

**Testimony of
Chisun Lee, Senior Counsel, and Joanna Zdanys, Counsel,
Brennan Center for Justice at NYU School of Law¹**

**In Support of S.B. 5991, the Washington State DISCLOSE Act of 2018
Submitted to Members of the Senate Committee on State Government, Tribal
Relationships & Elections**

January 9, 2018

The Brennan Center commends the sponsors of the Washington State DISCLOSE Act of 2018 for their efforts to increase transparency in state election spending. The Act would fortify the integrity of Washington elections by combatting the growing scourge of anonymous spending, through reasonable and constitutionally sound means. We submit the following testimony in support of the Act and urge the Legislature to approve the Act as soon as possible.

1. Dark money is a threat to democracy

After *Citizens United* and other cases in recent years opened the floodgates of independent election spending, outside actors — including nonprofits — have poured exorbitant sums of money into political campaigns across the country. A large portion of this unlimited spending has come in the form of “dark money”— spending by entities that do not disclose their donors.² A similar phenomenon of “gray money”— spending by entities that disclose donors in a manner that makes the original source of funds difficult, if not impossible, to identify — is also responsible for a large share of unaccountable spending.³ Nonprofit organizations have become popular conduits for anonymous election spending, since, unlike political action committees, they traditionally have not been required to disclose their donors publicly even when they engage in election spending.⁴

Dark money threatens democracy. It thwarts accountability for misleading messages and, by obscuring the interests behind election ads, robs voters of information necessary to properly

¹ The Brennan Center is a non-partisan public policy and law institute that focuses on the fundamental issues of democracy and justice. The opinions expressed in this testimony are only those of the Brennan Center and do not necessarily reflect the opinions of NYU School of Law.

² CHISUN LEE ET AL., BRENNAN CTR. FOR JUSTICE, SECRET SPENDING IN THE STATES 5 (2016), https://www.brennancenter.org/sites/default/files/analysis/Secret_Spending_in_the_States.pdf.

³ *Id.*

⁴ *Id.* at 5.

evaluate them.⁵ In extreme cases, dark money groups including nonprofits have served to facilitate corruptive relationships between candidates and donors.⁶

The dark money problem is especially acute at the state and local levels. Hidden funders of advertising often hold direct economic interests in contests — from ballot initiatives to regulator elections — whose outcomes could have significant and immediate impacts on their bottom lines.⁷ Voters may be less familiar with state and local election issues and candidates than with national ones, giving dark money advertisers greater opportunity to persuade voters even as they dodge accountability for their messages. The generally lower costs of state and local elections, compared to federal elections, also can make dark money more powerful in this context.⁸

It is hardly news to this body that Washington’s politics are susceptible to dark money. In one instance that achieved national prominence, a 2013 ballot proposal to require the labeling of genetically modified foods drew record spending, including many millions in undisclosed contributions via a nonprofit trade association.⁹ Attorney General Bob Ferguson ultimately won a court judgment of \$18 million against the nonprofit for intentionally evading disclosure rules in that case.¹⁰ But the ruling came too late for voters in that ballot contest to consider. Prophylactic reforms are necessary to deter abuses of dark money before they are able to impact election outcomes, coupled with sound enforcement to ensure compliance.

Alongside the particularly grave risks for state and local elections, the lack of leadership from the federal government in combatting secret spending makes it all the more urgent that states act to increase transparency. The Washington DISCLOSE Act will provide crucial tools for addressing threats to the integrity of the democratic process and empowering citizens.¹¹

2. The DISCLOSE Act is a robust and reasonable means to reduce dark money and gray money in Washington elections

The DISCLOSE Act is a robust and reasonable means to increase transparency, accountability, and public confidence in elections and government. By closing significant loopholes in Washington’s campaign finance regime, the Act will help to deter corruption and the circumvention of existing anti-corruption laws and disclosure rules. These fundamental concerns of democracy are well recognized in the Supreme Court’s jurisprudence.¹²

⁵ *Id.* at 10.

⁶ For example, payday loan companies worked with former Utah Attorney General John Swallow’s campaign to use a network of generically named PACs and nonprofits to obscure approximately \$450,000 in donations for election advertisements. *See id.* at 11. The lenders sought Swallow’s protection from toughened consumer protection rules. *Id.* Swallow’s advisors asked the lenders to donate to dark money groups that would not disclose their donors instead of to his campaign in order not to make the contest a “payday race.” *Id.*

⁷ *Id.* at 10.

⁸ *Id.* at 3.

⁹ *Id.* at 15.

¹⁰ Joel Connelly, *Grocery lobby must pay \$18M for laundering campaign money*, SEATTLEPI (Nov. 2, 2016, 6:36 PM), <http://www.seattlepi.com/local/politics/article/Grocery-manufacturers-told-Pay-millions-for-10531088.php>.

¹¹ LEE ET AL., *supra* note 2, at 10.

¹² *See Citizens United v. Federal Election Comm’n*, 558 U.S. 310, 364 (2010) (“Political speech is so ingrained in our culture that speakers find ways to circumvent campaign finance laws.”); *McConnell v. Federal Election*

The DISCLOSE Act squarely addresses the most serious aspect of Washington’s dark money problem: the spending and donating of large sums for election purposes by nonprofits that face no public accountability. The measure is carefully crafted to prioritize addressing this problem while avoiding needlessly burdening nonprofits that do not engage in significant election activity.

The Act’s new disclosure requirements apply only to nonprofits that make contributions or expenditures to support or oppose a candidate or ballot proposition — election activity.¹³ Moreover, nonprofits need to devote remarkably “significant” sums to such activity before they would fall within the scope of the Act’s reporting requirements, at levels far higher than the thresholds that trigger disclosure requirements for political committees.¹⁴ To the lay person, then, the Act’s term for nonprofits that engage in such significant election activity — “incidental committees” — is something of a misnomer.¹⁵ Many if not most nonprofits may never engage in the extent of election spending or contributing that would trigger the Act’s reporting requirements.

It takes \$10,000 in annual election spending or contributions by a nonprofit for the Act’s reporting requirements to apply.¹⁶ Contrast that to the \$5,000 threshold that triggers similarly detailed reporting requirements for political committees.¹⁷ The new incidental committee provisions narrowly and reasonably address only amounts significant enough to pose serious risks associated with dark and gray money.

The Act’s new payment disclosure regime is also narrowly and reasonably crafted, requiring nonprofits that engage in significant election activity to report only their ten biggest individual donors who contributed \$10,000 or more and all donors who contributed \$100,000 or more in the given year.¹⁸ In contrast, political committees must disclose individual donors contributing over \$25 in the aggregate in a calendar year.¹⁹ This aspect of the Act underscores its sensible

Comm’n, 540 U.S. 93, 176 (2003) (noting, in context of regulation of solicitations, that “Congress’ concerns about circumvention are not merely hypothetical”).

¹³ See S.B. 5991 § 3(25) (definition of “incidental committee”).

¹⁴ See S.B. 5991 § 2; *id.* § 6(2) (outlining requirements for reports and exceptions thereto); *id.* § 6(2)(d) (creating exception for incidental committees such that payments received from any one person need not be reported unless the person is one of the committee’s ten largest sources of payments over \$10,000 in the current calendar year, or gave the committee \$100,000 or more in the current calendar year); WASH. ADMIN. CODE § 390-16-105(2) (exempting political committees from reporting requirements if neither their aggregate contributions nor their expenditures exceed \$5,000 and no contribution from any person exceeds \$500). In line with existing law, the Act requires reports to include the name and address of each contributor, along with the monetary value and date of each contribution and the aggregate value of all contributions received from each person during the campaign. S.B. 5991 § 6(2); WASH. REV. CODE § 42.17A.240(2).

¹⁵ *Id.* § 3.

¹⁶ S.B. 5991 § 4 (outlining disclosure thresholds for incidental committees).

¹⁷ See WASH. ADMIN. CODE § 390-16-105 (exempting political committees from certain reporting and inspection requirements if neither their aggregate contributions nor aggregate expenditures exceed five thousand dollars and no contributions from any person exceed five hundred dollars in the aggregate).

¹⁸ S.B. 5991 §§ 5(1), 6(2)(d).

¹⁹ See S.B. § 5991 § 6(2)(c); WASH. REV. CODE § 42.17A.240(2)(c) (contributions of no more than twenty-five dollars in the aggregate may be reported as one lump sum if the treasurer maintains a separate and private list including the identifying information otherwise required for reports). Political committees that qualify for mini

tailoring to shed light on large sums of dark money from nonprofits. To further ease nonprofits' compliance with the Act's limited disclosure requirements, the Legislature might consider permitting incidental committees to establish segregated accounts specific to spending and receiving for election purposes.²⁰

Among its other reasonable aspects, the Act contemplates exemptions for instances of unreasonable hardship, an important component of any disclosure regime.²¹ In addition, the Act directs the Washington Public Disclosure Commission to adopt rules for the dissolution of incidental committees, narrowing the law's temporal application to those groups.²²

3. The DISCLOSE Act stands on firm constitutional ground

The Supreme Court has long recognized that transparency requirements serve vitally important government interests, including “providing the electorate with information, deterring actual corruption and avoiding any appearance thereof”²³ The Court has also emphasized that disclosure advances key First Amendment interests by allowing voters “to make informed decisions and give proper weight to different speakers and messages.”²⁴ As Justice Scalia once noted:

Requiring people to stand up in public for their political acts fosters civic courage, without which democracy is doomed. For my part, I do not look forward to a society which . . . campaigns anonymously . . . hidden from public scrutiny and protected from the accountability of criticism. This does not resemble the Home of the Brave.²⁵

A long line of cases spanning over three decades—from *Buckley v. Valeo*²⁶ to *Citizens United v. Federal Election Commission*²⁷ and beyond—have consistently and repeatedly held that the disclosure of the source of campaign funds is constitutional. This undisrupted line of Supreme Court precedent leaves no doubt that Washington's DISCLOSE Act is constitutional.

reporting are not subject to this requirement. See WASH. ADMIN. CODE § 390-16-105(2) (exempting political committees eligible for mini reporting from the provisions of section 42.17A.240, subject to certain limited exceptions).

²⁰ Other jurisdictions have created a segregated account option for similar circumstances. See, e.g., CONN. GEN. STAT. ANN. § 9-601d(g)(1) (allowing persons to establish a dedicated independent expenditure account and limit relevant disclosures to the funds in that dedicated account); N.Y. EXEC. LAW § 172-f(2)(c) (allowing social welfare nonprofits to establish a segregated account subject to donor disclosures for communications related to public officials or public policy).

²¹ S.B. 5991 § 6 (stating that the commission may suspend or modify reporting requirements for contributions received by an incidental committee in cases of manifestly unreasonable hardship under WASH. REV. CODE § 42.17A.120).

²² S.B. 5991 § 5(9).

²³ *McConnell v. Federal Election Comm'n*, 540 U.S. 93, 196 (2003). Disclosure rules are subject to “exacting scrutiny,” which requires “a ‘substantial relation’ between the disclosure requirement and a ‘sufficiently important’ governmental interest.” *Citizens United v. Federal Election Comm'n*, 558 U.S. 310, 366-67 (2010).

²⁴ *Citizens United*, 558 U.S. at 371.

²⁵ *Doe v. Reed*, 561 U.S. 186, 228 (2010) (Scalia, J., concurring).

²⁶ 424 U.S. 1, 62-64, 84, 143, 155-161 (1976) (per curiam) (upholding constitutionality of federal disclosure requirements for political committees, candidates, and independent expenditures).

²⁷ 558 U.S. 310, 366-67 (2010).

Notably, even while dismantling other campaign finance regulations, the *Citizens United* Court upheld challenged disclosure requirements by an 8-1 vote.²⁸ These requirements “help citizens make informed choices in the political marketplace,” the Court noted.²⁹ The Court explained that transparency requirements comported with the First Amendment, because even if “[d]isclaimer and disclosure requirements may burden the ability to speak, . . . they impose no ceiling on campaign-related activities, and do not prevent anyone from speaking.”³⁰ The Court also made clear that disclosure of money in politics *further*s First Amendment values: “The First Amendment protects political speech; and disclosure permits citizens and shareholders to react to the speech of corporate entities in a proper way.”³¹

Federal circuit and district courts across the country have consistently upheld campaign finance disclosure laws, including their application to nonprofits.³² These courts have repeatedly stressed the importance of robust disclosure. As the Ninth Circuit Court of Appeals observed, in upholding the application of reporting requirements to a 501(c)(4) nonprofit in *Human Life of Washington, Inc. v. Brumsickle*:³³

Campaign finance disclosure requirements . . . advance the important and well-recognized governmental interest of providing the voting public with the information with which to assess the various messages vying for their attention in the marketplace of ideas. An appeal to cast one’s vote in a particular way might prove persuasive when made or financed by one source, but the same argument might fall on deaf ears when made or financed by another.³⁴

Disclosure requirements specifically for nonprofit incidental committees have been upheld as constitutional within the Ninth Circuit.³⁵ In *National Association for Gun Rights, Inc. v. Murry*,

²⁸ 558 U.S. at 316, 366-67.

²⁹ *Id.* at 367, 369.

³⁰ *Id.* at 366 (quoting *McConnell v. Federal Election Comm’n*, 540 U.S. 93, 201 (2003)).

³¹ *Id.* at 371.

³² See, e.g., *Human Life of Washington, Inc. v. Brumsickle*, 624 F.3d 990, 1013 (9th Cir. 2010) (upholding as constitutional, *inter alia*, Washington’s campaign finance disclosure requirements as applied to a 501(c)(4) nonprofit and noting, “[i]ndeed, it is the Supreme Court’s decision in *Citizens United* . . . that provides the best guidance regarding the constitutionality of the Disclosure Law’s requirements”); see also *Nat’l Org. for Marriage v. McKee*, 649 F.3d 34, 41 (1st Cir. 2011) (upholding Maine’s political committee financial disclosure requirements and finding that provisions “neither erect a barrier to political speech nor limit its quantity”), *aff’d*, No. 11-1196, 40 (1st Cir. Jan. 31, 2012) (finding that a “ballot question committee” law, like PAC laws, was constitutional and that “transparency is a compelling objective”), *cert. denied*, No. 11-559 (U.S. Feb. 27, 2012).

³³ The plaintiff in that case, *Human Life of Washington*, was a 501(c)(4) nonprofit. 624 F.3d 990, 994 (9th Cir. 2010); see also *About Us*, *Human Life of Washington, Inc.*, www.humanlife.net/about (last accessed Jan. 4, 2018).

³⁴ *Brumsickle*, 624 F.3d at 1008.

³⁵ See, e.g., *Montanans for Community Development, Inc. v. Motl*, 216 F. Supp. 3d 1128, 1153-54 (D. Mont. 2016) (dismissing 501(c)(4)’s challenge to Montana’s incidental committee reporting requirements for electioneering communications, finding that the “burdens associated with incidental committee reporting are minimal and narrowly tailored to the State’s interest in disclosure”); *Montanans for Community Development, Inc. v. Motl*, 54 F. Supp. 3d 1153, 1155-56, (D. Mont. 2014) (dismissing 501(c)(4)’s facial challenge to Montana’s disclosure scheme for political committees, which included incidental committees. In finding Montana’s political committee definitions and disclosure requirements constitutional facially and as applied, the court observed that incidental committees, such as plaintiff, were only subject to “minimal burden[s]” under the law and that the interest of Montana voters in transparent political funding outweighed that burden); *National Ass’n for Gun Rights, Inc. v. Murry*, 969 F. Supp. 2d 1262, 1270 (D. Mont. 2013) (reasoning, in rejecting nonprofit’s challenge to incidental committee disclosure and reporting requirements, that such requirements were substantially related to important government interest).

for example, the U.S. District Court of Montana rejected a nonprofit’s challenge to such reporting requirements, reasoning that the disclosure scheme was substantially related to the important government interest in informing the public about who was funding political campaigns.³⁶ In reaching this conclusion, the court recognized that “the public’s interest in transparent political funding outweighs the minimal burden the incidental disclosure requirements impose, even for one-time expenditures.”³⁷

Further, Washington need not restrict the Act’s new disclosure requirements to nonprofits with “the major purpose” of political advocacy.³⁸ The Ninth Circuit has rejected the notion that a nonprofit must have “the major purpose” of political advocacy in order to be deemed constitutionally a political committee.³⁹ Indeed, in *Yamada v. Snipes*, the Ninth Circuit even dismissed the argument that disclosure regulations should reach only organizations with a primary purpose of political advocacy.⁴⁰ The court recognized that “[l]arge organizations that spend only one percent of their funds on political advocacy likely have many other, more important purposes—but this small percentage could amount to tens or hundreds of thousands of dollars in political activity, depending on the size of the organization.”⁴¹

* * *

³⁶ 969 F. Supp. 2d at 1269-70. *Murry* concerned a prior version of Montana’s current disclosure regime. That law required, among other things, periodic disclosure reports for incidental committees whose contributions or expenditures to local candidates exceeded \$500. *See id.* at 1265.

³⁷ *Id.* at 1270 (citing *Family PAC v. McKenna*, 685 F.3d 800, 809 (9th Cir. 2012)).

³⁸ Federal circuit courts have reached diverging conclusions as to whether an organization must have “the major purpose” of political advocacy in order to be subject to disclosure provisions. *Compare Yamada v. Snipes*, 786 F.3d 1182, 1198, 1200 (9th Cir. 2015) (holding that Hawaii’s noncandidate committee reporting and disclosure requirements were sufficiently tailored as applied to plaintiff even without a “primary” modifier and rejecting notion that “regulations should reach only organizations with a primary purpose of political advocacy”) and *Brumsickle*, 624 F.3d at 1009, 1011 (rejecting the notion that the First Amendment categorically prohibits the government from imposing disclosure requirements on groups without “the” major purpose of engaging in political advocacy) with *N.C. Right to Life, Inc. v. Leake*, 525 F.3d 274, 289 (4th Cir. 2007) (“[P]olitical committees can only be regulated if they have the support or opposition of candidates as their primary purpose[.]”)

³⁹ *Brumsickle*, 624 F.3d at 1009, 1011 (recognizing the “‘fundamental organizational reality’ that most organizations ‘do not have just one major purpose’”); *accord Yamada*, 786 F.3d at 1198-1200. It is true that both cases observed that the laws’ provisions avoided reaching “incidental advocacy.” *See Yamada*, 786 F.3d at 1198; *Brumsickle*, 624 F.3d at 1011. However, neither case held that incidental advocacy could not be subject to disclosure. Moreover, in *Yamada*, the Ninth Circuit observed that Hawaii’s registration and reporting requirements were not triggered until an organization made more than \$1,000 in aggregate contributions and expenditures during a two-year election period. *Yamada*, 786 F.3d at 1199. The court reasoned that this threshold was high enough to “ensure[] that an organization *must be more than incidentally engaged* in political advocacy before it will be required to register and file reports as a noncandidate committee.” *Id.* (emphasis added). Although the plaintiff in *Yamada* was a for-profit electrical contractor, the Ninth Circuit concluded that the distinction between such an entity and a nonprofit advocacy corporation was “not constitutionally significant” in this context. *Id.* at 1200. Notwithstanding the somewhat muddled semantics, under *Yamada*, the Legislature can be confident that incidental committees meeting the Washington DISCLOSE Act’s much higher thresholds are engaged in more than “incidental” activity.

⁴⁰ *Yamada*, 786 F.3d at 1200 (“[Plaintiff’s] argument that regulations should reach only organizations with a primary purpose of political advocacy also ignores the ‘fundamental organizational reality that most organizations do not have just one major purpose’”) (quoting *Brumsickle*, 624 F.3d at 1011).

⁴¹ *Id.*

The Washington DISCLOSE Act of 2018 closes loopholes that have allowed veiled actors to inject large sums of money into elections without transparency, which thwarts public accountability, deprives voters of important information, heightens the risk of corruption and undue influence by deep-pocketed donors, permits the circumvention of existing anti-corruption laws, and undermines public confidence in elections and government. By enacting it, Washington’s leaders will be shoring up a campaign finance disclosure regime that has long been the will of its citizens.⁴² Washington will join a vanguard of states and cities that — recognizing that disclosure remains an effective and constitutional way of increasing democratic accountability in an age of unlimited spending — have recently moved to strengthen transparency including for nonprofits that engage in election activity.⁴³ The Brennan Center endorses the Act, and urges the Washington legislature to pass this legislation promptly.

⁴² S.B. 5991 § 2. As the bill’s drafters noted, the citizens of Washington State overwhelmingly support campaign finance disclosure. The two initiatives underpinning Washington’s current campaign finance system passed with over seventy-two percent of the popular vote, with winning margins in every county in the state. *Id.* See also *Brumsickle*, 624 F.3d at 996 (noting that Washington’s public disclosure law was enacted by ballot initiative in 1972, with the support of 72% of the voting public).

⁴³ Last year’s California DISCLOSE Act further strengthening the state’s already robust disclosure regime, including new measures that would apply to nonprofits engaging in covered activity. *Brown Approves ‘California Disclose Act,’ Vetoes Extending License Restrictions*, CAPITAL PUBLIC RADIO (Oct. 7, 2017), <http://www.capradio.org/articles/2017/10/07/brown-approves-california-disclose-act-vetoes-extending-license-restrictions/>; A.B. 249 (Ca. 2017), https://leginfo.legislature.ca.gov/faces/billNavClient.xhtml?bill_id=201720180AB249 (last accessed Jan. 7, 2018); see LEE ET AL., *supra* note 2, at 7. In 2015, a bipartisan coalition of Montana legislators enacted a sweeping set of transparency laws, also with application to nonprofits for covered activity. See 2015 Mont. Laws Ch. 259. Other efforts to strengthen disclosure are currently under way in Idaho, Arizona, and other jurisdictions. Betsy Z. Russell, *Campaign Finance Working Group Convenes at Capitol, Working on Changes . . .*, THE SPOKESMAN-REVIEW (Nov. 27, 2017, 8:24 AM), <http://www.spokesman.com/blogs/boise/2017/nov/27/campaign-finance-working-group-convenes-capitol-working-changes/>; Laurie Roberts, *Arizona voters have a chance to demand dark money disclosure*, USA TODAY (Nov. 10, 2017, 12:01 PM), <https://www.usatoday.com/story/opinion/op-ed/laurieroberts/2017/11/10/arizonans-soon-have-chance-demand-dark-money-disclosure/851669001/>.