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CIVIL LIBERTIES  
UNITED STATES HOUSE OF REPRESENTATIVES**

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*Citizens United at 10:  
The Consequences for Democracy and  
Potential Responses by Congress*

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**TESTIMONY OF**

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*The Institute for Free Speech is a nonpartisan, nonprofit 501(c)(3) organization that promotes and defends the First Amendment rights to freely speak, assemble, publish, and petition the government. Founded in 2005 as the Center for Competitive Politics, the Institute is the nation's largest organization dedicated solely to protecting First Amendment political rights.*

## Introduction

Thank you Chair Cohen, Vice Chair Raskin, Ranking Member Johnson, and Members of the House Committee on the Judiciary’s Subcommittee on the Constitution, Civil Rights, and Civil Liberties for inviting me to testify today on *Citizens United* and its impact on democracy ten years after the Supreme Court’s landmark ruling.

As soon as the Court handed down its decision in *Citizens United*, howls of protest erupted. Critics assailed the Court for supposedly “thrust[ing] politics back to the robber-baron era of the 19th century”<sup>1</sup> and “giv[ing] a green light to a new stampede of special interest money in our politics.”<sup>2</sup> Others castigated the majority for “rul[ing] that corporations can buy elections”<sup>3</sup> and creating “government of the CEOs, by the CEOs, and for the CEOs.”<sup>4</sup> Later, one now-U.S. Senator compared the Court’s decision in *Citizens United* to its infamous ruling in *Dred Scott v. Sandford* – a case which ruled that the Constitution’s protections weren’t afforded to African Americans.<sup>5</sup>

Hyperbole and charged rhetoric aside, what was *Citizens United* actually about? Quite simply, on January 21, 2010, the Supreme Court struck down a law that prohibited corporations and labor unions from independently voicing their support or opposition to federal candidates. That law, the Court correctly said, violated those organizations’ First Amendment rights.

The case came before the Court after the government attempted to prohibit a nonprofit organization from advertising a film criticizing then-candidate Hillary Clinton during the 2008 election. During oral arguments, the government even claimed that it could prohibit the publication of a book containing a single line advocating for or against a candidate, if it was funded by a corporation. Unsurprisingly, the Court ruled that these actions violate the First Amendment right to free speech.

*Citizens United* set the stage for new ways of speaking about candidates, making it easier for Americans to learn both the good and the bad about the choices on their ballots. Federal campaigns, previously dominated by legacy media outlets and the candidates themselves, now include independent voices. The decision also coincided with an increase in political diversity and volatility, with more political newcomers finding paths to success.

Today, in these prepared remarks, I want to focus first on the facts underlying the case and the constitutional law that rendered the Court’s decision in *Citizens United* the only correct outcome. Then, with ten years and five election cycles of hindsight, I will review what we can

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<sup>1</sup> Editorial, “The Court’s Blow to Democracy,” *The New York Times*. Retrieved on January 30, 2020. Available at: <https://www.nytimes.com/2010/01/22/opinion/22fri1.html> (January 21, 2010).

<sup>2</sup> Kenneth P. Vogel, “Court decision opens floodgates for corporate cash,” *Politico*. Retrieved on January 30, 2020. Available at: <https://www.politico.com/story/2010/01/court-decision-opens-floodgates-for-corporate-cash-031786> (January 21, 2010).

<sup>3</sup> Charles Mahtesian, “Court rejects campaign spending limits,” *Politico*. Retrieved on January 31, 2020. Available at: <https://www.politico.com/story/2010/01/court-rejects-campaign-spending-limits-031794> (January 21, 2010).

<sup>4</sup> U.S. Senator Sheldon Whitehouse, “Whitehouse Reacts To Supreme Court Decision On Campaign Finance,” Office of U.S. Senator Sheldon Whitehouse. Retrieved on January 31, 2020. Available at: <https://www.whitehouse.senate.gov/news/release/whitehouse-reacts-to-supreme-court-decision-on-campaign-finance> (January 21, 2010).

<sup>5</sup> Elspeth Reeve, “What Dred Scott Has to Do with Citizens United (Hint: Nothing),” *The Atlantic*. Retrieved on January 30, 2020. Available at: <https://www.theatlantic.com/politics/archive/2013/02/what-dred-scott-has-do-citizens-united/318096/> (February 21, 2013).

learn from the effects of *Citizens United* on American campaigns. Far from a gift to large corporations and moneyed interests, the Court's decision was a sweeping victory for the First Amendment, Americans' political speech rights, electoral competition, and a robust, healthy democracy.

**I. Constitutional Law 101: *The Government Cannot Ban Political Books or Movies.***

Most forgotten in the decade since *Citizens United* is the actual speech the Court protected. The case was about political speech in its purest form and the government's belief that it could regulate and prohibit that speech. *Citizens United* is a nonprofit corporation that, in 2008, wanted to advertise and sell on-demand a documentary critical of then-Democratic primary candidate Hillary Clinton. The Federal Election Commission said doing so would be illegal, because it was funded by a corporation, and under the statute any corporate spending that supports or opposes a candidate – or in the case of broadcast advertising, even mentions a candidate close to an election – is prohibited (unless the speaker is a media corporation). The government's position before the Supreme Court was that it could prohibit companies from publishing books that contained a single line advocating for or against a candidate.

This is not hyperbole. Here are portions from the *Citizens United* argument:

JUSTICE ALITO: What's your answer to Mr. Olson's point that there isn't any constitutional difference between the distribution of this movie on video demand and providing access on the Internet, providing DVDs, either through a commercial service or maybe in a public library, providing the same thing in a book? ...

MR. STEWART: I think the -- the Constitution would have permitted Congress to apply the electioneering communication restrictions...

JUSTICE ALITO: That's pretty incredible. You think that if -- if a book was published, a campaign biography that was the functional equivalent of express advocacy, that could be banned?

MR. STEWART: I'm not saying it could be banned. I'm saying that Congress could prohibit the use of corporate treasury funds ...

JUSTICE ALITO: Well, most publishers are corporations. And a publisher that is a corporation could be prohibited from selling a book?

MR. STEWART: ... there would be a potential argument that media corporations, the institutional press, would have a greater First Amendment right. That question is obviously not presented here.

JUSTICE KENNEDY: Well, suppose it were an advocacy organization that had a book. Your position is that under the Constitution, the advertising for this book or the sale for the book itself could be prohibited within the 60 -- 90-day period -- the 60 -- the 30-day period?

MR. STEWART: If the book contained the functional equivalent of express advocacy. ...

JUSTICE KENNEDY: Is it the Kindle where you can read a book? I take it that's from a satellite. So the existing statute would probably prohibit that under your view?

MR. STEWART: Well, the statute applies to cable, satellite, and broadcast communications....

JUSTICE KENNEDY: Just to make it clear, it's the government's position that under the statute, if this kindle device where you can read a book which is campaign advocacy, within the 60-30 day period, if it comes from a satellite, -- it can be prohibited under the Constitution ...?

MR. STEWART: It -- it can't be prohibited, but a corporation could be barred from using its general treasury funds to publish the book and could be required to use -- to raise funds to publish the book using its PAC.

CHIEF JUSTICE ROBERTS: If it has one name, one use of the candidate's name, it would be covered, correct?

MR. STEWART: That's correct.

CHIEF JUSTICE ROBERTS: It's a 500-page book, and at the end it says, and so vote for X, the government could ban that?

MR. STEWART: ... Yes, our position would be that the corporation could be required to use PAC funds rather than general treasury funds.

CHIEF JUSTICE ROBERTS: And if they didn't, you could ban it?

MR. STEWART: If they didn't, we could prohibit the publication of the book.

Of course, every book you have ever purchased from a book store or on Amazon, every documentary movie you have ever seen in a theater, rented or purchased on a DVD, or watched on a video service such as Netflix, had a corporation using "general treasury funds" in the production or distribution of the product. A rule that bans this speech must be inconsistent with the First Amendment. As Justice Anthony Kennedy put it for the majority: "political speech must prevail against laws that would suppress it."<sup>6</sup>

Amazingly, four justices of the Supreme Court would have held that the government could indeed ban a book or movie if any portion of its production or distribution were financed by a corporation – again, as with every book you have ever purchased in a bookstore or on Amazon, and every movie you have ever seen in a theater or on a cable, broadcast, or streaming service. What was radical in *Citizens United* was not the majority view, but the view of the dissenters, who would have upheld the government's position on the censorship of books and movies, not to mention pamphlets, advertisements, and other forms of communication.

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<sup>6</sup> *Citizens United v. Fed. Election Comm'n*, 558 U.S. 310 (2010).

Thanks to the *Citizens United* ruling, companies like Netflix and Amazon don't have to worry about streaming political documentaries during election season, small publishing houses don't have to hire a campaign finance attorney before publishing political books, and the government is one step further removed from policing political speech. This is the most obvious benefit of *Citizens United*.

## II. The “Dark Money” Issue

I next want to address the question of “dark money” post-*Citizens United*.

“Dark money” is a term with no legal meaning and little fixed meaning in ordinary discourse. However, to the extent it has meaning, it has historically meant independent expenditures made by organizations that do not, in turn, disclose the identities of all of their donors.<sup>7</sup> Although it is sometimes claimed that we don't know how much “dark money” is spent, in fact we do, because the spending must be reported even when the identities of donors to organizations doing the spending is not.

The reality is that “dark money” is not “swamping” the system. Since *Citizens United v. Federal Election Commission* set off the current alarm about “dark money” in 2010, such spending has never reached even six percent of total political spending in an election cycle. In 2018, according to the numbers at the pro-regulation Center for Responsive Politics (CRP), it was between 2.2 percent and 5.2 percent, depending on how calculated.<sup>8</sup> Moreover, many of those “dark money” spenders are hardly unknown to voters. For example, according to CRP, the largest “dark money” groups in 2018 included the U.S. Chamber of Commerce, the Environmental Defense Action Fund, Everytown for Gun Safety Action Fund, the National Association of Realtors, Planned Parenthood Action Fund, the Republican Jewish Coalition, the ACLU, and NARAL Pro-Choice America. It's highly doubtful that voters don't know what these organizations stand for without knowing the names of all their individual members.

There are, of course, costs to attempting to expose the members and donors to these organizations. The Supreme Court has long recognized that that excessive, mandated disclosure can intrude on the First Amendment rights of association, exposing donors to official and unofficial harassment and other violations of privacy.<sup>9</sup> Furthermore, efforts to target the “real donor” lead to the added problem of “junk disclosure.” For example, a person may give to an organization because she supports its general principles and mission, but not be in favor of a particular ad the organization runs supporting or opposing a particular candidate. Yet the individual would be

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<sup>7</sup> Occasionally, efforts are made to sweep up as “dark money” funds spent by nonprofit organizations and others to promote discussion of public affairs separate from candidate elections. It should be understood that such spending has long existed and never been regulated by campaign finance laws. Efforts to regulate based on any such definition would be a dramatic expansion of federal regulatory authority and would likely be unconstitutional under Supreme Court precedent. See *Buckley v. Valeo*, 424 U.S. 1 (1976); *Federal Election Commission v. Wisconsin Right to Life*, 551 U.S. 449 (2007).

<sup>8</sup> Approximately \$5.7 billion was spent on the 2018 midterms. The Center for Responsive Politics estimates that \$126 million was spent by “dark money” groups directly and another \$176 million given to Super PACs, which disclose their donors, and may or may not have spent all of their funds.

<sup>9</sup> See *NAACP v. Alabama*, 357 U.S. 449 (1958) (“It is hardly a novel perception that compelled disclosure of affiliation with groups engaged in advocacy may constitute [an] effective [] restraint on freedom of association... This Court has recognized the vital relationship between freedom to associate and privacy in one's associations.”).

disclosed as having helped fund that ad. This would be at best misleading to voters, not informative, and unfair to the donor.

The problem grows as legislation becomes more intrusive in seeking out the “true donor.” For example, a member may pay year-end dues to a local trade association in December of 2020, which in turn pays dues to a larger industry association in 2021, which in turn contributes to a super PAC which makes expenditures in October of 2022. Those who claim that we must disclose the “true spender” would have to go back nearly two years, to a member that gave to a group which is itself two stages removed from the expenditure decisions. This is more likely to be confusing than enlightening to voters.

Efforts to dictate disclosure of these donors create constitutional problems as well. In *Buckley v. Valeo*, the Supreme Court held that disclosure of donors to such organizations was constitutionally limited to situations where the donors either “make contributions earmarked for political purposes or authorized or requested by a candidate or his agent,” or “when [the donors] make expenditures for communications that expressly advocate the election or defeat of a clearly identified candidate.”<sup>10</sup> The question is whether that first clause allows for publication of all donors to such organizations, or only to those who contributed specifically for such expenditures – i.e., who “earmarked” their contributions for political purposes. Taking the term “earmarked” seriously and concerned about the First Amendment and policy impacts of overly-broad disclosure, the FEC has, literally for decades, subscribed to the latter approach. Nevertheless, in 2018, for the first time, a federal district court ruled that the FEC should take the former, broader approach, requiring the junk disclosure of general donors to and members of the organization who may not have intended or known about such expenditures. That case is still being litigated.<sup>11</sup> No federal appellate court has made such a ruling.

In short, “dark money” is not a crisis swamping the system, but a small percentage of total political spending, primarily by well-known public interest organizations and associations. If one defines it as including spending on “electioneering communications – one common definition – it has always existed in the system. However one defines it, since 2010, it has not grown as a percentage of total political spending and continues to hover in the two-to-four percent range. As with almost any “zero tolerance” policy, the alleged benefits from attempting to squeeze out the last bit of juice can be and often are overtaken by the costs incurred.

### III. The Foreign Money Issue

Complaints have also been voiced, most famously by President Obama, that *Citizens United* would allow foreign interests to influence elections. This, too, has proven unfounded.

First, since *Citizens United*, the Supreme Court has summarily and unanimously affirmed a lower court ruling upholding the ban on foreign contributions and spending in U.S. elections.<sup>12</sup> It is illegal for foreign citizens who are not permanent residents, including, of course, foreign corporations, to spend or contribute in U.S. elections. Further, any U.S. corporation that wishes to

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<sup>10</sup> 424 U.S. at 80.

<sup>11</sup> *Citizens for Responsibility and Ethics in Washington v. Federal Election Commission*, 316 F. Supp. 3d 349 (D.D.C. 2018).

<sup>12</sup> *Bluman v. Federal Election Commission*, 565 U.S. 1104 (2012).

spend funds on campaign activity must follow existing FEC rules requiring that (1) U.S. nationals make those decisions instead of foreign nationals, and (2) that any funds must come from the corporation's domestic activities (and, again, not from foreign sources).<sup>13</sup> In other words, a foreign government or corporation cannot simply capitalize a U.S. corporation and have it start spending in political races. Similarly, nonprofit corporations may legally accept foreign contributions, but may not use those donations to influence elections, and must be able to demonstrate that any activities are funded by U.S. citizens and permanent residents. Corporate PACs, which are already funded solely by U.S. donors, must have only U.S. citizens in decision-making positions.<sup>14</sup>

Second, we know that so-called “dark money” constitutes a small percentage—typically about 3.5%—of total spending. Thus, unless people are breaking the law on their reporting of contributions and spending—something unrelated in any way to *Citizens United*—that is the outermost limit of foreign spending that could in any way be attributed to *Citizens United*. But in fact we know that the percentage is far, far less, unless we are prepared to argue that leading “dark money” groups such as Planned Parenthood Action Fund and NARAL Pro-Choice America are merely front groups funded entirely by foreign interests. Of course, there are always those willing to break the law,<sup>15</sup> and foreign governments have long sought to influence U.S. politics.<sup>16</sup> But even at the height of the Cold War, Americans refused to sacrifice our First Amendment rights, and in any event, these are not problems related to the *Citizens United* case.

That emphasizes my third point on this topic. Foreign meddling in 2016 was unrelated to the decision in *Citizens United*. Foreign nationals, and all corporations and labor unions, whether or not they have foreign shareholders or members, are still prohibited from contributing to campaigns. To the extent there was any foreign influence in 2016, it wasn't because corporations or unions were using their rights under *Citizens United*. Meanwhile, foreign authors publish widely in the U.S.; foreign publications are widely available in print and on the internet;<sup>17</sup> foreign citizens without U.S. permanent residency have owned major shares in U.S. publications, such as billionaire Carlos Slim, long the largest shareholder in *The New York Times*. Foreign corporations may lobby U.S. officials and members of this body. Campaign finance laws are ill-suited to counter Russian government interference in elections. Most of the proposals floated as responses to *Citizens United* will burden American citizens far more than Russian state actors. We made it through the Cold War without sacrificing the First Amendment. We should not let the rump state of the Soviet Union scare us into passing laws that unduly burden the rights of Americans with no real gain in combatting foreign influence.

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<sup>13</sup> See e.g. AO 2006-15 (TransCanada); MUR 7081 (Floridians for a Strong Middle Class).

<sup>14</sup> *Id.*

<sup>15</sup> See e.g. Byron Tau, “Major Donor to Trump, Clinton to Plead Guilty in Campaign-Finance Case,” *The Wall Street Journal*. Retrieved on February 4, 2020. Available at: <https://www.wsj.com/articles/major-donor-to-trump-clinton-to-plead-guilty-in-campaign-finance-case-11571787747> (October 22, 2019); Terry Frieden, “Former Democratic fund-raiser John Huang pleads guilty,” CNN. Retrieved on February 4, 2020. Available at: <http://www.cnn.com/ALLPOLITICS/stories/1999/08/12/huang.sentence/> (August 12, 1999); “Charlie Trie Pleads Guilty to Federal Campaign Finance Violations,” U.S. Department of Justice. Retrieved on February 4, 2020. Available at: <https://www.justice.gov/archive/opa/pr/1999/May/201crm.htm> (May 21, 1999).

<sup>16</sup> See Seth G. Jones, “Russian Meddling in the United States: The Historical Context of the Mueller Report,” Center for Strategic and International Studies. Retrieved on February 4, 2020. Available at: <https://www.csis.org/analysis/russian-meddling-united-states-historical-context-mueller-report> (March 27, 2019).

<sup>17</sup> For example, the Russian government subsidizes a U.S. cable news network, RT. See “About RT,” RT. Retrieved on February 4, 2020. Available at: <https://www.rt.com/about-us/>. (“RT is an autonomous, non-profit organization that is publicly financed from the budget of the Russian Federation.”).

#### IV. Six Reflections on *Citizens United* at Ten: More Speech, Better Democracy

In light of the extreme rhetoric and misinformation surrounding *Citizens United* – about both the decision and its effects – it’s worthwhile to take a fact-based approach to examining what has happened since it was decided ten years ago. The following remarks highlight six lessons about the decision and its beneficial impacts on democracy. These takeaways are adapted from a report by my organization, the Institute for Free Speech, “*Citizens United* After 10 Years: More Speech, Better Democracy.”<sup>18</sup>

##### 1. *Since Citizens United, Politics Is More Diverse and Political Change Is Rapid.*

One common prediction about *Citizens United* was that it would fundamentally distort our elections in favor of wealthy interests. *The New York Times*, for example, wrote after decision, “With a single, disastrous 5-to-4 ruling, the Supreme Court has thrust politics back to the robber-baron era of the 19th century... If a member of Congress tries to stand up to a wealthy special interest, its lobbyists can credibly threaten: We’ll spend whatever it takes to defeat you.”<sup>19</sup>

But far from an era dominated by the wealthy, in the five election cycles since the decision, America has seen some of the most vibrant, diverse, and rapid political change in a generation. We have seen the re-election of the first black President, Barack Obama, a Democrat, over business favorite Mitt Romney. This was followed by a celebrity outsider Republican in Donald Trump emerging victorious over noted Washington establishment figure, Hillary Clinton.

The House of Representatives has seen similar rapid change with both Republicans and Democrats taking the House in populist waves. This is perhaps best exemplified by major establishment power brokers such as Eric Cantor and Joe Crowley being bested by political neophytes and outsiders David Brat and Alexandria Ocasio-Cortez, respectively.

It is impossible to ascribe any one electoral outcome solely to *Citizens United*, but the prevalence of new voices in the political arena since the decision is undeniable. At the very least, it seems highly unlikely that if powerful moneyed interests were putting their finger on the scale of elections to a greater degree post-*Citizens United*, these are the outcomes they would have sought.

##### 2. *Incumbents and Challengers Have Both Benefited From Super PAC Support – but the Support Helps Challengers More.*

Supporters of *Citizens United*, far from believing the decision hindered democratic ideals, regarded it as a boon to democracy by allowing political outsiders to more easily challenge incumbents and the status quo. As famed First Amendment attorney Floyd Abrams put it, “We want, for example, more Gene McCarthys and Ross Perots and individuals to come upon the scene

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<sup>18</sup> See Scott Blackburn, “*Citizens United* After 10 Years: More Speech, Better Democracy,” Institute for Free Speech. Retrieved on January 31, 2020. Available at: [https://www.ifs.org/wp-content/uploads/2020/01/2020-01-16\\_Issue-Brief\\_Blackburn\\_Citizens-United-After-10-Years-More-Speech-Better-Democracy.pdf](https://www.ifs.org/wp-content/uploads/2020/01/2020-01-16_Issue-Brief_Blackburn_Citizens-United-After-10-Years-More-Speech-Better-Democracy.pdf) (January 16, 2020).

<sup>19</sup> Editorial, “The Court’s Blow to Democracy,” *The New York Times*. Retrieved on January 14, 2020. Available at: <https://www.nytimes.com/2010/01/22/opinion/22fri1.html> (January 21, 2010).



and have a chance to build a war chest and go on out and try to reform the country as they think best.”<sup>20</sup> The elections since the decision have certainly seen a significant amount of new blood in Washington, many of whom benefited from super PAC spending that was not tied to the traditional levers of party power. But incumbent politicians and insiders also quickly learned to take advantage of this new tool of campaigning.

The best example of this is perhaps Right to Rise, the super PAC organized by supporters of Jeb Bush heading into the 2016 Republican primary. That group spent over \$120 million peppering primary states with pro-Bush ads. But while Right to Rise bought a lot of ads, it failed to convince a lot of voters. Super PACs supporting newcomers have had better success, as groups like Independent USA PAC<sup>21</sup> and Women Vote!<sup>22</sup> were able to give key support to previously unknown candidates.

All told, the five election cycles since *Citizens United* saw an average of 79 freshmen members of Congress. The five cycles prior to the decision saw just 55.<sup>23</sup>

Congress	Total Freshmen
107th Congress (2001–2003)	49
108th Congress (2003–2005)	56
109th Congress (2005–2007)	42
110th Congress (2007–2009)	64
111th Congress (2009–2011)	65
<i>Citizens United</i>	
112th Congress (2011–2013)	99
113th Congress (2013–2015)	82
114th Congress (2015–2017)	62
115th Congress (2017–2019)	65
116th Congress (2019–2021)	89

Again, we cannot say that this is clearly due to *Citizens United*, but we can say that the claims that *Citizens United* would lock in an oligarchy have been wrong.

### 3. For-Profit Corporations Are Not Big Spenders in Campaigns.

In the immediate wake of *Citizens United*, the main prediction from those opposed to the decision concerned corporate spending in elections. As one commentator put it, “today’s decision

<sup>20</sup> James Taranto, “The Media and Corporate Free Speech,” *The Wall Street Journal*. Retrieved on January 13, 2020. Available at: <http://www.jamestaranto.com/abrams.htm> (January 30, 2010).

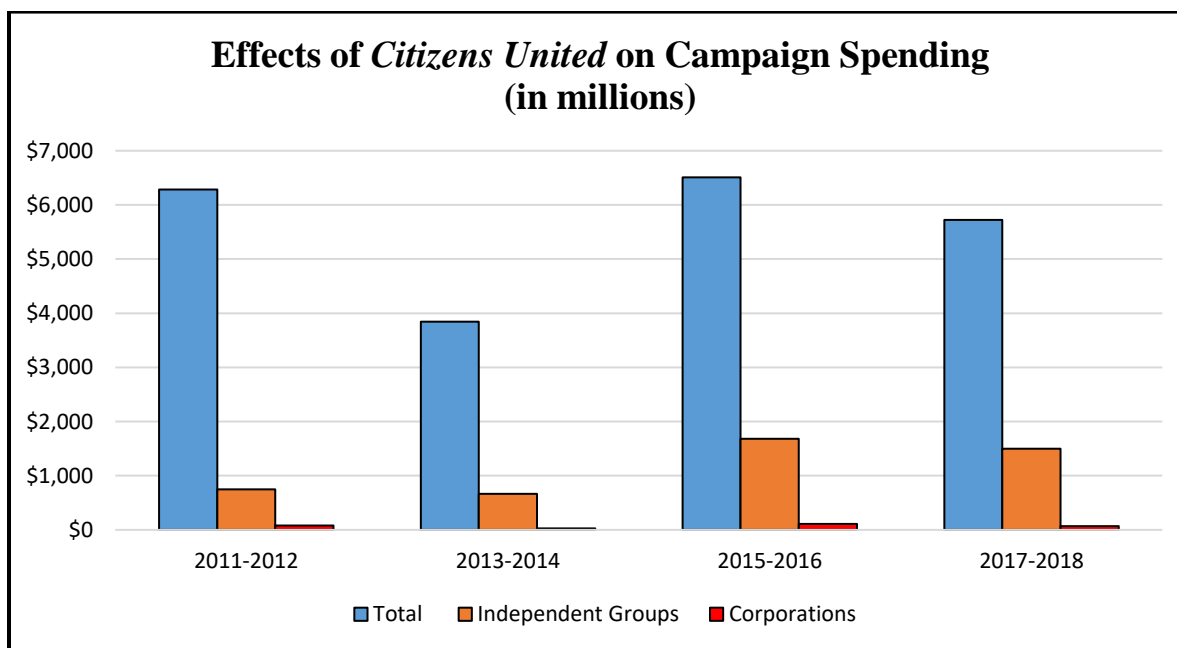
<sup>21</sup> See “Independence USA PAC,” Center for Responsive Politics. Retrieved on January 13, 2020. Available at: <https://www.opensecrets.org/pacs/indexpend.php?strID=C00532705&cycle=2018> (June 20, 2019).

<sup>22</sup> See “Women Vote!,” Center for Responsive Politics. Retrieved on January 13, 2020. Available at: <https://www.opensecrets.org/pacs/indexpend.php?strID=C00473918&cycle=2018> (June 20, 2019).

<sup>23</sup> “First-Term Members of the House of Representatives,” U.S. House of Representatives. Retrieved on January 13, 2020. Available at: <https://history.house.gov/Institution/First-Term/First-Term-Numbers/>. For data on the 116<sup>th</sup> Congress, see “Membership of the 116<sup>th</sup> Congress: A Profile,” Congressional Research Service. Retrieved on January 13, 2020. Available at: <https://fas.org/sgp/crs/misc/R45583.pdf> (January 14, 2020).

does far more than simply provide Fortune 500 companies with a massive megaphone to blast their political views to the masses; it also empowers them to drown out any voices that disagree with them.”<sup>24</sup> Simply put, this fear has not materialized.

Corporate political spending continues to be dwarfed by spending from other traditional sources. In the four cycles since the decision,<sup>25</sup> for-profit corporate political spending has averaged around 1% of spending from all sources. The following chart shows total campaign contributions<sup>26</sup> (to any entity – candidates, political parties, standard PACs, super PACs, and other groups) (*in blue*), total contributions to independent groups from any source (including individuals, PACs, corporations, and unions) (*in orange*), and for-profit corporate contributions to independent groups (predominantly super PACs) (*in red*).<sup>27</sup>



Even the roughly 1% of corporate contributions to super PACs each cycle likely overstates the situation, at least in the common understanding of Fortune 500 companies. As the Sunlight Foundation reported in 2014, “As far as we can tell, one thing the [200 largest corporations] did not do, for the most part, was take advantage of the new opportunities to spend on politics that the *Citizens United* decision afforded them. The 200 corporate donors gave just \$3 million to super PACs, with the bulk of that amount a single \$2.5 million donation from Chevron” to one particular

<sup>24</sup> Ian Millhiser, “Citizens United Decision: ‘A Rejection Of The Common Sense Of The American People’,” *ThinkProgress*. Retrieved on January 13, 2020. Available at: <https://thinkprogress.org/citizens-united-decision-a-rejection-of-the-common-sense-of-the-american-people-d7b83c583b1b/> (January 21, 2010).

<sup>25</sup> This excludes the 2010 election cycle, which occurred both before and after *Citizens United*. Comparable data on corporate contributions for that cycle was not readily available.

<sup>26</sup> “Cost of Election,” Center for Responsive Politics. Retrieved on January 13, 2020. Available at: <https://www.opensecrets.org/overview/cost.php?display=T&infl=N>.

<sup>27</sup> Karl Evers-Hillstrom, “In hyperpartisan political environment, major corporations stay away from controversial super PACs,” Center for Responsive Politics. Retrieved on January 13, 2020. Available at: <https://www.opensecrets.org/news/2019/04/major-corporations-stay-away-from-controversial-pacs20/> (April 12, 2019).

super PAC.<sup>28</sup> In 2018, *The Washington Post* looked at the top 50 donors for that election cycle and found similar results: just four were nonpersons, and they gave just 3% of the total donations from that group.<sup>29</sup> Of those four corporate donors, two were nontraditional. One was a group that advocates on behalf of hospitals, and one was the company of longtime political activist Ross Perot.

No matter how you slice it, *Citizens United* has not led to a flood of corporate money in our elections. It is good that corporations are not “drowning out” other voices. But it is also good that the public is able to hear their voices.

#### **4. Money Still Can't “Buy” an Election.**

Despite a near constant drumbeat from some politicians and activist groups, in the post-*Citizens United* era, money still cannot buy elections. In fact, this point is conventional wisdom among most experts. As University of Missouri professor Jeff Milyo wrote:

[T]here is something of a scholarly consensus . . . stand[ing] in stark contrast to the popular wisdom so often echoed by pundits, politicians and reform advocates that elections are essentially for sale to the highest bidder (spender). Decades of social science research consistently reveal a far more limited role for campaign spending.<sup>30</sup>

Since 2010, this truism has been demonstrated again and again, from the notable failure of deep-pocketed Jeb Bush<sup>31</sup> to the meteoric rise of the heavily outspent Alexandria Ocasio-Cortez.<sup>32</sup> It is true, both before and after *Citizens United*, that the candidate who spends more money usually wins, but while spending certainly helps campaigns, it cannot buy victory by itself. Rather, candidates who attract more voters typically also attract more donors. The inability of spending to “buy” votes on Election Day is easiest to see in the almost cliché trend of rich individuals self-funding lavish campaigns and underperforming when actual votes are counted, sometimes spectacularly so.<sup>33</sup> As Richard Lau, Professor of Political Science at Rutgers, put it, “I think where you have to change your thinking is that money causes winning. I think it’s more that winning

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<sup>28</sup> Bill Allison and Sarah Harkins, “Fixed Fortunes: Biggest corporate political interests spend billions, get trillions,” Sunlight Foundation. Retrieved on January 13, 2020. Available at: <https://sunlightfoundation.com/2014/11/17/fixed-fortunes-biggest-corporate-political-interests-spend-billions-get-trillions/> (November 17, 2014).

<sup>29</sup> Anu Narayanswamy, Chris Alcantara, and Michelle Ye Hee Lee, “Meet the wealthy donors pouring millions into the 2018 elections,” *The Washington Post*. Retrieved on January 14, 2020. Available at: <https://www.washingtonpost.com/graphics/2018/politics/superpac-donors-2018/> (October 26, 2018).

<sup>30</sup> Jeff Milyo, “Campaign Spending and Electoral Competition: Towards More Policy Relevant Research,” *The Forum: A Journal of Applied Research in Contemporary Politics*. Vol. 11, No. 3 (October 2013), 437-454. Jeff Milyo is an Academic Advisor to the Institute for Free Speech. Milyo’s research was completed independently.

<sup>31</sup> Zachary Mider, “The Failure of Money to Buy the Presidential Nomination, in One Chart,” *Bloomberg*. Retrieved on January 13, 2020. Available at: <https://www.bloomberg.com/news/articles/2016-02-17/the-failure-of-money-to-buy-the-presidential-nomination-in-one-chart> (February 17, 2016).

<sup>32</sup> Conor Lynch, “Alexandria Ocasio-Cortez proves that money doesn’t win elections: Are Democrats listening?,” *Salon*. Retrieved on January 13, 2020. Available at: <https://www.salon.com/2018/07/06/alexandria-ocasio-cortez-proves-that-money-doesnt-win-elections-are-democrats-listening/> (July 6, 2018).

<sup>33</sup> See Joe Albanese, “Failure of Campaign Self-Funders Highlights Once Again that Money Doesn’t Buy Elections,” Institute for Free Speech. Retrieved on January 13, 2020. Available at: <https://www.ifs.org/blog/failure-of-campaign-self-funders-highlights-once-again-that-money-doesnt-buy-elections/> (March 20, 2017).

attracts money.”<sup>34</sup> Money helps candidates be heard, and it appears that more viewpoints and candidates are being heard after *Citizens United*.

### 5. *The Substantial Majority of Campaign Spending Still Comes From Limited Contributions by Individuals to Candidates and Traditional PACs.*

The emergence of super PACs<sup>35</sup> – political groups that exclusively make independent expenditures and therefore can accept contributions of any size – has been the largest and most significant innovation of the *Citizens United* decision. (Though technically it was a different case – *SpeechNow.org v. FEC* – that permitted the creation of super PACs, that unanimous decision followed the reasoning of *Citizens United*.<sup>36</sup>) And it is true that super PAC spending has been increasing, as more and more groups see the advantages of independent speech.

Nevertheless, the overall impact of super PACs has been overstated. At the time of the decision, its detractors argued that, “[those] players with the deepest pockets will be able to pay premium prices for as many ads as they want, easily dominating the airwaves.”<sup>37</sup> But significantly more political spending is funded by donors that must abide by strict contribution limits, namely those who give to candidates and political parties. Contributions to super PACs have ranged from 12% to 26% of total political contributions over the four cycles since *Citizens United*. Candidates and political parties continue to outspend super PACs by at least three-to-one.

<i>Total Election Spending vs. Spending from Independent Groups</i>			
	<b>Total Spending</b>	<b>Independent Spending</b>	<b>Percent of Total</b>
<i>2011-2012</i>	\$6,286	\$746	11.9%
<i>2013-2014</i>	\$3,845	\$667	17.3%
<i>2015-2016</i>	\$6,511	\$1,680	25.8%
<i>2017-2018</i>	\$5,725	\$1,496	26.1%

It’s also worth remembering that federal law automatically gives candidates the lowest cost rates for a political ad on TV or radio,<sup>38</sup> meaning a dollar of super PAC spending buys less air time than the same dollar of candidate spending.

<sup>34</sup> Maggie Koerth, “How Money Affects Elections,” FiveThirtyEight. Retrieved on January 13, 2020. Available at: <https://fivethirtyeight.com/features/money-and-elections-a-complicated-love-story/> (September 10, 2018).

<sup>35</sup> See Luke Wachob, “Super PACs: Expanding Freedom of Speech,” Institute for Free Speech. Retrieved on January 13, 2020. Available at: [https://www.ifs.org/wp-content/uploads/2017/10/2017-10-30\\_Issue-Brief\\_Wachob\\_Super-PACs-Expanding-Freedom-Of-Speech.pdf](https://www.ifs.org/wp-content/uploads/2017/10/2017-10-30_Issue-Brief_Wachob_Super-PACs-Expanding-Freedom-Of-Speech.pdf) (October 30, 2017).

<sup>36</sup> See Luke Wachob, “*SpeechNow.org v. Federal Election Commission: Protecting the First Amendment Rights of Americans*,” Institute for Free Speech. Retrieved on January 13, 2020. Available at: [https://www.ifs.org/wp-content/uploads/2018/03/2018-03-26\\_Issue-Brief\\_Wachob\\_SpeechNow.org-v-FEC-Protecting-The-First-Amendment-Rights-of-Americans.pdf](https://www.ifs.org/wp-content/uploads/2018/03/2018-03-26_Issue-Brief_Wachob_SpeechNow.org-v-FEC-Protecting-The-First-Amendment-Rights-of-Americans.pdf) (March 26, 2018). The Institute for Free Speech represented the plaintiffs in *SpeechNow*.

<sup>37</sup> Ron Gettelfinger and Larry Cohen, “Why the Citizens United decision undermines democracy,” *The Hill*. Retrieved on January 13, 2020. Available at: <https://thehill.com/opinion/op-ed/79373-why-the-citizens-united-decision-undermines-democracy> (February 2, 2010).

<sup>38</sup> David Oxenford, “Political Broadcasting Reminder Part 1 – The Basics of Lowest Unit Charges,” Broadcast Law Blog. Retrieved on January 13, 2020. Available at: <https://www.broadcastlawblog.com/2012/09/articles/political-broadcasting-reminder-part-1-the-basics-of-lowest-unit-charges/> (September 10, 2012).

## ***6. There is More Speech About Candidates Now Than Before.***

By legalizing corporate and union independent expenditures and paving the way for super PACs, *Citizens United* opened up new and useful avenues for speech. Americans are speaking more now than before.

This is true in monetary terms – campaign spending is up, as candidates and independent groups attempt to persuade voters through the airwaves and over the internet. It is also true in human terms. The Supreme Court’s ruling has allowed Americans to innovate new ways of organizing and speaking to promote their shared ideas. Challengers and newcomers, in particular, have found unexpected and sometimes highly persuasive ways to speak, providing them the opportunity to catch-up and compete both with incumbent politicians and established political powerbrokers. And research shows that all of this speech, from mailers to TV ads, make voters more informed and more engaged.<sup>39</sup>

### **Conclusion**

While *Citizens United* hasn’t resulted in a flood of corporate cash “drowning out” ordinary voices, it has allowed new, often very important, voices to be heard. The decision not only protects the right to speak, but it protects the right of Americans to hear those voices. Citizens, rather than the government, decide what arguments are worthwhile. For these reasons, *Citizens United* is one of the most important decisions of the century for protecting, fostering, and benefiting American democracy.

As a former member and Chair of the Federal Election Commission who has devoted my academic life to questions of campaign finance and my professional life to protecting Americans’ political speech freedoms, I am happy to answer any questions you may have about these remarks.

Thank you.

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<sup>39</sup> See Paul Freedman, Michael Franz, and Kenneth Goldstein, “Campaign Advertising and Democratic Citizenship,” *American Journal of Political Science*. Vol. 48, No. 4 (October 2004), 723–741.