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Proposition 59:

Corporations. Political Spending. Federal Constitutional Protections. Legislative Advisory Question.

Legislative Advisory Question

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I. EXECUTIVE SUMMARY

Proposition 59 gives voters a chance to voice their opinion on whether or not Congress should pass a constitutional amendment to overturn the United States Supreme Court decision, *Citizens United v. Federal Election Commission*.¹ Proposed constitutional amendments must originate in Congress before the states ratify them, or two-thirds of the states must call for a Constitutional Convention. If successful, it would be sent to Congress to show California's support for commencing the amendment process in order to regulate campaign contributions to independent expenditure committees by corporations and unions. Proposition 59 is a non-binding voter instruction.

A **YES** vote on Proposition 59 encourages the state's elected officials to use their authority to overturn the *Citizens United* decision, potentially through an amendment to the U.S. Constitution.

A **NO** vote on Proposition 59 opposes this measure encouraging the state's elected officials to use their authority to overturn the *Citizens United* decision.

II. THE LAW

A. Background

Many individuals, corporations, labor unions, and other groups spend money to influence voters' decisions in political campaigns in the form of direct contributions and independent expenditures.² *Citizens United* affects the latter of the two. An "independent expenditure" is an expenditure that advocates for the election or defeat of a clearly identified candidate and is not made in coordination with any candidate, a candidate's authorized political committee, or political party committee.³

B. The Law Before *Citizens United*

Beginning in *Trustees of Dartmouth College v. Woodward*,⁴ a Supreme Court case in 1819, the Court considered the concept of corporate personhood in the context of a corporation's right to enter into a contract and engage in litigation in the same way as people can. Corporate personhood is a legal concept that recognizes corporations as having the same legal rights and responsibilities as human beings. The Court held that corporations could enter into contracts because they were "artificial persons" who had the same legal rights as human beings.

Although Congress passed several laws, including the Tillman Act of 1907, to resolve the public's disapproval of money in politics, none of these laws were effective in enforcing federal

¹ 558 U.S. 310 (2010).

² *Proposition 59, Campaign Finance: Voter Instruction*. (SB 254, Chapter 20, Statutes of 2016), LEGISLATIVE ANALYST'S OFFICE, <http://www.lao.ca.gov/ballot/2016/Prop59-110816.pdf> (last visited Aug. 20, 2016).

³ 52 U.S.C. § 30101(17) (2016).

⁴ 17 U.S. 518, 636 (1819); THOMAS A. GLESSNER, CREATED EQUAL: REFLECTIONS ON THE UNALIENABLE RIGHT TO LIFE 12 (2016).

limitations on campaign contributions.⁵ The Tillman Act of 1907 prohibited corporations and national banks from “making money contributions in connection with any election to any political office.”⁶ Almost two decades later, Congress passed the Federal Corrupt Practices Act of 1925, which increased spending limits on campaign funds for general elections.⁷ In 1939 and 1947, Congress passed amendments to the Hatch Act to regulate primary elections and limit campaign contributions and expenditures made to support or oppose Congressional campaigns.⁸ It was not until the Taft-Hartley Act of 1947 that corporations and labor unions were barred from making contribution and expenditures in federal elections.⁹ As stated, none of these laws were effective at limiting corporate contributions in campaigns.

In response to the ineffectual laws predating the 1970’s and President Nixon’s Watergate scandal, Congress passed the Federal Election Campaign Act (“FECA”), which created the Federal Election Commission (“FEC”) to regulate campaign contributions and expenditures.¹⁰ In 1971, the FECA limited spending on media advertisements, which was later repealed. The statute also established the framework for political action committees (“PACs”), allowing corporations to use their treasury funds to collect and make contributions for federal elections that were voluntary and separate from the organization. Although the 1971 version did not establish one independent body to enforce the law, members of the executive branch, including the Department of Justice, were given authority to enforce campaign laws.¹¹ The 1974 amendments to the FECA also limited contributions and expenditures to all candidates running for office in the federal government.

However, within the next few decades, the courts began to erode the protections against big-moneyed interests in politics, laying the groundwork for *Citizens United*. The provisions of the 1974 amendments were challenged in 1976 in *Buckley v. Valeo*.¹² In *Buckley*, the Supreme Court considered whether the FECA, which banned independent expenditures by not distinguishing direct contributions to political candidates from independent expenditures made to support or oppose candidates, was constitutional. Deciding that the ban on independent expenditures did not serve the government’s interest in preventing corruption in elections, the

⁵ *The Federal Election Campaign Laws: A Short History*, FEDERAL ELECTION COMMISSION, <http://www.fec.gov/info/appfour.htm> (last visited Sept. 20, 2016). The Federal Election Commission noted that the laws were largely ignored by individuals making campaign contributions “because [none of the laws] provided an institutional framework to administer their provisions effectively”.

⁶ 34 Stat. 864(b) (1907). Although unclear at the time whether this ban included independent expenditures, some argue that Congress was not concerned with campaign contributions in terms of independent expenditures. Angie Drobnic Holan, *Campaign Finance Ruling on United Citizens is Historical, but 100 Years is a Stretch*, POLITIFACT (Jan. 22, 2010, 5:42 PM), <http://www.politifact.com/truth-o-meter/statements/2010/jan/22/charles-schumer/campaign-finance-ruling-united-citizens-historical/>.

⁷ See FEDERAL ELECTION COMMISSION, *supra* note 5.

⁸ *Id.*

⁹ *Id.*

¹⁰ *Id.*; see Holan, *supra* note 6.

¹¹ The Clerk of the House, the Secretary of the Senate, and the Comptroller General of the United States General Accounting Office (GAO) monitored compliance with FECA, and the Justice Department was responsible for prosecuting violations of the law referred by the overseeing officials. It wasn’t until 1974 that FECA was amended to create the Federal Election Commission, when Congress became aware of the campaign abuses during the 1972 election. See FEDERAL ELECTION COMMISSION, *supra* note 5.

¹² 424 U.S. 1 (1976).

Court held that the ban was unconstitutional.¹³ The *Buckley* court, however, left open the question of whether the ban on corporate and union independent expenditure was unconstitutional.

Less than two years later, the Supreme Court reaffirmed First Amendment principle in *First National Bank of Boston v. Bellotti*,¹⁴ holding that the federal government did not have the authority to restrict political speech on the grounds that the speaker was a corporation.¹⁵ The ability to influence elections was essentially the type of right the First Amendment protected because it encourages public discourse. Regardless of whether the speaker was a person or a corporation, the principle still stood in both contexts.¹⁶

Then in *Austin v. Michigan Chamber of Commerce*,¹⁷ the Supreme Court upheld a ban on corporate independent expenditures because the Court believed the government had an interest in preventing the “corrosive and distorting effects of immense aggregations of [corporate] wealth [t]hat had little or no correlation to the public’s support for the corporation’s political ideas.” *Austin* was seen as a significant departure from First Amendment principles despite the movement towards lax restrictions on corporate independent expenditures in *First National Bank* and *Buckley*.¹⁸

Austin laid the groundwork for another Supreme Court case in 2003, *McConnell v. Federal Election Commission*.¹⁹ In *McConnell*, the Supreme Court considered whether the Bipartisan Campaign Reform Act of 2002 was constitutional. Specifically, the issue was whether a federal statute that banned all corporations, including nonprofit organizations, from speaking on subjects immediately before federal elections violated a corporation’s right to free speech and association. Because the government’s interest in preventing corruption was said to be sufficiently important, the Court upheld the statute’s ban on the use of corporate or union treasury funds to support “electioneering campaigns.”²⁰ The Court also indicated that the use of PACs, which are funds separate from the corporation’s treasury funds, could still be used by corporations and unions to support or oppose political campaigns. As a result, *McConnell* stood for the notion that political speech could be banned when the speaker was a corporation.

C. Existing Law

Citizens United is a Supreme Court decision overturning century-old precedent that allowed the federal government to restrict the use of corporate independent expenditures from a corporation’s treasury on political campaigns.²¹ The Court held that a corporation’s independent expenditures were speech protected by the First Amendment, and therefore could not be

¹³ *Buckley* identified that the government had an interest in preventing quid pro quo corruption, or at least the appearance of corruption. Recognizing only a very narrow view on quid pro quo corruption, the Court dismissed its possibility on the ground that speakers did not have access to elected officials, and were therefore not engaging in quid pro quo corruption.

¹⁴ 435 U.S. 765, 784 (1978).

¹⁵ *Id.* The court invalidated Massachusetts’ restrictions on corporate spending in support or against ballot referenda.

¹⁶ *Id.*

¹⁷ 494 U.S. 652, 660 (1990).

¹⁸ *Fed. Election Comm’n v. Wis. Right to Life, Inc.*, [551 U.S. 449, 490](#) (2007).

¹⁹ 540 U.S. 93 (2003), *overruled by Citizens United v. Fed. Election Comm’n*, 558 U.S. 310 (2010).

²⁰ See note 24 for definition of electioneering campaigns as defined in federal statutes.

²¹ *Citizens United v. Fed. Election Comm’n*, 558 U.S. 310, 471 (2010).

restricted by the federal government on the ground that the government had an interest in protecting against corruption or the “appearance of corruption.”²²

To resolve the issues, the Court reconsidered *Austin*'s and *McConnell*'s holdings, and overruled *Austin*²³ in its entirety and *McConnell* in part.²⁴ The case involved a nonprofit corporation called Citizens United that collected a majority of its funds from donations by individuals and a small portion of its funds from for-profit corporations.²⁵ Citizens United released a film called *Hillary: The Movie*, which contained negative interviews about Hillary Clinton during the 2008 presidential election. The organization was planning to increase public accessibility through video on demand preceding the General Election. To prevent incurring civil and criminal penalties when the movie would be placed on demand, the organization sued the FEC. Citizens United argued that 2 U.S.C § 441(b) of the United States Code was unconstitutional, and that *Austin* and *McConnell* should be overruled.²⁶

First, section 441(b) banned corporations from advocating for or against candidates expressly or through broadcast electioneering communications that are within 30 days of primary elections and 60 days of a general election. Section 441(b) had the effect of chilling speech, which was the evil the First Amendment intended to guard against.²⁷

The Court explained that a restriction on the amount of money a person or group can spend on political communication during a campaign reduces the quantity of expression. The restriction reduces the number of issues that the communication raises, explores, and that are accessible to the public.²⁸ The weeks preceding elections are crucial since the public pays the most attention to elections during this time. Therefore, based on distinctions made in previous decisions, banning corporate independent expenditures and dissemination of political ideas during the critical period of elections could risk chilling protected speech altogether.²⁹

Second, although PACs were exempted from the ban, since they did not allow corporations to speak, the Court's First Amendment concerns were not alleviated (especially since registration requirements on PACs were heavily burdensome). Speech is an essential

²² *Id.*

²³ *Id.* at 363-34. By overruling *Austin*, the Court invalidated section 203 of BCRA, which prohibited 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. The Court also invalidated 441(b)'s prohibition of the use of corporate funds for express advocacy.

²⁴ *Id.* at 913-14. By overruling *McConnell* in part, the Court decided that the anti-distortion interest that was recognized in *Austin* was not a sufficient government interest, invalidating BCRA section 203's extension of section 441(b)'s restrictions on corporate independent expenditures. BCRA was amended to prohibit “any electioneering communication,” which is defined as “any broadcast, cable, or satellite communication” that “refers to a clearly identified candidate for Federal office” and is made within 30 days of a primary or 60 days of a general election. 2 U.S.C. 441(b); *McConnell*, 540 U.S. at 203-09; *Austin*, 494 U.S. at 652.

²⁵ *Citizens United*, 558 U.S. at 471.

²⁶ *Id.* at 358.

²⁷ The First Amendment provides that “Congress shall make no law [a]bridging the freedom of speech.” U.S. CONST. amend. I.

²⁸ *Citizens United*, 558 U.S. at 339, citing *Buckley v. Valeo*, 424 U.S. 1, 19 (1976).

²⁹ In deciding the federal ban on independent expenditures based on corporate identity was constitutional, *McConnell* distinguished between who and what could make independent expenditures to engage in public discourse about political ideas. 540 U.S. at 176-77. *Austin* allowed for the interpretation that Congress could distinguish between times that were appropriate for public discourse and times that were not. 494 U.S. at 652-53.

mechanism of democracy, and corporations have a valuable hand in holding elected officials accountable to the people.³⁰ Since speech through PACs cannot be considered speech directly for themselves, corporations like Citizen United cannot engage in the kind of public discourse the First Amendment guarantees. Through its decision, the Court returned to the principles outlined in *Bellotti* and *Buckley*, restricting the government from suppressing political speech on the basis of the corporation's identity, thereby allowing corporations to use independent expenditures to share political ideas. Thus, under *Citizens United*, corporate independent expenditures from treasury funds are protected political speech.

D. Proposed Law

The proposed measure is advisory and non-binding, meaning it creates no obligation for any elected official to pass legislation relating to campaign finance regulation. The results of the election would be sent to Congress by the Secretary of State to show that the people of California support passing a constitutional amendment to overturn *Citizens United*, and would allow for the regulation of campaign spending and contributions by any entity, including corporations. Since *Citizens United* was decided by the United States Supreme Court, the only way to overturn the decision is by way of a Constitutional amendment or by bringing a lawsuit before the Court, which could allow it to decide the case differently.

III. PATH TO THE BALLOT

What became known as Proposition 59 originally started when the California Legislature enacted Senate Bill 1272 in the 2013-2014 legislative session.³¹ SB 1272 called for a special election that was to be consolidated with the November 2014 statewide general election.³² Secretary of State Debra Bowen then presented SB 1272 as Proposition 49 in the 2014 general election, which read:

Shall the Congress of the United States propose, and the California Legislature ratify, an amendment or amendments to the United States Constitution to overturn *Citizens United v. Federal Election Commission*, and other applicable judicial precedents, to allow the full regulation or limitation of campaign contributions and spending, to ensure that all citizens, regardless of wealth, may express their views to one another, and to make clear that the rights protected by the United States Constitution are the rights of natural persons only?³³

Upon the assignment of Proposition 49, the Howard Jarvis Taxpayers Association (“HJTA”) appealed to the Third District Court of Appeals in an effort to prevent the Secretary of State from placing the advisory measure on the ballot.³⁴ After a denial by the Third District Court, HJTA filed a petition for a writ of mandate to the California Supreme Court.³⁵

³⁰ *Citizens United*, 558 U.S. at 339.

³¹ *Howard Jarvis Taxpayers Assn. v. Padilla*, 62 Cal. 4th 486, 495-96 (2016).

³² *Id.* at 496.

³³ *Id.*

³⁴ *Id.*

³⁵ *Id.*

In a 5–4 decision, the California Supreme Court directed the Secretary of State to delay placing Proposition 49 on the ballot and ordered each party to show cause. The Court based its decision on the determination that the dangers of potentially allowing an invalid measure to reach the ballot were greater than the cost of postponing a potentially valid measure.³⁶ In response, both parties addressed the larger issues before the Court: (1) whether advisory measures are ever allowed to be placed on the ballot, and (2) specifically, whether Proposition 49 was permissible or if it should be prevented in future statewide elections.³⁷

SB 1272 specifically called for a special election on November 4, 2014; therefore Proposition 49’s delay rendered SB 1272 moot. However, the Court nonetheless concluded that the issue was significant to election law and therefore retained jurisdiction to decide the issue presented in the instance the legislation were passed again.³⁸

The Legislature argued, among many things, that it was designated with plenary power by the California Constitution as it pertains to any activities that relate to its lawmaking function, and it is only restricted in actions that are expressly or by necessary implication forbidden by the State Constitution.³⁹ There is nothing in the State Constitution that forbids the legislature from placing an advisory measure on the ballot. Therefore, it is within the Legislature’s plenary power to do so.

The Legislature also argued that it has exercised advisory measures previously, as early as 1891 (regarding whether or not Senators should be directly elected by the citizens), and is thus a power that the Legislature has always maintained.⁴⁰ The Legislature last used an advisory measure in 1933 when it placed Propositions 9 and 10 on the ballot to determine if the legislature should designate a specified dollar amount from a gasoline tax to the general fund to pay the interest on unsettled highway bonds.⁴¹ The Legislature argued that since neither one of the propositions were challenged when placed on the ballot in 1933, it further supports the validity of SB 1272.

The Court focused on the Legislature’s obligation to pass meaningful laws and its powers of investigation to facilitate that purpose.⁴² The Legislature has broad, but not unlimited, discretion in invoking its investigatory powers, and those powers must be tied to matters falling within the powers of the Legislature.⁴³ The Court then recognized the Legislature’s role in the federal constitutional amendment process under Article V of the U.S. Constitution.⁴⁴

Based on those Article V powers, the Court analyzed whether the Legislature may use an advisory measure to determine the electorate’s support of a federal constitutional amendment.⁴⁵

³⁶ *Id.* at 496–97.

³⁷ *Id.* at 497.

³⁸ *Id.*

³⁹ *Prop 49: The Briefs and Amicus Filings*, MONEY OUT VOTERS IN (Nov. 12, 2014), http://www.moneyoutvotersin.org/prop_49_the_briefs_and_amicus_filings.

⁴⁰ *Id.* at 45–46.

⁴¹ *Voter Information Guide for 1933, Special Election*, UNIV. OF CAL., HASTINGS COLLEGE OF THE LAW, http://repository.uchastings.edu/cgi/viewcontent.cgi?article=1313&context=ca_ballot_props.

⁴² *Howard Jarvis Taxpayers Assn.*, 62 Cal. 4th at 499.

⁴³ *Id.*

⁴⁴ *Id.* at 500.

⁴⁵ *Id.* at 504.

After examining the history relating to the passage of the U.S. Constitution, the Court recognized an implicit understanding that elected officials may solicit their constituents on fundamental issues concerning its Article V powers.⁴⁶

HJTA argued that Article IV, Section 11 of the California Constitution provides the only mechanism in which the Legislature may investigate: through committee.⁴⁷ However, the Court concluded that the committee clause was an expansion of the power to investigate and not a restriction.⁴⁸ Therefore, the clause does not prevent the Legislature from placing an advisory measure on the ballot.⁴⁹

HJTA also argued that the people may only place initiatives on the ballot that enact laws based on the California Supreme Court's decision in *AFL-CIO v. Eu*.⁵⁰ *Eu* stands for the notion that the people may only place an initiative on the ballot that creates law.⁵¹ HJTA then reasoned that if citizens are restricted from placing advisory measures on the ballot, the Legislature must be as well.⁵² The Court distinguished the *Eu* case by noting that it established limits specifically on the initiative power, but did not establish limits on what actions the Legislature may take.⁵³ This argument is based on the idea that when the Legislature was established, it was given complete legislative powers by the people. However, when the people established the initiative and referendum process in 1911, the people subsequently took back only a shared piece of that power.⁵⁴

The Court ultimately concluded that the Legislature may solicit the electorate to determine their viewpoint on fundamental issues that are related to the passage of a federal constitutional amendment, but are under no obligation to vote in accordance with that viewpoint.⁵⁵ It appears clear that the Court will allow the Legislature to place advisory measures on the ballot that relate to a federal constitutional amendments in the future.

The court determined that there existed a “nexus” between the proposition and some legislative action which may be taken in the future.⁵⁶ Justice Corrigan, in her concurrence, stated that an advisory measure that is reasonably related to the proper exercise of legislative powers would be allowed.⁵⁷ The Legislature subsequently passed SB 254 which contained similar language to that of Proposition 49.⁵⁸ SB 254 ultimately became law without Governor Jerry Brown's signature and was placed on the 2016 general statewide election.⁵⁹

⁴⁶ *Id.* at 507.

⁴⁷ *Id.* at 512.

⁴⁸ *Id.* at 513.

⁴⁹ *Id.*

⁵⁰ *AFL-CIO v. Eu*, 36 Cal. 3d 687, 694 (1984).

⁵¹ *Howard Jarvis Taxpayers Assn.*, 62 Cal. 4th at 516.

⁵² *Id.*

⁵³ *Id.*

⁵⁴ *Id.*

⁵⁵ *Id.* at 519.

⁵⁶ *Id.* at 500.

⁵⁷ *Id.* at 551.

⁵⁸ Bri Holmes, *CA Gov. Jerry Brown Allows “The Overturn Citizens United Act” to Become Law*, FREE SPEECH FOR PEOPLE.ORG (June 8, 2016), <http://freespeechforpeople.org/ca-gov-jerry-brown-allows-the-overturn-citizens-united-act-to-become-law/>.

⁵⁹ *Id.*

The case before the court was very specific towards the passing of a federal constitutional amendment. Therefore, it is unclear whether or not the legislature has the power to place advisory measures on the ballot that are unrelated to federal constitutional issues. This advisory measure could potentially open the door to future advisory measures aimed at driving voter turnout.⁶⁰

Seventeen other states have passed similar legislation voicing their displeasure with *Citizens United* since it was decided.⁶¹ Along with seventeen states, fifty California cities and counties have passed local measures stating their displeasure with the *Citizens United* decision and for it to be overturned.⁶²

IV. DRAFTING ISSUES

As alluded to above, when Proposition 59 was originally introduced in 2014, it became the subject of litigation that focused on the placement of advisory questions on the California ballot. After the court decided in *Howard Jarvis Taxpayers Association* that advisory measures could be placed on the ballot, the issues pertaining to validity of advisory measures became moot. Also, in part based on its advisory, non-binding status, there are no drafting issues.

V. CONSTITUTIONAL ANALYSIS

A. Judicial Review

The U.S. Supreme Court has the final say when it comes to interpreting the United States Constitution. Since *Citizens United* was a recent decision made by seven members of the current Supreme Court justices, some believe the only way to change it is through a constitutional amendment. However, with Justice Scalia's recent death (Justice Scalia sided with the majority in *Citizens United*), there exists a possibility that the Court could overrule *Citizens United* once a new justice is appointed should a similar issue reach the Court in the near future.⁶³

If the next Supreme Court justice is appointed by a Democratic President, the Justice will most likely favor the overturning of *Citizens United*. The next President of the United States could potentially have up to four Supreme Court nominations which would have an enormous impact on the judicial philosophy of the next generation.⁶⁴

⁶⁰ Maura Dolan, 'Citizens United' Advisory Measure Can Go on Ballot, California High Court Says, L.A. TIMES (June 4, 2016, 7:41 PM PST), <http://www.latimes.com/local/lanow/la-me-ln-california-supreme-court-ballot-20160104-story.html>.

⁶¹ *State and Local Support*, UNITED FOR THE PEOPLE, <http://united4thepeople.org/state-and-local-support-2/> (last visited Sept 8, 2016).

⁶² *Id.*

⁶³ Richard Hasen, *How Scalia's Death Could Shake Up Campaign Finance*, POLITICO (Feb. 14, 2016), <http://www.politico.com/magazine/story/2016/02/antonin-scalia-death-campaign-finance-reform-213633>.

⁶⁴ David Morris, *The Next President Will Likely Appoint 4 Supreme Court Justices: Which President Do You Want Picking Them?*, ALTERNET (July 27, 2016) <http://www.alternet.org/election-2016/next-president-likely-appoint-4-supreme-court-justices>. These nominations would most likely take the place of Justice Scalia, Justice Ginsburg, who is 83, Justice Kennedy, who is 80, and Justice Breyer, who is 78, based on the fact that the average retirement age of a Supreme Court justice has been 79 since the early 1970's. Those Justices comprise two Republican nominees (Justice Scalia and Justice Kennedy) and two Democratic nominees (Justice Ginsburg and Justice Breyer).

B. Constitutional Amendment Process

Proposition 59 is an effort to show support for Congress to initiate a constitutional amendment to overturn *Citizens United*. There are only two ways in which the U.S. Constitution may be amended. One way is for two-thirds of the states to call for a constitutional convention so that amendments may be proposed. After proposal of all amendments, three-fourths of the states (38) must ratify the proposed amendments. However, in the history of the United States, the Constitution has never been amended by way of a constitutional convention since its creation in 1787.⁶⁵ Also, it is unclear what the requirements would be if three-fourths of the states called a constitutional convention.⁶⁶ For example, the problems that arise from a constitutional convention are that there are no specifications for exactly how a convention would work, how many delegates would each state send? How long would the convention last? What issues would be covered? There are no answers to these questions which makes passing an amendment by way of a constitutional convention a potentially messy business.

The final way to amend the Constitution is by Congress proposing an amendment that passes both the House and Senate with at least two-thirds support in each chamber. After congressional approval, three-fourths of all the states (38) must ratify the amendment in order to amend the federal Constitution.⁶⁷ Every subsequent amendment to our Constitution since the Bill of Rights has been passed this way.⁶⁸ Since the Constitution is the supreme law of the land, any amendment to the Constitution would be binding on all courts.

VI. PUBLIC POLICY CONSIDERATIONS

A. Supporting Arguments

Supporters of Proposition 59 argue that corporations are not people and should not be entitled to the same rights as citizens.⁶⁹ Supporters also feel that a Constitutional amendment ensures that future Justices will not be able to change positions regarding contributions to independent expenditure committees, thus change the law.⁷⁰ The Sacramento Bee Editorial Board took the position that, while not in favor of advisory measures, supporting Proposition 59 would be worthwhile to avoid sending the wrong message that voters accept the effects of *Citizens United*.⁷¹ Proponents consider Proposition 59 a voter instruction that directs California's

⁶⁵ Robert Greenstein, *A Constitutional Convention Could Be The Single Most Dangerous Way to "Fix" American Government*, THE WASHINGTON POST (Oct. 21, 2014), https://www.washingtonpost.com/posteverything/wp/2014/10/21/a-constitutional-convention-could-be-the-single-most-dangerous-way-to-fix-american-government/?utm_term=.b67c90310ffe.

⁶⁶ *Id.*

⁶⁷ U.S. CONST. art. V.

⁶⁸ See Greenstein, *supra* note 65.

⁶⁹ *FAQ Prop 59, OVERTURN CITIZENS UNITED, YES ON 59*, http://yesonca59com.nationbuilder.com/faq_prop_59 (last visited Oct. 19, 2016).

⁷⁰ *Id.*

⁷¹ The Editorial Board, *Take a Stand on Citizens United*, THE SACRAMENTO BEE (Sept. 5, 2016, 2:00 PM PDT), <http://www.sacbee.com/opinion/editorials/article99742712.html>.

elected officials to take action. While they concede it is not legally binding, proponents argue that if elected officials do not honor the intention of the voters, they risk not being re-elected.⁷²

B. Opposing Arguments

The opponents' arguments are varied. Some oppose Proposition 59 because they believe it is a limit on the freedom of speech by corporations.⁷³ Opponents also argue that *Citizens United* only bans unlimited spending by corporations in making contributions to independent expenditure committees. The Los Angeles Times Editorial Board opposes Proposition 59 because Proposition 59 does not specify what a constitutional amendment overturning *Citizens United* would look like.⁷⁴ While Proposition 59 does specify that the constitutional amendment will make clear that corporations should not have the same constitutional rights as people, the initiative does not specify what rights corporations would lose. Would corporations lose Freedom of Speech or Due Process rights?⁷⁵ Finally, the opponents stress the fact that Proposition 59 is not legally binding and does not create a legal obligation on any elected official to vote a certain way.

C. Presidential Candidates' Viewpoints

As previously mentioned, the next President of the United States may have up to four Supreme Court nominations within their term.⁷⁶ Hillary Clinton has pledged to introduce a constitutional amendment to overturn the *Citizens United* decision within her first 30 days in office if she is elected President.⁷⁷ Though the President does not have the power to propose a constitutional amendment, it is likely that any Supreme Court Justice appointed by Secretary Clinton would be open to overturning *Citizens United*. Secretary Clinton has said she would have a litmus test for a judge to be appointed to the Supreme Court, and one of those tests would be to overturn *Citizens United*.⁷⁸

Donald Trump has not expressed his view on *Citizens United*, but has campaigned on a 'rigged system.' Trump selected Indiana Governor Mike Pence to be his running mate. Governor

⁷² See OVERTURN CITIZENS UNITED, YES ON 59, *supra* note 69.

⁷³ Lachian Markay, *Tom Steyer Wants to Nullify The Bill of Rights to Get Other People's Money Out Of Politics*, THE FEDERALIST (Sept. 13, 2016), <http://thefederalist.com/2016/09/13/prop-59-tom-steyer-wants-nullify-bill-rights/>.

⁷⁴ The Times Editorial Board, *Prop 59: Don't Amend the Constitution over Citizens United*, L.A. TIMES (Sept. 9, 2016, 5:00 AM PDT), <http://www.latimes.com/opinion/editorials/la-ed-proposition-59-20160906-snap-story.html>.

⁷⁵ *Id.*

⁷⁶ See Morris, *supra* note 64.

⁷⁷ Benjamin Oreskes, *Clinton Pledges Constitutional Amendment to Overturn Citizens United Ruling*, POLITICO (July 16, 2016, 1:28 PM EDT), <http://www.politico.com/story/2016/07/hillary-clinton-citizens-united-225658>.

⁷⁸ Editorial Board, *The Danger of Trump, Sanders and Clinton's Supreme Court Lists and Litmus Tests*, THE WASHINGTON POST (May 20, 2016), https://www.washingtonpost.com/opinions/the-danger-of-trump-sanders-and-clintons-supreme-court-lists-and-litmus-tests/2016/05/20/f59484d8-1179-11e6-8967-7ac733c56f12_story.html?utm_term=.c6da51ead9e7.

Pence supports the *Citizens United* decision and declared that freedom won when the Supreme Court made their decision.⁷⁹

VII. CONCLUSION

Proposition 59 is an advisory measure that is non-binding, creating no obligation on any elected official to pass any legislation overturning *Citizens United*. Despite Congress' attempts to limit corporations' use of independent expenditures, the Supreme Court in *Citizens United* protected a corporation's use of independent expenditures through a corporation's treasury funds to support or oppose campaigns. Proposition 59 is designed to be a step towards the possible overturning of *Citizens United* through an amendment to the United States Constitution.

However, many criticisms of Proposition 59 surround the lack of effectiveness and usefulness of an advisory measure that does not outline the specifics of an amendment and whether it will encourage other states to follow suit. If passed, it remains debatable whether its passage will result in any substantial change in campaign spending limits.

The California Supreme Court did not say the State Legislature always has the power to propose advisory measures, but it did give the Legislature the ability to propose advisory measures specifically related to the exercise of its Article 5 powers under the California Constitution. All that being said, a "yes" vote on Proposition 59 encourages the state's elected officials to use their authority to overturn the *Citizens United* decision, potentially through an amendment to the U.S. Constitution. A "no" vote on Proposition 59 opposes this measure encouraging the state's elected officials to use their authority to overturn the *Citizens United* decision.

⁷⁹ Mike Pence, *Pence Praises Supreme Court Decision In Citizens United Case*, PROJECT VOTE SMART (Jan. 20, 2010), <https://votesmart.org/public-statement/479161/pence-praises-supreme-court-decision-in-citizens-united-case#.V9hzLZMrJTY>.