulent, but because of their organizational structure.

Bottom line

Citizens United held that the government cannot ban independent political speech because the speaker is a corporation, union, or nonprofit.

Hawaii's Act 11 tests whether a state can reach a similar result by redefining the legal powers of organizations and stripping them of the "power" to speak.

That question matters far beyond any one case, organization, or political viewpoint. It addresses a basic First Amendment principle: people do not lose their constitutional rights when they join together to speak.

The Institute for Free Speech is a nonpartisan, nonprofit 501(c)(3) organization that promotes and defends the First Amendment political rights to freely speak, assemble, publish, and petition the government.