Testimony of Trevor Potter[*] before the Senate Rules Committee at its hearing:
Dollars and Sense: How Undisclosed Money and Post-McCutcheon Campaign Finance Will Affect the 2014 Elections and Beyond

April 30, 2014

Thank you for the invitation to appear before you today as you take a much needed look at the effect of the flood of undisclosed money on our elections. Because it is difficult to map the road ahead without knowing how we got where we are, I would like to talk about how we moved from the full disclosure of electioneering communications required by Congress in 2002 as part of the Bipartisan Campaign Reform Act (BCRA), to where we are today, post-*Citizens United* and post-*McCutcheon*. What we have seen in the dozen years since Congress enacted BCRA is the steady unraveling of the Act's disclosure requirements. However, that unraveling has been the result of political developments and administrative action and inaction, not federal court decisions.

Both *Citizens United v. FEC*, 558 U.S. 310 (2010) and *McCutcheon v. FEC*, 572 U.S. ___ (2014), reversed over half a century of the Supreme Court's deference to Congress's understanding of how large aggregations of wealth used to influence elections corrupts our democracy. But, even as the Court tossed aside longstanding limits and prohibitions on the sources of campaign contributions or expenditures, it spoke of—in fact, relied upon—the importance of disclosure, and the value of providing the electorate meaningful information about the funding of political communications in order to help them make decisions about their elected officials. In his *Citizens United* majority opinion, Justice Kennedy referred to prior Supreme Court precedent and wrote glowingly in favor of disclosure:

> In *Buckley*, the Court explained that disclosure could be justified based on a governmental interest in "provid[ing] the electorate with information" about the sources of election-related spending. The *McConnell* Court applied this interest in rejecting facial challenges to BCRA §§ 201 and 311. There was evidence in the record that independent groups were running election-related advertisements "'while hiding behind dubious and misleading names.'" The Court therefore upheld BCRA §§ 201 and 311 on the ground that they would help citizens "'make informed choices in the political marketplace.'"
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> A campaign finance system that pairs corporate independent expenditures with effective disclosure has not existed before today. It must be noted, furthermore, that many of Congress' findings in passing BCRA were premised on a system without adequate disclosure. 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

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> 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. 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. at 370-71 (internal citations omitted). Importantly, this is the only part of the *Citizens United* opinion joined by eight out of the nine justices, demonstrating a broad consensus across the Court on the importance of the disclosure of the sources of funding of political speech.

Earlier this month in *McCutcheon*, Chief Justice Roberts again emphasized the importance of disclosure in our campaign finance system and echoed Justice Kennedy's reliance on modern technological means for achieving such disclosure rapidly in our connected world:

> [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, No. 12-536, slip op. at 35-36 (internal citations omitted).

I agree with the Court about the fundamental importance of disclosure in providing voters with critical information about who is funding communications supporting and opposing candidates. Unfortunately, the high value the Supreme Court places on such disclosure is not reflected in the reality of how those laws are currently interpreted and administered by the Federal Election Commission (FEC). In fact, the FEC's actions have eviscerated the reach of Congress's disclosure requirements, and Commission deadlocks have made the situation worse. What remains of federal campaign finance disclosure laws does not comport with the Supreme Court's description in *Citizens United* and *McCutcheon*, and thus does not deter corruption or provide citizens with sufficient information to properly evaluate speakers in the way the Court envisions.

The short history of this state of affairs, so dangerous to our democracy and so contrary to the Supreme Court's expectations, began with the proliferation of so-called "issue ads" in the elections of the 1990s and 2000 paid for by unregulated and undisclosed soft money, where the "issue" was which candidate deserved your vote. In response to this, Congress included a provision in BCRA creating a new category of campaign spending called "electioneering communication." BCRA defines electioneering communication as a broadcast, cable or satellite communication referring to a federal candidate, made within 30 days of a primary or 60 days of a general election and targeted to the candidate's electorate. Crucially, BCRA required all persons, including corporations and labor organizations, who make disbursements exceeding

$10,000 in a calendar year for electioneering communication to disclose the names and addresses of all contributors who contributed $1,000 or more to the person making the disbursement, or the disclosure of all contributors who contribute $1,000 or more to a segregated account of the organization used to make the disbursement.

The FEC's initial regulation implementing BCRA's electioneering communication disclosure requirement tracked the language of the statute. Unfortunately, the Commission thereafter promulgated a revised, and significantly narrowed, regulation in 2007 after the Supreme Court's decision in *FEC v. Wisconsin Right to Life* (*WRTL*). In that case, the Supreme Court narrowed BCRA's ban on corporate electioneering communications to only apply to communications containing express advocacy or its functional equivalent. However, the Supreme Court expressly said that this narrowing construction did not apply to the disclosure requirements for electioneering communications. In response to the decision and a petition for rulemaking to incorporate the *WRTL* holding into its regulations, the FEC initiated a rulemaking. Although the Supreme Court had said the *WRTL* holding did not apply to the disclosure rules, and the rulemaking petitioners had not raised the issue of disclosure in their petition, the Commission nonetheless proposed to revise its electioneering communication disclosure regulation. Specifically, the Commission asked for public comments regarding whether the electioneering communication disclosure requirement should be limited to "funds donated for the express purpose of making electioneering communications."

In its final rule, the Commission adopted this narrow "for the purpose of furthering" language. The consequence was to make it easy for organizations to hide the source of the money funding electioneering communications. As long as there was no proof that a person "earmarked" the donation or gave it specifically for the purpose of furthering such ads, the Commission regulation does not appear to require disclosure of the donor. This is true even where it was clear that the organization would be producing electioneering communications.

But that was not the end of the FEC's attack on disclosure. When it came to actually enforcing its electioneering communication disclosure regulation, the FEC has effectively further limited the already narrow regulation. In 2010, three members of the six-member Commission blocked an enforcement investigation into whether Freedom's Watch, a 501(c)(4) corporation, violated the law by failing to disclose its major donor, Sheldon Adelson, after making electioneering communications. The three Commissioners interpreted the regulation even more narrowly than what is required by the plain language of the regulation, stating that donor disclosure is required "only if such donations are made for the purpose of furthering the electioneering communication that is the subject of the report. Otherwise, the corporation or union is under no obligation to disclose such information." In other words, unless a donor specifically designates their contribution for the airing of a particular ad, the Statement of Reasons of those three Commissioners held that no donor disclosure is required by law. Given that political ads are typically created after the money is raised to pay for them, this effectively means there is no required donor disclosure, even where the donor specifically designated their contribution for the general purpose of funding electioneering communications that have not yet been created.

It is also worth noting that in addition to the Commission's failure to adequately define and enforce the existing law, the Commission has failed to update its regulations in response to

Citizens United. To date, more than four years after *Citizens United*, the FEC has failed even to approve a Notice of Proposed Rulemaking to begin the process of revising its rules on disclosure in response to the Court's decision. In 2011 alone, the Commission deadlocked three times on the simple question of whether to initiate a post-*Citizens United* rulemaking before compromising and issuing a NPRM which does not address disclosure . This is important because the Supreme Court's endorsement of the value of disclosure of the sources of funding of such campaign advertising, and its apparent unawareness that the Commission had gutted the disclosure requirement of BCRA, can and should be addressed by the FEC in such a rulemaking. If it did so, the Commission could undo the lawless change made in its 2007 rulemaking, and restore the BCRA disclosure requirements mandated by Congress and upheld by the Supreme Court.

In 2011, Representative Chris Van Hollen brought suit against the FEC challenging the Commission's narrow electioneering communication disclosure regulation. The district court agreed with Representative Van Hollen that the FEC's disclosure regulation was contrary to law, resulting in the reinstatement of the BCRA statutory electioneering communication donor disclosure requirement. However, in September 2012, the D.C. Circuit Court of Appeals reversed the district court's decision and sent the case back to the district court for further review and proceedings. The district court has not yet rendered another decision in the *Van Hollen* case. Thus, independent expenditures and electioneering communications are both currently subject to the "for the purpose of furthering" donor disclosure requirements. As a result of the FEC's regulation, corporate and other donors to 501(c) organizations and other non-political committee entities may refrain from designating contributions "for the purpose of funding" election ads, and by so doing, avoid the statutory federal campaign-finance law donor disclosure requirements.

The result of these court decisions and the FEC's narrow interpretation and application of the electioneering communication disclosure requirement has been a steep decline in the disclosure of donors funding outside spending (spending that excludes the party committees). In 2008, outside groups (that did not register with the FEC or IRS as political entities) spent $69,187,001 on political ads without disclosing the funders of that advertising. This number more than quadrupled to $310,818,577 in secret funding in the 2012 election cycle. The numbers do not look much better when you consider the percentage of outside spenders that disclosed their donors. In 2008, only 64.5% of outside spending was accompanied by full donor disclosure. In 2012, this number had dropped to only 40.7% of outside spending accompanied by donor disclosure.[1]

The reason for these enormous drops in the level of donor disclosure is that these "dark money" expenditures are occurring through groups that claim that their "major purpose" is something other than participating in federal elections, and therefore do 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, 501(c)(7)s or other non-profit legal entities. As a result they do not disclose their donors in their IRS public filings, and because they claim that they received no funds designated for political advertisements as defined under the FEC's 2007 regulation, they do not report their

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

donors to the FEC either. By contrast, contributions to Super PACs (which are entities registered with the FEC as political committees) are publicly reported—unless the contributions are made through shell corporations or other entities designed to avoid disclosure of the true funder.

There are several promising proposals out there to begin to address the current lack of transparency and provide better disclosure in political fundraising. Senator King introduced a bill earlier this month, S.2207, that would require political committees to report all cumulative contributions of $1,000 or more to the FEC within 48 hours of receipt. The DISCLOSE Act, introduced in 2012, would have required any "covered organization"—a corporation, labor union, 501(c) organization (other than (c)(3)), Super PAC and section 527 organization—that spends $10,000 or more on a "campaign-related disbursement" to file a disclosure report with the FEC within 24 hours of the spending and to file a new report each time an additional $10,000 or more was spent. Covered organizations could have established a segregated bank account to make its campaign-related disbursements and would have then been required only to disclose the donors of more than $10,000 to that segregated account. If, however, the campaign-related disbursement was paid for out of its general treasury fund, the organization would have been required to disclose the source of all donations totaling more than $10,000. Finally, the American Bar Association adopted a resolution earlier this year urging Congress to mandate consistent disclosure of all political expenditures and contributions by all entities, regardless of type or tax status.

I would like to again quote Chief Justice Roberts' opinion in *McCutcheon*, "With modern technology, disclosure now offers a particularly effective means of arming the voting public with information." I would take the Chief Justice's remark even one step further and say that we have never had such powerful tools available to provide comprehensive and easily accessible disclosure of the sources of large donations to groups making significant expenditures in federal elections. Unfortunately, we do not have meaningful content to put these tools to good use.

Finally, I would like to address the arguments made by opponents of full disclosure that requiring such disclosure chills First Amendment-protected speech. These arguments rely on a line of Supreme Court cases that exempt organizations from disclosure requirements "if there [is] a reasonable probability that the group's members would face threats, harassment, or reprisals if their names were disclosed." *Citizens United*, 558 U.S. at 370.

The case most often cited to oppose disclosure requirements is *NAACP v. Alabama ex rel. Patterson*, 357 U.S. 449 (1958). In that case, the Supreme Court held that the free speech and association protections of the Fourteenth Amendment Due Process Clause prohibited the state of Alabama from compelling the NAACP to disclose its membership list. 357 U.S. at 466. The NAACP had made "an uncontroverted showing that on past occasions revelation of the identity of its rank-and-file members ha[d] exposed these members to economic reprisal, loss of employment, threat of physical coercion, and other manifestations of public hostility." *Id*. at 462. The Court concluded that the state's purported interest in disclosure of the NAACP's membership list—determining whether the organization had violated state law by failing to register as a foreign corporation doing business in the state—was insufficient "to justify the deterrent effect which we have concluded these disclosures may well have on the free exercise by petitioner's members of their constitutionally protected right of association." *Id*. at 463-64.

In today's debates, billionaires and associations of large corporations sometimes claim that they are in the shoes of the NAACP in Alabama in the 1950s. This distorts the context of that case, where a small and vulnerable minority organization faced not only threats of physical violence, including lynching, and cross burnings, but also the organized repression by the state of Alabama, including its state and local police forces, so that it had no reasonable expectation of protection by public safety officials.

Instead, the proper standard for an analysis of the disclosure obligations of wealthy and powerful individuals and business corporations in 2014 begins with the Supreme Court's decision in *Buckley v. Valeo*, where the Court made it clear that the constitutional standard for the "threats, harassment, or reprisals" exemption is exceedingly narrow. Under the formulation articulated in *Buckley*, the exemption is only available when the "threat to the exercise of First Amendment rights is so serious and the state interest furthered by disclosure so insubstantial that [the challenged disclosure requirements] cannot be constitutionally applied." 424 U.S. 1, 71 (1976). The *Buckley* Court explained that the narrow exemption from disclosure requirements that the Court described is "necessary because compelled disclosure has the potential for substantially infringing the exercise of First Amendment rights[,]" but "acknowledged that there are governmental interests sufficiently important to outweigh the possibility of infringement, particularly when the 'free functioning of our national institutions' is involved." *Id.* at 66 (citing *Communist Party v. Subversive Activities Control Bd.*, 367 U.S. 1, 97 (1961)). "The governmental interests sought to be vindicated by [the Federal Election Campaign Act] disclosure requirements are of this magnitude." *Id.*

The Supreme Court applied *Buckley*'s "reasonable probability" of "threats, harassment, or reprisals" standard for exemption from disclosure laws in *Brown v. Socialist Workers '74 Campaign Comm.*, 459 U.S. 87, 88 (1982). The case involved another very small and vulnerable political organization, in many ways similar to the NAACP. The Supreme Court held: "In light of the substantial evidence of past and present hostility from private persons and government officials against the SWP [*i.e.*, Socialist Workers Party], Ohio's campaign disclosure requirements cannot be constitutionally applied to the Ohio SWP." *Id*. at 102. The Court reviewed the evidentiary record compiled in the district court, explaining that the SWP had introduced evidence of incidents including "threatening phone calls and hate mail, the burning of SWP literature, the destruction of SWP members' property, police harassment of a party candidate, and the firing of shots at an SWP office." *Brown*, 459 U.S. at 99. The Court continued: "There was also evidence that in the 12- month period before trial 22 SWP members, including four in Ohio, were fired because of their party membership." *Id.* The Court explained that although the state of Ohio "contend[ed] that two of the Ohio firings were not politically motivated, the evidence amply supports the District Court's conclusion that 'private hostility and harassment toward SWP members make it difficult for them to maintain employment.'" *Id.*

More recently, in *McConnell v. FEC*, 251 F. Supp. 2d 176 (D.D.C. 2003), the U.S. District Court for the District of Columbia rejected an argument by the ACLU, Chamber of Commerce, National Association of Manufacturers, and National Rifle Association that, due to their "controversial" nature, the groups were entitled to the "threats, harassment, or reprisals" exemption from FECA's "electioneering communication" disclosure requirements. *Id*. at 242-47. The court explained that "[n]either *NAACP* nor *Brown* stand for the proposition that disclosure laws that apply to organizations 'whose positions are often controversial and whose

members and contributors frequently request assurances of anonymity' are facially unconstitutional." *Id*. at 245.

Most recently, the Supreme Court referenced *Buckley*'s "threats, harassment, or reprisals" standard in *Doe v. Reed*, 130 S. Ct. 2811 (2010). In *Doe*, proponents of a referendum to deny certain benefits to same-sex couples claimed that disclosing the referendum petitions would unconstitutionally subject signatories to threats, harassment and reprisals. *Id*. at 2820-21. The Court rejected the plaintiffs' facial challenge to the disclosure of referendum petitions and Justice Scalia observed:

> Plaintiffs raise concerns that the disclosure of petition signatures may lead to threats and intimidation. . . . There are laws against threats and intimidation; and harsh criticism, short of unlawful action, is a price our people have traditionally been willing to pay for self-governance. Requiring people to stand up in public for their political acts fosters civic courage, without which democracy is doomed.

Id. at 2836-37 (Scalia, J., concurring).

All of these cases show that the "threats, harassment, or reprisals" exemption is intended to carve out a narrow protected space for speakers who are sufficiently weak and vulnerable that they would otherwise be forced to retreat from the "marketplace of ideas" in the face of physical attack or other extreme reprisals. Thus, the "threat, harassment, or reprisals" exemption does not cover individuals and groups seeking anonymity merely because they are expressing controversial or potentially unpopular ideas. Instead the Court has wisely acknowledged that publicly taking responsibility for speech is an important element of debate in our representative democracy.

I thank this Committee for the invitation to testify today.