



January 29, 2019

The Honorable Jerrold Nadler
United States House of Representatives
2132 Rayburn House Office Building
Washington, DC 20515

The Honorable Doug Collins
United States House of Representatives
1504 Longworth House Office Building
Washington, DC 20515

Dear Chairman Nadler, Ranking Member Collins, and Members of the House Judiciary Committee:

The Institute for Free Speech¹ writes in response to a provision of H.R. 1 related to the Supreme Court decision, *Citizens United v. FEC*, scheduled for discussion by this Committee on January 29, 2019. From the moment the ruling was announced in 2010, *Citizens United* has been wildly misconstrued. H.R. 1's factual findings related to *Citizens United*, unfortunately, continue this trend.² The Institute for Free Speech seeks to correct some of these mistakes and provide members of this Committee an accurate educational resource describing the Court's holding in *Citizens United* and placing the case in context.

***Citizens United* upheld the First Amendment. If the Court would have ruled differently, the government would have the power to ban books and movies about candidates, if produced and distributed by corporations.**

The *Citizens United* case arose because the Federal Election Commission (FEC) attempted to prohibit a nonprofit corporation from advertising and distributing a film about then-candidate Hillary Clinton. Threatened with legal action by the Federal Election Commission if it aired the movie or advertisements for the movie – simply because it criticized a politician close to an election – *Citizens United* decided to sue to vindicate its First Amendment right to show the film. The Supreme Court rightly found that the government cannot ban books and movies that were made using corporate funds, simply because they criticize a candidate close to an election. Since virtually all books and movies are produced and distributed by corporations, this ruling was an important victory for free speech and press rights.

While outside spending has increased since the *Citizens United* decision, it remains dwarfed by candidate and party spending.

Much of the current criticism of *Citizens United* comes from its effect of increasing so-called “outside spending” – spending that occurs independently of candidates or parties. Campaign speech does not belong only to candidates and parties. The American people have a right to speak, and they are not outsiders. It is better for citizens to hear from all perspectives. Nevertheless, candidate spending and party spending still dominate campaigns. In 2018, \$1.1 billion was spent by all independent, non-party groups. Candidates and parties spent nearly four times that amount, \$4.1 billion.³ It's simply not true that independent groups have an “outsized” influence on campaigns.

¹ 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. Originally known as the Center for Competitive Politics, the organization was founded in 2005 by Bradley A. Smith, a former Chairman of the Federal Election Commission.

² See H.R. 1 § 5001.

³ The Center for Responsive Politics (CRP) estimates the total cost of the 2018 election at \$5.2 billion. See <https://www.opensecrets.org/overview/cost.php>. Likewise, CRP estimates the total cost of “outside spending” (excluding party

***Citizens United* has had a positive effect on our democracy.**

Those in favor of greater campaign finance restrictions often claim that, since *Citizens United*, our democracy has suffered. There is no evidence for this claim. Since the decision, we have seen wave elections for both Democrats and Republicans in the House, we have seen both Democratic and Republican control of the Senate, and Americans have re-elected a Democratic president and elected a Republican president. The 2018 election also saw record voter turnout in a midterm election. If *Citizens United* has had any effect on democracy, it is certainly not visible in electoral outcomes; it appears the American people are still deciding elections and doing so with enthusiasm.

It is a bad idea for the government to ensure “political equality.”

Calls to overturn *Citizens United*, like that in H.R. 1, often seek to eliminate the current Supreme Court justification for campaign finance restrictions – corruption and its appearance – and replace it with the idea that Congress should be able to restrict spending to further “equal” voices. The First Amendment is not – and never has been – conditioned upon a level playing field. In fact, there has never been a time in American history where everyone spoke equally and was heard equally, and there never will be. Few will ever be as famous as Oprah, run a newspaper, or host a television program. The purpose of the First Amendment is to protect Americans from being censored or punished for their views by government, so that they may always speak without limit to other citizens.

Amending the First Amendment to allow spending limits on speech and press rights, as H.R. 1 calls for, would overturn far more than *Citizens United*.

H.R. 1 calls for an amendment to the U.S. Constitution to allow for limits on *spending* money to “influence” elections. Such an amendment would overturn not just *Citizens United* but over 40 years of jurisprudence dating back to *Buckley v. Valeo*. The consequences of such an amendment would be disastrous. It would essentially overturn the First Amendment to the United States Constitution, as it applies to political speech and press rights, providing lawmakers with virtually unfettered power to regulate speech, ban certain types of speech, and stifle political dissent.

These are just some of the most important mistakes that are commonly made when discussing *Citizens United*. For further information on the case, please read the attached Institute for Free Speech explainer, “*Citizens United v. FEC: Facts and Falsehoods*.”⁴

Sincerely,



David Keating
President

CC: Members of the U.S. House Judiciary Committee

committees) for the 2018 cycle at \$1.1 billion. See https://www.opensecrets.org/outsidespending/fes_summ.php. Taken together, spending by candidates and political parties in the 2018 cycle accounted for \$4.1 billion.

⁴ This resource is also available via the Institute for Free Speech at https://www.ifs.org/wp-content/uploads/2017/11/2017-11-02_Issue-Brief_Wachob_Citizens-United-v.-FEC-Facts-and-Falsehoods.pdf.



Citizens United v. FEC: Facts and Falsehoods

Luke Wachob

“If the First Amendment has any force, it prohibits Congress from fining or jailing citizens, or associations of citizens, for simply engaging in political speech.”

– Citizens United v. Federal Election Commission, 558 U.S. 310, 349 (2010)

The U.S. Supreme Court’s 2010 ruling in *Citizens United v. Federal Election Commission* struck down a provision of the Bipartisan Campaign Reform Act of 2002, also known as McCain-Feingold, that prohibited nonprofits, businesses, and labor unions from independently voicing their support or opposition to federal candidates. The Court ruled that provision unconstitutional as a violation of the First Amendment.

In the years since, *Citizens United* has become a lightning rod for discussion about the state of campaign finance law and the First Amendment rights of corporations and unions. Supporters applaud the ruling as a landmark victory for free speech that creates new avenues for political outsiders to run competitive campaigns without the support of party leaders. Critics claim the decision increases the political power of corporations and the wealthy at the expense of average citizens.

With so much discussion about the impact of *Citizens United* – and frequent calls to reverse it by constitutional amendment¹ – it’s important to understand the facts of the case and how it came to be.

Three Key Facts about Citizens United

I. Citizens United produced a documentary criticizing Hillary Clinton during her candidacy for the Democratic nomination for President in 2008 and planned to air it over video-on-demand. The Federal Election Commission said no.

Citizens United is a small, conservative nonprofit corporation. In 2008, it produced the documentary film “Hillary: The Movie,” which sharply criticized then-Senator Hillary Clinton, a candidate for the Democratic nomination for President at that time. Citizens United planned to distribute its film via video-on-demand, DVDs, and in movie theaters. Four years earlier, liberal filmmaker Michael Moore executed a very similar plan with “Fahrenheit 9/11,” a documentary released during the 2004 election year criticizing then-President George W. Bush that Moore intended to function as an organizing tool for Bush’s opponents.

Unlike Moore’s company, Dog Eat Dog Films, Citizens United ran into problems with campaign finance laws that prohibited corporations and unions from funding speech supporting or opposing a candidate near an election. Threatened with legal action by the Federal Election Commission (FEC) if it aired the movie or advertisements for the movie – simply because it criticized a politician close to an election – Citizens United decided to sue to vindicate its First Amendment right to show the film.

II. During oral argument, the government told the Supreme Court that it not only had the power to ban “Hillary: The Movie,” but also the authority to prohibit the publication of books that support or oppose candidates near an election.

¹ Matt Nese, “The Udall Amendment: A Briefing Book,” Institute for Free Speech. Retrieved on October 17, 2017. Available at: http://www.ifs.org/wp-content/uploads/2014/05/2014-09-09_Center-For-Competitive-Politics_Udall-Amendment-Briefing-Book.pdf (September 9, 2014).

The Supreme Court initially explored narrow grounds on which to decide the case, such as by ruling that Citizens United's criticism of Senator Clinton did not equate to advocating against her in the election, or that video-on-demand was not covered by the statute. At oral argument, however, the government took such an extreme position that the Court decided to address the constitutional question of whether Citizens United could be prevented from distributing "Hillary: The Movie" simply because it was a corporation.

The turning point came when the Justices asked then-Deputy Solicitor General Malcom Stewart, the lawyer arguing the government's case, if the government also believed it could prohibit corporations from publishing books that advocate for or against candidates – even if the advocacy was limited to a single line in a 500-page book. Stewart's response: "Well, if it says vote for X, it would be express advocacy and it would be covered by the pre-existing Federal Election Campaign Act provision."² In other words: yes, the government argued it had the power to ban such books.

Taken aback by the government's position, the Court scheduled a reargument of the case to further explore the issue. Once again, the government refused to disavow its power to ban books under the law. The Court's majority then did the only reasonable thing it could do: it struck down the law as unconstitutional and ruled in favor of Citizens United.

III. The Supreme Court's ruling in *Citizens United* allowed nonprofits, businesses, and labor unions to independently voice their support or opposition to candidates, but did not remove the prohibition on corporate or union contributions to candidates' campaign committees, and did not affect campaign finance disclosure laws in any way.

The *Citizens United* ruling sparked an immediate uproar among groups and activists opposed to corporations having a voice in politics. In the media, the decision was commonly misconstrued as having eliminated limits on corporate money in politics. In reality, *Citizens United* left intact the prohibition on direct contributions to federal candidates by corporations and unions. As a result, they still cannot participate in campaigns to the extent that individuals and political action committees can. And, in roughly half the states, the *Citizens United* ruling had no effect on state law because no prohibition on corporate and union political speech existed in the first place.³

In later years, critics of *Citizens United* have associated the ruling with super PACs and so-called "dark money." But super PACs were created through a subsequent 2010 case, *SpeechNow.org v. FEC*, which may well have succeeded regardless of the *Citizens United* ruling. And "dark money," a pejorative term for nonprofit groups that can engage in limited political speech without reporting the names and home addresses of their supporters to the government, concerns campaign finance disclosure laws that were not affected by *Citizens United* in any way. The Justices actually voted 8-1 in favor of existing disclosure requirements – although this does not mean that other, more extensive disclosure laws would pass constitutional muster in the future. Despite this fact, in the years since the ruling, opponents of *Citizens United* have pushed for more expansive disclosure laws in an effort to discourage or prevent nonprofits, businesses, and labor unions from exercising their newfound freedom.

Conclusion

In pop culture, *Citizens United* has become a symbol of corporate speech rights and the ubiquity of "money in politics." In reality, it was a straightforward case about whether the government can ban movies and books that criticize candidates near elections. Advocates for free speech and limited government must push back against the myths and misconceptions surrounding *Citizens United* by making sure the facts don't get lost in the fray.

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. Originally known as the Center for Competitive Politics, it was founded in 2005 by Bradley A. Smith, a former Chairman of the Federal Election Commission. The Institute is the nation's largest organization dedicated solely to protecting First Amendment political rights.

² Transcript of Oral Argument at 29, *Citizens United v. Fed. Election Comm'n*, 558 U.S. 310 (2010) (No. 08-205) ("MR. STEWART: Well, if it says vote for X, it would be express advocacy and it would be covered by the pre-existing Federal Election Campaign Act provision."). Retrieved on October 17, 2017. Available at: https://www.supremecourt.gov/oral_arguments/argument_transcripts/2008/08-205.pdf (March 24, 2009).

³ Sean Parnell, "Citizens United, Citizens' Lives: A comparison of states with and without prohibitions on corporate independent expenditures," Institute for Free Speech. Retrieved on October 17, 2017. Available at: <http://www.ifs.org/wp-content/uploads/2012/11/Parnell-2010-CU-States.pdf> (July 14, 2010).