

CITIZENS UNITED AND THE 2010 MIDTERM ELECTIONS

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THE PUBLIC ADVOCATE FOR THE CITY OF NEW YORK
Bill de Blasio – PUBLIC ADVOCATE



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Executive Summary

In January of 2010, the Supreme Court rendered a decision, Citizens United v. Federal Election Commission, which opened the door for increased corporate involvement in our elections. In the 2010 midterm elections, money flowed through that open door. The Court's decision expanded opportunities for anonymous spending that mask the full extent of corporate participation in elections.

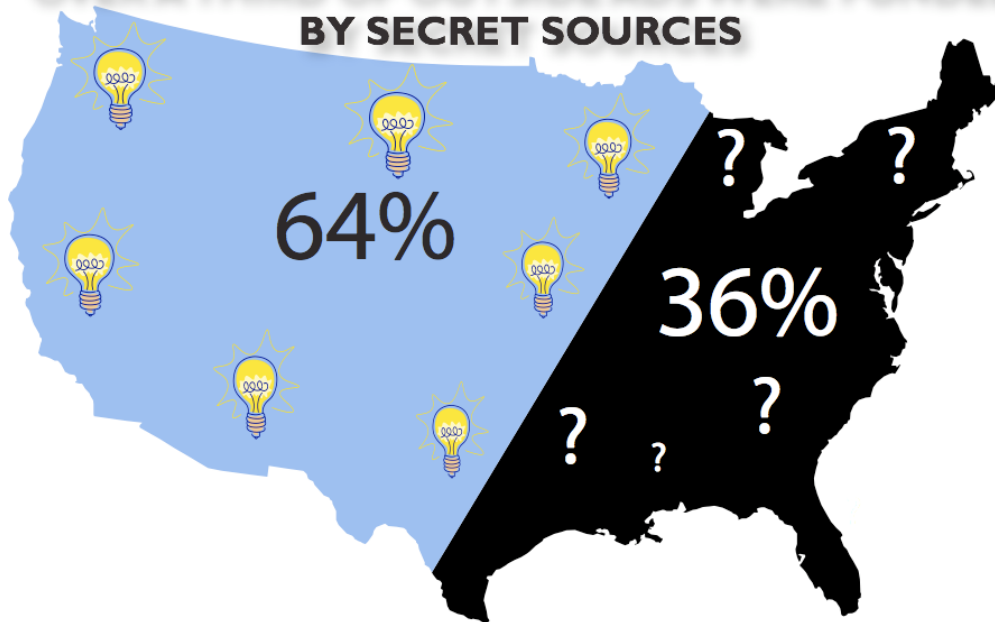
Public Advocate Bill de Blasio's office examined campaign finance records from the 2010 election cycle, the first election since the court's ruling, to better understand the full impact of the Citizens United decision on our democratic process. The Office's analysis provides a more complete picture of the role Citizens United spending played in this election cycle, including the following findings:

- **CITIZENS UNITED LED TO A SIGNIFICANT UPTICK IN SPENDING ON ELECTIONS.**
 - Citizens United spending represented 15 percent of total political spending
 - Citizens United spending was responsible for over \$85 Million in all U.S. Senate races
- **CITIZENS UNITED SIGNIFICANTLY INCREASED ANONYMOUS SPENDING**
 - New anonymous spending allowed by Citizens United represented 30 percent of all spending by outside groups.
 - Anonymous donations funded over \$40 Million in the 10 most costly U.S. Senate races
- **CITIZENS UNITED HAS CREATED A MORE NEGATIVE ELECTORAL ENVIRONMENT.**
 - Anonymous spending groups created by Citizens United spent 20 percent more on negative advertisements than groups required to disclose

The new spending that occurred this election cycle has far reaching implications for voters and investors, both of whom have to fear the new anonymous spenders in our campaign finance environment. Right now voters and the general public cannot see the whole picture a fact that is especially troubling since anonymous groups spend more on negative advertisements.

An academic consensus is growing around the negative impact that corporate political spending has on company bottom lines. Anonymous spending denies investors the means to evaluate their companies' spending practices, and the risks they may face on account of those practices. Investors must act to urge corporate transparency and Congress must act to give voters transparency.

OVER A THIRD OF OUTSIDE ADS WERE FUNDED BY SECRET SOURCES



The Court's Decision

In Citizens United the Supreme Court held that the First Amendment precludes limiting corporate funding of independent political broadcasts in elections. The majority opinion reasoned that limits on independent expenditures by corporations violate the First Amendment right to free speech. The Bipartisan Campaign Reform Act prohibited corporations and labor unions from airing broadcast messages that refer to a political candidate 30 days before a primary election and 60 days before a general election (so-called “electioneering communications”). The majority opinion struck down the electioneering communications rule as applied to corporations. As a result, corporations may now spend unlimited sums on independent political expenditures.

Additionally, Citizens United , along with the Court’s earlier decision in Federal Election Commission v. Wisconsin Right to Life, Inc., 551 U.S. 449 (2007), enabled non-profit corporations to spend unlimited amounts on independent political broadcasts and to accept unlimited political contributions for the purpose of such advertising spending. While the Court acknowledged the permissibility of disclosure requirements for political spending, the decision enabled many corporations to spend money on independent political broadcasts without disclosing the donors that fund their activities.

2010: The World Post-Citizens United

During the 2010 election cycle, outside groups spent over \$290 million on federal independent expenditures. Much of that spending took advantage of recent changes in the law: 527 groups (referred to as 527 groups because of the section of the tax code that regulates them) gathered pools of uncapped donations to fund political spending while tax-exempt non-profit corporations amassed anonymous contributions to support independent political expenditures.

While public records provide an incomplete picture, one can piece together an idea of how some of this spending occurred by considering several sources. The few groups that solicited unlimited contributions and disclosed their donors showed a mix of wealthy individuals, privately held companies, and publicly traded companies funding their efforts.¹ Investigative journalists unearthed examples of companies and special interests that contributed to independent expenditure efforts.²³⁴ With a significant amount of outside spending coming from groups that do not disclose their sources of support, corporate spending likely played a greater role than is currently known.

Companies clearly took advantage of the ability to make uncapped contributions. After the Citizens United decision, 527 organizations had the option— upon filing additional paperwork — to solicit uncapped contributions from individuals and corporations to spend on independent political efforts. 527 organizations are required to disclose their donors. American Crossroads, a 527 organization formed by former Bush administration officials including former White House Deputy Chief of Staff Karl Rove and former Republican National Committee Chairman Ed Gillespie, is a prime example. The group accepted contributions of unlimited size and disclosed large contributions from corporations that would not have been possible before the Citizens United decision.

Some groups also took advantage of the ability to spend on independent expenditure campaigns without disclosing funding sources. Social welfare organizations, known as 501(c)(4)s for the section of the Internal Revenue Code under which they are organized, could spend on independent political efforts in the aftermath of the Citizens United decision. They are not required to disclose their funders. The founders of the American Crossroads organization created a companion 501(c)(4) organization called Crossroads Grassroots Policy Solutions (“Crossroads GPS”). Crossroads GPS could accept uncapped anonymous donations like its 527 companion, but did not disclose its donors. The two groups closely coordinated their spending, so anonymous contributions to Crossroads GPS bolstered the shared mission of both organizations.

¹ Exempt from Limits Donors, American Crossroads, Accessed [11/26/10](#)

² “News Corp. gave \$1 million to pro-GOP group,” Politico, [9/30/10](#);

³ “Offering Donors Secrecy, and Going on Attack,” New York Times, [10/11/10](#);

⁴ “Spending blitz by outside groups helped secure big GOP wins,” MSNBC, [11/4/10](#)

Trade associations and business leagues, organized under section 501(c)(6) of the internal revenue code, also capitalized on the new ability to spend on independent expenditure campaigns. 501(c)(6)s are funded by payments from member corporations. Since the Supreme Court lifting the ban on corporate funding of electioneering, trade associations are freer to directly engage the electoral process. They, like 501(c)(4) organizations, are not required to disclose their donors. The activities of the U.S. Chamber of Commerce in the 2010 elections offer a notable example of trade association spending post-Citizens United. The Chamber of Commerce spent \$32.9 million from its corporate-funded treasury on independent political communications. The Chamber of Commerce boasts a deep roster of corporate members, but did not disclose whose contributions provided the funding for its political advertising.

While these are a few notable examples, the activities of the above-mentioned groups did not represent fringe activity in 2010 elections. This spending represented a significant portion of outside spending in this year's elections.

Methodology & Findings

To gauge the impact of changes brought about by the Citizens United ruling, we examined three sets of data. First, we considered aggregate spending data for the 2010 election cycle. We also examined a dataset containing records of independent expenditures undertaken in the 2010 election cycle filed with the Federal Election Commission. Finally, we conducted a deeper analysis of the 10 most costly federal races in 2010, all of which were races for the U.S. Senate. Examination of public records makes clear that this spending occurred at a massive scale.

- **In the 2010 Election Cycle, Groups Accumulating Anonymous Donations Spent More Than \$130 Million.** In the 2010 midterm election, tax-exempt non-profits reported spending \$132.5 Million on independent expenditures – a little less than half of all outside spending by non-party committee groups. These groups, social welfare organizations, trade associations, and unions, have to disclose that they spent but not the sources of funds used for independent expenditures.
- **In the 2010 Election Cycle, Groups Spent Anonymous Or Uncapped Donations Totaling Over \$85 Million on U.S. Senate Races.** In the fall of 2010, anonymous or uncapped entities spent \$65.4 million on the 10 top senate races, and over \$80 million on all Senate races.

To take a closer look at the spending, my Office focused on the 10 Senate races where the most money was spent. Our key findings:

- **Anonymous Donations Funded over \$40 Million in the 10 Most Costly Senate Races in 2010.** Tax-exempt non-profits spent \$42.9 Million in the 10 most costly races (Nevada, California, Connecticut, Pennsylvania, Colorado, Florida, Illinois, Missouri, Wisconsin, and Kentucky).
- **Outside Spending That Took Advantage Of Citizens United Represented 20% Of Candidate Spending, 15% Of The Spending In Races.** In aggregate, outside spenders taking advantage of Citizens United spent \$1 for every \$5 dollars spent by candidates in the races examined. Ads from groups that raised uncapped funds for political expenditures or raised anonymous contributions for political expenditures amounted to 15% of all spending in the races analyzed.
- **Over 30% of All Outside Spending Was Funded By Anonymous Donations.** 30% of the ads not funded directly by campaigns were bought by groups that did not fully disclose their donors. There is an imperfect match between money and advertising time, but in basic terms, if viewers in the ten states examined ads that were not funded by candidates, for only 7 out of the 10 ads could the viewer find out information about the funders supporting the advertisement.
- **Anonymous Spenders Were More Likely To Fund Negative Advertisements Than Outside Spenders Required To Disclose.** To gain a better sense of the manner and scope of spending in the most costly races, we examined a data set of independent expenditures notices filed with the FEC in the 2010 election. In that time period, anonymous spenders spent almost 20% more of their total spending on negative ads than spenders who were subject to disclosure requirements. 527 groups, which are required to disclose their donors on a regular basis, spent a substantial amount (46%) of their money on positive efforts. Trade associations and social welfare organizations, which are not required to disclose their donors, spent a fraction of that amount (24%) on positive efforts.
- **An Influx of Spending Taking Advantage of Citizens United Did Not Strictly Predict Election Outcomes.** In some of the 10 Senate races examined by our Office, candidates won despite significant spending from outside groups that accepted anonymous donations. 37% of anonymous spending in these races supported candidates who lost, while 56% supported winning candidates. In the three most expensive races (California, Nevada, and Connecticut), candidates won despite outside anonymous spending being directed against them.

Implications for Investors

The Citizens United decision has a special relevance for investors. A growing body of evidence shows that political spending has a negative effect on the bottom line of businesses. Studies by academics at the University of Minnesota⁵ and Harvard Law School⁶ show a strong relationship between outside political spending and negative excess returns. Returns suffer when managers forsake investments in the core business of the corporation in favor of investing management time and energy in working the political system. As managers at companies take advantage of the ability to spend anonymously, risks to the company, from diversion of attention, waste of capital on losing races, to reputational risk increase.

As companies contribute to independent political expenditure efforts, they also further an arms race mentality of sorts – managers at each company will feel bound by the actions of their peers. Justice Stevens spoke to this issue in his dissent in Citizens United.

“Some corporations have affirmatively urged Congress to place limits on their electioneering communications. These corporations fear that officeholders will shake them down for supportive ads, that they will have to spend increasing sums on elections in an ever-escalating arms race with their competitors, and that public trust in business will be eroded ... A system that effectively forces corporations to use their shareholders’ money both to maintain access to, and to avoid retribution from, elected officials may ultimately prove more harmful than beneficial to many corporations.”⁷

While investors have reason to be concerned about the impact of increased corporate political spending in light of Citizens United, they lack information necessary to incorporate that concern into their investment decisions. Because many non-profit groups organized under section 501(c) of the internal revenue code do not have to disclose the sources of contributions, they have emerged as a top outlet for independent expenditures. Corporations can give to social welfare organizations or trade associations without disclosing their contributions, allowing them to spend anonymously in elections.

Investors need to ensure that companies adopt transparent political spending practices. Companies should not make contributions to groups that do not disclose their donors, and should adopt policies that require disclosure of all contributions to external parties that could spend directly in elections. Investors are well positioned to demand that companies take these steps, using shareholder resolutions and director elections to directly engage companies and their directors on the issue of corporate political spending.

⁵ “Corporate Political Contributions: Investment or Agency?” Rajesh Aggarwal, Felix Meschke, and Tracy Wang, Carlson School of Management, University of Minnesota, June 2009

⁶ “Corporate Governance and Corporate Political Activity: What Effect will Citizens United have on Shareholder Wealth?” Dan Coates, Harvard Law School, September 2010

⁷ Citizens United v. Federal Election Commission, 130 S. Ct. 876, 929 (2010) (Stephens, J., dissenting).

Conclusion

The 2010 midterm elections offered a glimpse of the impact that the Citizens United decision will have on our elections. Increased anonymous spending translated to more political advertisements and little information about the interests behind them. Entities that did not disclose their sources of support accounted for a significant amount of outside spending and few corporations made commitments to disclose their contributions to independent expenditures or to refrain from making independent expenditures.

The sea change in the law regarding corporate political spending wrought by Citizens United presents a multitude of risks for investors. In the face of these risks, investors should consider corporate political spending practices with the same level of scrutiny given to other basic corporate governance standards. Companies can spend more money in politics and are subject to few requirements to disclose their actions. Moving forward, investors must use all tools at their disposal to ensure transparency and accountability.

National Tables

Fig. 1.1 – “Positive vs. Negative Advertising by Group Type”

Positive and Negative Advertising By Group Type		
Group Type	Type of Advert	Percent of Spending
527* (Contributions Disclosed)	Positive	45.99%
	Negative	54.01%
501(c)† (Contributions Not Disclosed)	Positive	24.03%
	Negative	75.41%
*527 refers to the section of the Internal Revenue code under which regular political action committees and independent expenditure committees are organized. This grouping includes both normal political action committees and those gathering unlimited contributions		
†501(c) refers to the section of the Internal Revenue code under which certain politically active groups are organized. Social Welfare Organizations (Action Funds) are organized under Section 501(c)4. Trade Associations are organized under Section 501(c)6. Labor Unions are organized under Section 501(c)5. 501(c) organizations are tax-exempt entities, and are not required to disclose the donors who fund their political activities.		
Source: Independent Expenditure Data, Accessed from Federal Election Commission Disclosure Data Catalog, http://www.fec.gov/data/IndependentExpenditure.do		

Fig. 1.2. – “Key Campaign Finance Ratios, 10 Most Costly Senate Races, Fall 2010”

Key Campaign Finance Ratios, 10 Most Costly Senate Races, Fall 2010	
Percentage of Outside Spending That Used New post-Citizens United Rules	55.48%
Percentage of Outside Spending Funded by Anonymous Sources	35.72%
<i>Source: FEC Data Accessed through Center for Responsive Politics, OpenSecrets.org</i>	

Fig. 1.3 – “Aggregate Spending By Race, 10 Most Costly Senate Races, Fall 2010”

Aggregate Spending By Race, 10 Most Costly Senate Races, Fall 2010						
Race State	Type	Total Spending	Total Third-Party Spending	Anonymous Spending	Spending From Groups Gathering Unlimited Contributions	Citizens United Spending
Nevada	Senate	\$59,105,399	\$17,523,111	\$5,580,446	\$4,034,803	\$9,615,249
California	Senate	\$52,654,436	\$11,261,288	\$6,706,861	\$1,522,944	\$8,229,805
Connecticut	Senate	\$50,870,207	\$2,742,198	\$504,692	\$16,720	\$521,412
Pennsylvania	Senate	\$49,046,141	\$25,739,595	\$4,625,069	\$3,309,669	\$7,934,738
Colorado	Senate	\$48,236,654	\$34,526,670	\$13,720,491	\$8,232,487	\$21,952,978
Florida	Senate	\$43,490,607	\$6,435,959	\$2,786,761	\$2,730,133	\$5,516,894
Illinois	Senate	\$37,144,075	\$18,776,587	\$7,542,421	\$2,825,674	\$10,368,095
Missouri	Senate	\$30,439,243	\$12,789,166	\$5,916,079	\$3,288,744	\$9,204,823
Wisconsin	Senate	\$30,832,668	\$4,125,860	\$1,631,165	\$356,434	\$1,987,599
Kentucky	Senate	\$19,694,001	\$9,355,105	\$2,168,186	\$1,986,626	\$4,154,812
Totals		\$421,513,431	\$143,275,539	\$51,182,171	\$28,304,234	\$79,486,405
<i>Source: FEC Data Accessed through Center for Responsive Politics, OpenSecrets.org</i>						

Fig. 1.4 – “Notable Independent Group Spending”

Notable Independent Group Spending		
Group	2010 Total Reported Spending	Notes
U.S. Chamber of Commerce	\$32,851,997	Did not disclose donors who were funding independent expenditures
American Action Network	\$26,088,031	Did not disclose donors who were funding independent expenditures
American Crossroads	\$21,553,277	Raised uncapped donations from corporations, both privately held and publicly traded
Crossroads Grassroots Policy Strategies	\$17,122,446	Did not disclose donors who were funding independent expenditures
<i>Source: FEC Data Accessed through Center for Responsive Politics, OpenSecrets.org</i>		

Fig. 1.5 – “How Have the Rules Changed?”

2006 Midterms vs. 2010 Midterms: How Have The Rules Changed?		
Issue	2006	2010
Corporate Contributions	Independent expenditure groups organized under Section 527 of the Internal Revenue code (527s) may accept uncapped donations, but not from companies	527s can take uncapped donations, including donations from companies
Limits on Electioneering	Corporations could not engage in direct electioneering. Certain qualified non-profits could fund "issue ads"	Corporations can now engage in direct electioneering - their disclosure requirements do not change
Independent Expenditure Disclosure	All groups that could electioneer had to disclose (Some groups, like 527(s), disclose later than others, or disclose to the IRS instead of the FEC)	Many non-profit organizations can engage in direct electioneering without disclosing sources of funding.

State Tables

Nevada:

Spending Breakdown, 2010 Nevada Senate						
Race State	Total Spending	Candidate Spending	Third-Party Spending	Anonymous Spending	Spending From Groups Gathering Unlimited Contributions	Citizens United Spending
Nevada - Senate	\$59,105,399	\$41,582,288	\$17,523,111	\$5,580,446	\$4,034,803	\$9,615,249
Outside Spending / Total Spending	29.65%	Anonymous Spending / Total Outside Spending -->	31.85%	Citizens United Spending / Outside Spending -->	54.87%	
<i>Source: FEC Data Accessed through Center for Responsive Politics, OpenSecrets.org</i>						

California:

Spending Breakdown, 2010 California Senate						
Race State	Total Spending	Candidate Spending	Third-Party Spending	Anonymous Spending	Spending From Groups Gathering Unlimited Contributions	Citizens United Spending
California - Senate	\$52,654,436	\$41,393,148	\$11,261,288	\$6,706,861	\$1,522,944	\$8,229,805
Outside Spending / Total Spending	21.39%	Anonymous Spending / Total Outside Spending	59.56%	Citizens United Spending / Outside Spending	73.08%	
<i>Source: FEC Data Accessed through Center for Responsive Politics, OpenSecrets.org</i>						

Connecticut:

Spending Breakdown, 2010 Connecticut Senate						
Race State	Total Spending	Candidate Spending	Third-Party Spending	Anonymous Spending	Spending From Groups Gathering Unlimited Contributions	Citizens United Spending
Connecticut - Senate	\$50,870,207	\$48,128,009	\$2,742,198	\$1,004,692	\$16,720	\$1,021,412
Outside Spending / Total Spending	5.39%	Anonymous Spending / Total Outside Spending	36.64%	Citizens United Spending / Outside Spending	37.25%	
<i>Source: FEC Data Accessed through Center for Responsive Politics, OpenSecrets.org</i>						

Pennsylvania:

Spending Breakdown, 2010 Pennsylvania Senate						
Race State	Total Spending	Candidate Spending	Third-Party Spending	Anonymous Spending	Spending From Groups Gathering Unlimited Contributions	Citizens United Spending
Pennsylvania - Senate	\$49,046,141	\$23,306,546	\$25,739,595	\$4,625,069	\$3,309,669	\$7,934,738
Outside Spending / Total Spending	52.48%	Anonymous Spending / Total Outside Spending	17.97%	Citizens United Spending / Outside Spending	30.83%	
<i>Source: FEC Data Accessed through Center for Responsive Politics, OpenSecrets.org</i>						

Colorado:

Spending Breakdown, 2010 Colorado Senate						
Race State	Total Spending	Candidate Spending	Third-Party Spending	Anonymous Spending	Spending From Groups Gathering Unlimited Contributions	Citizens United Spending
Colorado - Senate	\$48,236,654	\$13,709,984	\$34,526,670	\$13,720,491	\$8,232,487	\$21,952,978
Outside Spending / Total Spending	71.58%	Anonymous Spending / Total Outside Spending	39.74%	Citizens United Spending / Outside Spending	63.58%	

Source: FEC Data Accessed through Center for Responsive Politics, OpenSecrets.org

Florida:

Spending Breakdown, 2010 Florida Senate						
Race State	Total Spending	Candidate Spending	Third-Party Spending	Anonymous Spending	Spending From Groups Gathering Unlimited Contributions	Citizens United Spending
Florida - Senate	\$43,490,607	\$37,054,648	\$6,435,959	\$2,786,761	\$2,730,133	\$5,516,894
Outside Spending / Total Spending	14.80%	Anonymous Spending / Total Outside Spending	43.30%	Citizens United Spending / Outside Spending	85.72%	

Source: FEC Data Accessed through Center for Responsive Politics, OpenSecrets.org

Illinois:

Spending Breakdown, 2010 Illinois Senate						
Race State	Total Spending	Candidate Spending	Third-Party Spending	Anonymous Spending	Spending From Groups Gathering Unlimited Contributions	Citizens United Spending
Illinois - Senate	\$37,144,075	\$18,367,488	\$18,776,587	\$7,542,421	\$2,825,674	\$10,368,095
Outside Spending / Total Spending	50.55%	Anonymous Spending / Total Outside Spending	40.17%	Citizens United Spending / Outside Spending	55.22%	

Source: FEC Data Accessed through Center for Responsive Politics, OpenSecrets.org

Missouri:

Spending Breakdown, 2010 Missouri Senate						
Race State	Total Spending	Candidate Spending	Third-Party Spending	Anonymous Spending	Spending From Groups Gathering Unlimited Contributions	Citizens United Spending
Missouri - Senate	\$30,439,243	\$17,650,077	\$12,789,166	\$5,916,079	\$3,288,744	\$9,204,823
Outside Spending / Total Spending	42.02%	Anonymous Spending / Total Outside Spending	46.26%	Citizens United Spending / Outside Spending	71.97%	

Source: FEC Data Accessed through Center for Responsive Politics, OpenSecrets.org

Wisconsin:

Spending Breakdown, 2010 Wisconsin Senate						
Race State	Total Spending	Candidate Spending	Third-Party Spending	Anonymous Spending	Spending From Groups Gathering Unlimited Contributions	Citizens United Spending
Wisconsin - Senate	\$30,832,668	\$26,706,808	\$4,125,860	\$1,631,165	\$356,434	\$1,987,599
Outside Spending / Total Spending	13.38%	Anonymous Spending / Total Outside Spending	39.54%	Citizens United Spending / Outside Spending	48.17%	

Source: FEC Data Accessed through Center for Responsive Politics, OpenSecrets.org

Kentucky:

Spending Breakdown, 2010 Kentucky Senate						
Race State	Total Spending	Candidate Spending	Third-Party Spending	Anonymous Spending	Spending From Groups Gathering Unlimited Contributions	Citizens United Spending
Kentucky - Senate	\$19,694,001	\$10,338,896	\$9,355,105	\$2,168,186	\$1,986,626	\$4,154,812
Outside Spending / Total Spending	47.50%	Anonymous Spending / Total Outside Spending	23.18%	Citizens United Spending / Outside Spending	44.41%	

Source: FEC Data Accessed through Center for Responsive Politics, OpenSecrets.org