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July 23, 2014

The Honorable Charles E. Schumer
Chairman
Senate Committee on Rules & Administration
305 Russell Senate Office Building
Washington, DC 20510

The Honorable Pat Roberts
Ranking Member
Senate Committee on Rules & Administration
305 Russell Senate Office Building
Washington, DC 20510

Re: The DISCLOSE Act (S.2516) and the Need for Expanded Public Disclosure
of Funds Raised and Spent to Influence Federal Elections

Dear Chairman Schumer, Ranking Member Roberts and Members of the Senate Committee on
Rules and Administration:

These remarks are submitted on behalf of the Campaign Legal Center regarding the July
23, 2014 hearing on the Democracy Is Strengthened by Casting Light on Spending in Elections
Act (DISCLOSE Act), S.2516. Now that a revised DISCLOSE Act has once again been
introduced, we applaud the Committee for acting quickly to hold a hearing on this important bill.
Given the current lack of disclosure of the sources of funds used by outside spenders in political
campaigns, we urge the Committee to support and expedite passage of the DISCLOSE Act in
order to ensure voters have full information as to the sources of funding that influence federal
elections.

The DISCLOSE Act is of particular urgency due to the mushrooming of outside spending
in elections combined with the Federal Election Commission's (FEC) ongoing efforts to narrow
the coverage of the disclosure rules. The FEC's disclosure regulations—which are clearly
contrary to the legislative intent of Congress—and the Commission's failure to enforce the law
as intended have largely created this problem. The good news is that this is a problem that can be
fixed legislatively, and in fact was addressed by Congress when it passed the Bipartisan
Campaign Reform Act (BCRA) in 2002. The "electioneering communications" disclosure
provision of BCRA, which the Supreme Court upheld and is still on the books, says that any
"person," including corporations and labor unions, that spends more than \$10,000 on TV and
radio ads mentioning candidates in close proximity to elections must file a report with the FEC
disclosing the names and addresses of all contributors who contributed \$1,000 or more to the
person making the ad buy.

The FEC's initial regulation implementing this disclosure requirement tracked the language of the statute. However, the Commission promulgated a revised, and significantly narrowed, regulation in 2007 after the Supreme Court's decision in *FEC v. Wisconsin Right to Life (WRTL)*, a case that had nothing to do with disclosure. In its 2007 rule, the FEC provided that a corporation, including a 501(c)(4) social welfare corporation, that spends more than \$10,000 on electioneering communication no longer has to disclose the names of all contributors who contributed \$1,000 or more but, instead, need only disclose the names of contributors who specifically designated their contributions for the purpose of furthering electioneering communications. Not surprisingly, in the wake of the FEC's 2007 gutting of the electioneering communication donor disclosure requirement, there has been a sharp drop in the disclosure of donors to groups spending money on electioneering communication. Donors simply refrain from specifically designating their contributions for electioneering communications and, as a result, they remain anonymous to the voting public.

To date, the FEC has gotten away with this blatant override of Congressional intent to require donor disclosure for electioneering communications. The lack of disclosure of the true funders of outside spending deprives citizens of critical information regarding who is trying to influence their vote. The Supreme Court has consistently upheld the constitutionality of campaign finance disclosure provisions, supporting Congressional efforts to provide voters with timely and comprehensive information regarding the sources of funding of election spending. The vast amount of money from anonymous sources channeled through various organizations that is being spent in our elections is contrary to the high value the Supreme Court has placed on disclosure within our democratic system of government. Beginning with the Court's foundational campaign finance decision, *Buckley v. Valeo*, the Court has recognized the value of disclosing the sources of campaign spending:

First, disclosure provides the electorate with information as to where political campaign money comes from and how it is spent by the candidate in order to aid the voters in evaluating those who seek federal office. It allows voters to place each candidate in the political spectrum more precisely than is often possible solely on the basis of party labels and campaign speeches. The sources of a candidate's financial support also alert the voter to the interests to which a candidate is most likely to be responsive and thus facilitate predictions of future performance in office.

Buckley, 424 U.S. 1, 66-67 (1976) (internal citations and quotation marks omitted).

In 2003, when the Court upheld BCRA's electioneering communications disclosure requirements, it dismissed attacks on the disclosure requirements and again emphasized the fundamental value of disclosure to the democratic process:

Curiously, Plaintiffs want to preserve the ability to run these advertisements while hiding behind dubious and misleading names like: 'The Coalition–Americans Working for Real Change' (funded by business organizations opposed to organized labor), 'Citizens for Better Medicare' (funded by the pharmaceutical industry), 'Republicans for Clean Air' (funded by brothers Charles and Sam

Wyly). Given these tactics, Plaintiffs never satisfactorily answer the question of how ‘uninhibited, robust, and wide-open’ speech can occur when organizations hide themselves from the scrutiny of the voting public. Plaintiffs’ argument for striking down BCRA’s disclosure provisions does not reinforce the precious First Amendment values that Plaintiffs argue are trampled by BCRA, but ignores the competing First Amendment interests of individual citizens seeking to make informed choices in the political marketplace.

McConnell v. FEC, 540 U.S. 93, 196-97 (2003) (quoting the district court’s decision, *McConnell v. FEC*, 251 F. Supp. 2d 176, 237 (D.D.C. 2003)) (internal citations omitted).

The magnitude of money from undisclosed sources has rapidly increased since the Supreme Court’s problematic 2010 ruling in *Citizens United v. FEC*. Although the *Citizens United* decision opened the door for corporations and labor unions to spend money to influence elections, the Supreme Court upheld challenged disclosure provisions 8-1 and wrote strongly in favor of disclosure and the Court’s expectation that the funders of outside spending would be disclosed:

With the advent of the Internet, prompt disclosure of expenditures can provide shareholders and citizens with the information needed to hold corporations and elected officials accountable for their positions and supporters. Shareholders can determine whether their corporations political speech advances the corporations interest in making profits, and citizens can see whether elected officials are ‘in the pocket’ of so-called moneyed interests. The First Amendment protects political speech; and disclosure permits citizens and shareholders to react to the speech of corporate entities in a proper way. This transparency enables the electorate to make informed decisions and give proper weight to different speakers and messages.

Citizens United, 558 U.S. 310, 371 (2010). The lack of disclosure in the current system is contrary to the Court’s assumption in *Citizens United* that the real sources of funding of outside spending in elections would be publicly disclosed. In this year’s *McCutcheon v. FEC* decision, the Court again extolled the importance of disclosure and noted the utility of modern technology in facilitating public access to donor information:

[D]isclosure of contributions minimizes the potential for abuse of the campaign finance system. Disclosure requirements are in part justified based on a governmental interest in providing the electorate with information about the sources of election related spending. . . . With modern technology, disclosure now offers a particularly effective means of arming the voting public with information. . . . Because massive quantities of information can be accessed at the click of a mouse, disclosure is effective to a degree not possible at the time *Buckley*, or even *McConnell*, was decided.

McCutcheon, 134 S. Ct. 1434, 1459-60 (2014) (internal citations omitted). How can shareholders determine whether election related spending advances the interest of a corporation, or the electorate obtain information about the sources of election related spending, when that spending is funneled through outside groups that do not disclose the source of the funds they are using to influence elections?

The technology currently exists to provide voters with real time information about the true sources of outside spending. However, the reality is that voters simply cannot access this important information. Expenditures on political ads paid for by outside groups that did not disclose the source of the money used for election activity quadrupled between 2008 and 2012, increasing from \$69 million to more than \$310 million (Figure I). Simultaneously, the portion of outside spending accompanied by full donor disclosure decreased from 65 percent of spending to 41 percent (Figure II).*

Figure I. Outside Spending by Groups Not Disclosing Donors

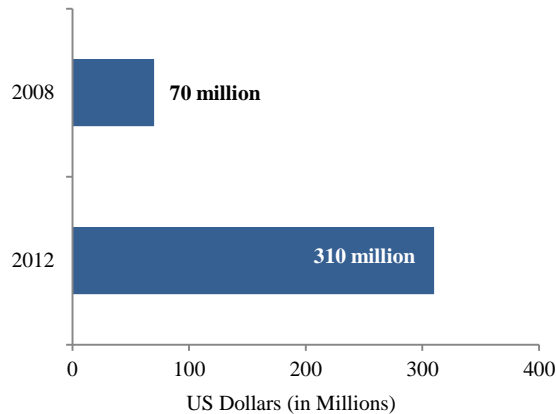
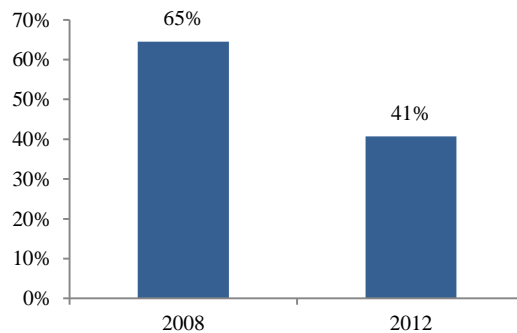


Figure II. Outside Spending Accompanied by Full Donor Disclosure



The DISCLOSE Act addresses this troubling lack of donor disclosure on several fronts. Under the Act, covered organizations (including corporations, all 501(c) organizations except 501(c)(3)s, labor organizations and 527 organizations) spending an aggregate amount of \$10,000 or more in an election cycle must disclose such expenditures to the FEC within 24 hours of spending in excess of the \$10,000 threshold. This disclosure filing must identify all sources of

* Numbers courtesy of the Center for Responsive Politics, available at <http://www.opensecrets.org/outsidespending/disclosure.php>.

donations that exceed \$10,000. Currently groups paying for political ads may claim that their “major purpose” is something other than participating in federal elections, and therefore not register or report with the FEC as political committees or with the IRS as 527 organizations. Instead, they file as 501(c)(4)s, 501(c)(6)s or other non-profit legal entities. Because they are permitted to keep secret the names of their large donors when they publicly release their tax returns filed with the IRS, and because they claim that they received no funds designated for political advertisements, they do not report their donors to the FEC either.

The Act also expands the amount of time covering electioneering communications. The electioneering communication disclosure provisions will apply to any broadcast, cable, or satellite communication that clearly refers to a House or Senate candidate and airs during the period beginning on January 1 of an election year through the general election. Likewise, the electioneering communication disclosure provisions will apply to such communications that clearly refer to a Presidential or Vice Presidential candidate and air during the period beginning 120 days before the first primary election, caucus, or preference election through the general election. Under current law, “electioneering communication” is defined to include only advertisements aired within 30 days of a primary election and 60 days of a general election. Expanding the periods covered by the electioneering communication disclosure requirements will capture more information about the funders of political ads during the long campaign season.

Most critically, the Act requires the disclosure of transfers by covered organizations to other persons or organizations when those funds are intended to be used to make campaign-related disbursements. This provision prevents the laundering of money through shell organizations for the purpose of keeping campaign-related spending anonymous. This goes to the heart of the current problem of vast sums of outside spending in our elections using funds from undisclosed donors. Currently, organizations that are required to disclose their contributors, such as Super PACs, may accept funds from organizations that are not required to disclose their donors, such as 501(c)(4) organizations. This has essentially made disclosure optional. Donors who want to keep their political contributions anonymous may simply give their money to a 501(c)(4) that then funnels the money to a Super PAC. The Super PAC must disclose the contribution from the (c)(4), but does not have to disclose the original source of the funds. The DISCLOSE Act will shed light on these shadowy transactions by requiring the (c)(4) to disclose its donors who gave \$10,000 or more—allowing the public to understand the original source of funding of campaign advertising. The Act will provide voters with critical information about who is funding communications supporting or opposing candidates.

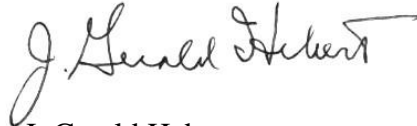
The disclosure requirements for outside spending are woefully inadequate and do not provide voters with information they need to make informed decisions about federal candidates. It is time to bring the statutes governing campaign finance disclosure in line with the Supreme Court’s repeated emphasis on the importance of disclosure in our system of government. It is time to utilize modern technology and the powerful disclosure tools it provides to give voters timely and meaningful information about the sources of funding in our elections. We urge the Committee to report out this legislation expeditiously and to oppose any efforts to significantly weaken the bill. Disclosure should be the cornerstone of our campaign finance system. We hope

the Committee will take this opportunity to begin the process of restoring this important foundation.

Sincerely,

Handwritten signature of Trevor Potter in black ink.

Trevor Potter
President & General Counsel

Handwritten signature of J. Gerald Hebert in black ink.

J. Gerald Hebert
Executive Director & Director of Litigation