



**Common Cause Testimony to the  
Subcommittee on The Constitution, Civil Rights and Human Rights of the  
United States Senate Committee on the Judiciary Hearing**

***Taking Back Our Democracy: Responding to Citizens United and the Rise of Super PACs***

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Common Cause is a national nonpartisan advocacy organization founded in 1970 by John Gardner as a vehicle for ordinary citizens to make their voices heard in the political process. On behalf of our 400,000 members and supporters, we appreciate the opportunity to submit this testimony to this Subcommittee about the proliferation of Super PACs and the call for an Amendment to the Constitution to restore the voices of average, ordinary Americans in our elections once and for all.

Mr. Chairman, Super PACs have transformed our elections into the sport of kings. Billionaires and corporations are pooling unlimited sums of money into joint accounts, pledging astronomical sums in support of or opposition to candidates, and recklessly drowning out the voices of the American people. These corporations and mega donors are motivated by an expectation of influence and access, often at the expense of the public interest. We cannot afford to auction off our vibrant democracy to the highest bidder.

***The Problem of Super PACs***

Independent expenditure-only political committees, so-called Super PACs, are the byproduct of two federal court decisions. In the first case, *Citizens United v. FEC*, the United States Supreme Court ruled by fiat that corporations enjoy a constitutional right to spend an unlimited amount of their general treasury funds influencing our elections.<sup>1</sup> Overturning a century of law with the stroke of a pen, the five-Justice majority reasoned – without citing a shred of evidence – that “independent expenditures, including those made by corporations, do not give rise to corruption or the appearance of corruption.”<sup>2</sup> Months later, a federal appeals court explicitly relied on *Citizens United* to hold that “contributions to groups that make only independent expenditures also cannot corrupt or create the appearance of corruption. The [Supreme] Court has effectively held that there is no corrupting ‘quid’ for which a candidate might exchange for a corrupt ‘quo.’”<sup>3</sup>

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<sup>1</sup> 130 S. Ct. 876 (2010).

<sup>2</sup> *Id.* at 909.

<sup>3</sup> *SpeechNow.org v. FEC*, 599 F.3d 686, 694-95 (D.C. Cir. 2010).

These decisions turn common sense on its head. To rule that a corporation's spending on elections (the "quid") is not intended for an exchange of favorable policy, access and influence (the "quo") belies reality.

The breathtaking indifference of the Supreme Court to well-settled precedent (and facts) shook democracy to its core, and unleashed a torrent of secret money over our subsequent federal elections. Super PACs quickly opened for business, soliciting tens of millions of dollars, including money funneled through sham corporate front groups that exist for no other reason than to hide the identity of political spenders from the electorate.

### **The Money**

2010 marked the first election year of Super PAC dominance in our elections. That year, 84 Super PACs collected over \$84.9 million, spending \$65.3 million of that amount on political expenditures.<sup>4</sup> Outside spenders, excluding party committees, dumped over \$299 million in independent expenditures, electioneering communications and other communication costs.<sup>5</sup> Other non-disclosing groups, such as tax-exempt nonprofit organizations, spent over \$132 million influencing our elections.<sup>6</sup> Disturbingly, 44% of outside spending in 2010 came from sources that failed to disclose their donors, compared to 25.2% in 2008, and just 1.3% in 2006.<sup>7</sup>

2012 will be the most moneyed election in our history. As of this writing, the number of Super PACs has risen exponentially to 678, and they have already spent \$144 million of the \$281 million that they have raised thus far.<sup>8</sup> By comparison, at this point in 2008 with over three months to go before Election Day, outside groups had spent a little over \$36 million on independent political expenditures, even then a significant sum but paling in comparison to what's been spent already this year.<sup>9</sup> Some Republican-aligned groups led by Karl Rove, the Koch brothers and the United States Chamber of Commerce are planning to spend approximately \$1 billion on federal elections this cycle.<sup>10</sup>

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<sup>4</sup> *Super PACs*, CENTER FOR RESPONSIVE POLITICS, <http://www.opensecrets.org/pacs/superpacs.php?cycle=2010/> (last updated July 8, 2012).

<sup>5</sup> *Total Outside Spending by Election Cycle*, CENTER FOR RESPONSIVE POLITICS, [http://www.opensecrets.org/outsidespending/cycle\\_tots.php?cycle=2012&view=A&chart=N#viewpt](http://www.opensecrets.org/outsidespending/cycle_tots.php?cycle=2012&view=A&chart=N#viewpt) (last visited July 17, 2012).

<sup>6</sup> *Spending by Viewpoint for Non-Disclosing Groups*, CENTER FOR RESPONSIVE POLITICS, <http://www.opensecrets.org/outsidespending/summ.php?cycle=2010&chrt=V&disp=O&type=U> (last visited July 16, 2012).

<sup>7</sup> *Outside Spending by Disclosure, Excluding Party Committees*, CENTER FOR RESPONSIVE POLITICS, <http://www.opensecrets.org/outsidespending/disclosure.php> (last visited July 17, 2012).

<sup>8</sup> *Super PACs*, CENTER FOR RESPONSIVE POLITICS <http://www.opensecrets.org/pacs/superpacs.php?cycle=2012> (last visited July 17, 2012).

<sup>9</sup> *Total Outside Spending by Election Cycle, Excluding Party Committees*, CENTER FOR RESPONSIVE POLITICS, [http://www.opensecrets.org/outsidespending/cycle\\_tots.php?cycle=2012&view=Y&chart=N#viewpt](http://www.opensecrets.org/outsidespending/cycle_tots.php?cycle=2012&view=Y&chart=N#viewpt) (last visited July 17, 2012).

<sup>10</sup> Mike Allen & Jim Vandehi, *GOP Groups Plan Record \$1 Billion Blitz*, POLITICO, May 30, 2012, <http://www.politico.com/news/stories/0512/76849.html>.

While a significant percentage of funds donated to Super PACs are directly paid out of for-profit corporate coffers, an even larger percentage is coming from wealthy individual donors - with 93% of Super PAC's itemized contributions from individuals in contributions starting at \$10,000.<sup>11</sup> To be clear – the very few are determining which candidates are viable and which candidates will fail.

Although corporations shy away from negative publicity, that does not stop them from spending significant sums of money on our political campaigns. In 2010, the year *Citizens United* was decided, Target Corp. donated \$150,000 to a political group, Minnesota Forward, that advocated for the election of a candidate opposed to the rights of gays and lesbians to marry.<sup>12</sup> Demonstrations quickly followed, showing that Target's shareholders and customers could, as *Citizens United* explained, "hold corporations and elected officials accountable for their positions."<sup>13</sup> Corporations have plenty of other options to participate in elections, however. The *New York Times* reports, for example, that American Electric Power, Prudential Financial, and Dow Chemical have each given at least \$1 million each to (c)(4) organizations and other nonprofit groups spending money on political campaigns.<sup>14</sup> Insurance giant Aetna gave a Republican-leaning nonprofit known for attacking supporters of the Affordable Care Act over \$3 million last year.<sup>15</sup> Whether spent secretly or publicly, however, the damage to representative democracy is done. Corporate spending distorts the political process by using funds generated for economic purposes on public policies that its own shareholders and customers oppose.

### **The Secrecy**

While we know hundreds of millions of dollars are dominating the airwaves, there is no streamlined process to analyze precisely where all of the funds are coming from, other than that they are from corporate entities and wealthy individuals.

More than two years after *Citizens United*, because Congress and the Federal Election Commission have failed to enact an adequate system of disclosure,<sup>16</sup> Americans are still in the dark about who exactly is funding these shadow campaigns. That's because our current laws and regulations legalize money laundering. If corporations or wealthy individuals want to remain anonymous, they are free to give to shell organizations, which then give to Super PACs dedicated to the election or defeat of candidates. The Super PAC only discloses the name of the sham organization or 501(c)(4) that transferred money to the Super PAC, rather than the underlying donors. Satirical comedian Stephen Colbert has brilliantly educated his viewers

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<sup>11</sup> BLAIR BOWIE & ADAM LIOZ, AUCTIONING DEMOCRACY 1, Dēmos & U.S. PIRG (2012), <http://www.demos.org/publication/auctioning-democracy-rise-super-pacs-and-2012-election>.

<sup>12</sup> Brody Mullins & Ann Zimmerman, *Target Discovers Downside to Political Contributions*, WALL ST. J., Aug. 7, 2010, <http://online.wsj.com/article/SB10001424052748703988304575413650676561696.html>.

<sup>13</sup> 130 S. Ct. at 916.

<sup>14</sup> Mike McIntire & Nicholas Confessore, *Tax-Exempt Groups Shield Political Gifts of Businesses*, N.Y. TIMES, July 7, 2012, <http://www.nytimes.com/2012/07/08/us/politics/groups-shield-political-gifts-of-businesses.html>.

<sup>15</sup> *Id.*

<sup>16</sup> Importantly, the Supreme Court upheld the constitutionality of disclosure requirements by a vote of 8-1, reasoning that disclosure of expenditures allows shareholders to "determine whether their corporation's political speech advances the corporation's interest in making profits, and citizens can see whether elected officials are 'in the pocket' of so-called moneyed interests." *Citizens United*, 130 S. Ct. at 916.

about these mechanics with his own Super PAC, forming his Anonymous Shell Corporation (a 501(c)(4) “social welfare” organization) to accept money for political purposes that is then donated directly to his Super PAC.<sup>17</sup>

Of course, corporations and other wealthy individuals can now bypass the minimum disclosure requirements of Super PACs all together and simply give to 501(c)(4) organizations, which can then make political expenditures without any disclosure of donors whatsoever. Karl Rove’s American Crossroads GPS, a “social welfare” (c)(4) organization, is a prime example. Citing “sources” (because the organization is under no legal obligation to disclose any of its donors), news outlets credited the anonymity of c(4) organizations like Mr. Rove’s as the motivating factor for a billionaire casino mogul to give generously – in the multiple millions of dollars – to fund the organization’s political spending.<sup>18</sup>

### **The Relationships to Campaigns**

Even without disclosure, the notion that Super PACs are “independent” from political candidates, and therefore cannot lead to corruption or the appearance of corruption, is farcical. While federal law holds that “coordination” between candidates and Super PACs and other spenders is prohibited, its legal definition is cramped, narrow and fails to capture conduct that is by no means “independent.”<sup>19</sup>

The Federal Election Commission’s advisory opinion on this matter is illustrative. It authorizes officeholders and candidates to “attend, speak at, or be featured guests at fundraisers for” Super PACs “at which unlimited individual, corporate and labor organization contributions will be solicited.”<sup>20</sup> The behavior of the two presidential candidates demonstrates the absurdity of the “independence” of Super PACs. President Obama’s own campaign website touts that “the campaign has decided to do what we can, consistent with the law, to support Priorities USA [a pro-Obama Super PAC] in its effort to counter the weight of the GOP Super PAC.”<sup>21</sup> It continues that “White House and Cabinet officials will attend and speak at Priorities USA fundraising events” but “won’t be soliciting contributions for Priorities USA.”<sup>22</sup> Meanwhile, Karl Rove, the head of American Crossroads, spoke at a posh retreat for individuals that have hauled in six figure donations to Governor Mitt Romney’s campaign.<sup>23</sup> Rove also spoke at a luncheon “held just outside” the retreat hosted by Solamere Capital, a private equity firm

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<sup>17</sup> Interview by Terry Gross with Trevor Potter, *Fresh Air*, NAT’L PUBLIC RADIO (Feb. 23, 2012), <http://www.npr.org/2012/02/23/147294509/examining-the-superpac-with-colberts-trevor-potter>.

<sup>18</sup> Kenneth P. Vogel & Steve Friess, *Karl Rove Hits Big: The Birth of a Mega-Donor*, POLITICO, July 13, 2012, <http://www.politico.com/news/stories/0712/78466.html>.

<sup>19</sup> See 2 U.S.C. § 441a(a)(7)(B); 11 C.F.R. § 109.21

<sup>20</sup> FEC Advisory Opinion 2011-12, pg. 4, available at <http://saos.nictusa.com/saos/searchao?SUBMIT=ao&AO=3268>.

<sup>21</sup> Jim Messina, *We Will Not Play by Two Sets of Rules*, Obama for America, Feb. 6, 2012, <http://www.barackobama.com/news/entry/we-will-not-play-by-two-sets-of-rules>.

<sup>22</sup> *Id.*

<sup>23</sup> Philip Rucker, *Romney Plans Posh Weekend Donor Retreat Featuring Rove and VP Hopefuls*, WASH. POST, June 20, 2012, [http://www.washingtonpost.com/politics/romney-plans-posh-weekend-donor-retreat-featuring-rove-and-vp-hopefuls/2012/06/20/gJQApFYnqV\\_story.html](http://www.washingtonpost.com/politics/romney-plans-posh-weekend-donor-retreat-featuring-rove-and-vp-hopefuls/2012/06/20/gJQApFYnqV_story.html); Peter H. Stone, *Karl Rove Gave Secret Speech Outside Romney Donor Retreat*, HUFFINGTON POST, July 9, 2012, [http://www.huffingtonpost.com/2012/07/09/karl-rove-speech\\_n\\_1656013.html](http://www.huffingtonpost.com/2012/07/09/karl-rove-speech_n_1656013.html).

founded by Governor Romney's son.<sup>24</sup> It was reported that Mr. Rove "was pushing for Crossroads the whole time," "promot[ing] his Super PAC and an affiliated nonprofit, Crossroads GPS, to campaign donors during private meetings during the retreat."<sup>25</sup>

And yet, even with government officials authorized to appear at Super PAC fundraisers, and heads of Super PACs appearing at candidates' fundraising retreats, one is supposed to presume the official campaign and its shadow Super PAC are wholly independent, with zero risk of corruption or the appearance thereof.

Former Speaker of the House and presidential candidate Newt Gingrich summed up his failed campaign starkly. A journalist asked him if running for President is "a rich man's game."<sup>26</sup> Speaker Gingrich replied: "No. It's certainly a game which requires you to have access to a lot of money. We couldn't have matched Romney's Super PAC, but in the end, **he had I think sixteen billionaires and we had one, and it made it tough.**"<sup>27</sup>

### Advertising Scarcity

The corrupting influence of unlimited spending by wealthy individuals and corporations raises other questions of fairness and equality in the political process. Super PACs and other wealthy donors are muffling the voices of political participants by snapping up airtime at a premium. Participation is becoming more expensive, because airtime is a scarce commodity, particularly in swing states. The *National Journal* explained in a recent article that demand is already forcing airtime prices to "skyrocket."<sup>28</sup> The limited supply of remaining airtime will soon become a major issue as the political season heats up. With hundreds of Super PACs and other outside groups raising hundreds of millions of dollars, a television station sales manager in Pennsylvania said that 2012 "will be a record-setting year ... In the battleground states, running out of inventory is a possibility."<sup>29</sup>

Complicating the matter is the provision of federal law that requires stations to allow federal candidates "reasonable access" to the airwaves even if they need to pay market rate, which may rise exponentially at the height of election season.<sup>30</sup> State and local candidates have no such legal grounds to receive the same access as federal candidates. A campaign trade publication explained that these "[d]own ballot candidates and issue groups ... aren't protected by ... most-favored-advertiser status. They can be bumped to less favorable ad times, have their ads dropped for other content, or told that there isn't room for them on the airwaves."<sup>31</sup>

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<sup>24</sup> Stone, *supra* note 23.

<sup>25</sup> *Id.*

<sup>26</sup> Jonathan Karl et al., *Newt Gingrich's Advice for Mitt Romney: Sharpen Your Animal Instincts*, ABCNEWS/YAHOO! NEWS, June 19, 2012, [http://news.yahoo.com/blogs/power-players-abc-news/newt-gingrich-advice-mitt-romney-sharpen-animal-instincts-105728293.html?\\_esi=1](http://news.yahoo.com/blogs/power-players-abc-news/newt-gingrich-advice-mitt-romney-sharpen-animal-instincts-105728293.html?_esi=1).

<sup>27</sup> *Id.*

<sup>28</sup> Reid Wilson, *Buy Early and Often*, NAT'L J., May 23, 2012, <http://mobile.nationaljournal.com/columns/on-the-trail/buy-early-and-often-20120523>.

<sup>29</sup> Sean J. Miller, *Could We Run Out of Airtime?*, CAMPAIGNS & ELECTIONS, Mar. 21, 2012, <http://www.campaignsandelections.com/magazine/us-edition/314232/could-we-run-out-of-airtime.thtml>

<sup>30</sup> 47 USC § 312; 47 C.F.R. § 73.1944.

<sup>31</sup> Miller, *supra* note 29.

*Citizens United* and its progeny – premised upon a constitutional right to spend unlimited funds on elections – actually has the deleterious effect of squelching speech. The voices of the wealthy and the corporations are able to speak the loudest, granting a very small minority the right to determine who is heard and who is relegated to silence on the airwaves. Where political commercials are stacked on top of each other – the overwhelming majority negative – the bombardment of political ads will desensitize voters, and lead to many tuning out from politics completely and disregarding the speech of even those who can afford to buy it in modest amounts.<sup>32</sup>

### ***Amend the Constitution***

While it is “emphatically the duty of the [courts] to say what the law is,”<sup>33</sup> it is We the People that adopt the Constitution as the law’s most basic foundation. A line of Supreme Court cases, from *Buckley v. Valeo* through *Citizens United*, have wrongly interpreted the First Amendment, extending its application to artificial entities of government like corporations and protecting their ability to electioneer, even though their interests are, by law, radically different than those of living, breathing human beings. Further, the courts equate unlimited expenditures and sums of money as constitutionally-protected speech, when in fact it is property. The poisonous effects of these decisions present a grave harm to our democracy, as demonstrated by the rise of Super PACs and secretive nonprofit spending. It is necessary, therefore, that the people make permanent our core political values in a Constitutional amendment to provide that corporations are not entitled to the constitutional rights of real people, and that unlimited spending on politics is not free speech.

It is time for the people to reclaim our democracy.

### **Corporations are Not Entitled to the Constitutional Rights of Real People**

Corporations are privileged with limited liability and perpetual life for economic purposes. Their interests are not always – nor often – the same as those of citizens. Corporate spending in our elections distorts the political process far more than even large donor money, because corporations are using their general treasury funds to influence policy, when its treasury’s purpose was instead to drive the engine of economic growth. The law obligates corporations to put profits ahead of the greater societal good, whereas real living, breathing people must balance their narrow interests with a broader public interest when making political decisions at the ballot box.

The Constitution is intended to protect the rights of individual human beings. Corporations are mentioned nowhere in the Constitution –and their authority cannot exceed that of “We the People.” While corporations make important contributions to society as engines of economic growth, the *government* grants them certain privileges that allow them to collect vast

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<sup>32</sup> *Id.*; see generally Louisa Ha & Kim McCann, *An Integrated Model of Advertising Clutter in Offline and Online Media*, INT’L J. OF ADVERTISING (2010).

<sup>33</sup> *Marbury v. Madison*, 5 U.S. (1 Cranch) 137 (1803).

sums of money, but has never considered them “real people” with rights to dictate electoral outcomes. In *Austin v. Michigan Chamber of Commerce*, the Court recognized that “the corrosive and distorting effects of immense aggregations of wealth that are accumulated with the help of the corporate form and that have little or no correlation to the public’s support for the corporation’s political ideas” posed a serious threat to our republican form of self-government.<sup>34</sup>

Unfortunately, *Citizens United* explicitly reversed *Austin* in its entirety.<sup>35</sup> Lamenting the majority’s reckless decision, Justice Stevens dissented by writing that “corporations have no consciences, no beliefs, no thoughts, no desires. Corporations help structure and facilitate the activities of human beings, to be sure, and their ‘personhood’ often serves as a useful legal fiction. **But they are not themselves members of “We the People” by whom and for whom our Constitution was established.**”<sup>36</sup>

Most egregiously, corporations have abused their “rights” bestowed on them by the courts to overturn democratically enacted laws that municipal, state and federal governments passed to *curb* corporate abuse, impairing local governments’ ability to protect their citizens against corporate harms.

### **Unlimited Spending on Politics is Not Free Speech**

It was in *Buckley v. Valeo* that the Supreme Court upheld limits on contributions to *candidates* because such restrictions were justified by corruption or the appearance thereof;<sup>37</sup> but it wrongly rejected the compelling interest of leveling the playing field to guarantee that all citizens, irrespective of wealth and resources, have an opportunity to make their political views known.<sup>38</sup>

For too long, the *only* government interest compelling enough to protect the voices of average, ordinary Americans in our politics has been that of corruption or the appearance thereof. In the wake of *Citizens United*, even that compelling interest is crumbling. While protection against corruption is exceedingly important – and continues to justify important regulations that protect our democracy from embracing full legalized bribery – another important government interest must be recognized. Equality. Americans of every stripe must have an equal opportunity to be heard in the election process, and not be drowned out by mega-wealthy donors who equate the size of their bank accounts with their right to be heard over other citizens.

Justice Stevens put it most eloquently in his concurrence in *Nixon v. Shrink Mo. Gov’t PAC*. He wrote to make “one simple point: money is property; it is not speech. . . . The right to use one’s own money to hire gladiators, or to fund ‘speech by proxy,’ certainly merits significant constitutional protection. These property rights, however, are not entitled to the same protection as the right to say what one pleases.”<sup>39</sup>

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<sup>34</sup> 494 U.S. 652, 660 (1990).

<sup>35</sup> 130 S. Ct. 876, 882 (2010).

<sup>36</sup> *Id.* at 972 (Stevens, J., dissenting).

<sup>37</sup> 424 U.S. 1, 29 (1976).

<sup>38</sup> *See id.* at 48-49.

<sup>39</sup> 528 U.S. 377, 398-399 (2000) (Stevens, J., concurring).

## **Amend2012**

Citizens across the country are rising up to instruct Congress that the time has come to enact a constitutional amendment that encompasses these principles. This fall in Montana, for example, citizens will vote on Initiative 166 – the “Prohibition on Corporate Contributions and Expenditures in Montana Elections Act.” This initiative would charge Montana’s delegation in Congress to support an amendment to the United States Constitution to nullify the Supreme Court’s ruling in *Citizens United v. FEC*. The initiative is supported by leading Montana Democrats and Republicans, including many small businesses. The Committee collected more than 40,000 signatures – far more than is required.

Beyond the ballot box, legislatures in Hawaii, California, New Mexico, Rhode Island and Vermont and other towns and city councils across the country have passed resolutions calling for a constitutional amendment overturning the constitutional right of corporations to spend money on our political campaigns.

### *Conclusion*

Mr. Chairman, your leadership and that of this Committee is critical to restoring the voices of the American people in their elections. The unchecked power of Super PACs and unlimited political spending by corporations and the very wealthy, left to its own devices, threatens to swallow the very democracy it seeks to buy.

Common Cause thanks you for the opportunity to submit this testimony.