

**Testimony of
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On Improving Campaign Finance Disclosure in West Virginia and H.B. 4463

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Subcommittee C of the Joint Committee on the Judiciary, West Virginia Legislature**

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On behalf of the Brennan Center, I would like to thank the members of the Committee for giving me the opportunity to testify today. As a native of Parkersburg and as a person who is truly proud to call West Virginia his homeland, disclosure of political spending in West Virginia is of particular importance to me.

West Virginia has been a leader on disclosure of political spending. When the state was met with the events that led to the famous *Caperton v. Massey* case, the West Virginia Legislature responded by enacting new disclosure requirements. Furthermore, in recent years, the Legislature has twice responded to court rulings in order to ensure that robust disclosure exists in this state.

But more can be done. Political spenders are finding new ways to evade disclosure provisions and the Legislature must act if these challenges are to be met. Existing provisions can be improved to ensure that all political spending is disclosed.

In this testimony, I first discuss how political spending has increased in recent years, both at the federal level and in West Virginia. Much of this spending has been made with inadequate disclosure. Second, I explain why disclosure of political spending is valuable. Third, I discuss the U.S. Supreme Court's strong support for robust disclosure requirements.

¹ The Brennan Center is a non-partisan public policy and law institute that focuses on the fundamental issues of democracy and justice. The Center's Money in Politics project works to reduce the real and perceived influence of money on our democratic values. Our attorneys defend campaign finance, public funding, and disclosure laws in courts around the country, and provide legal guidance to state and local reformers through counseling, testimony, and public education. The views expressed in this testimony are solely those of the Brennan Center.

Finally, I examine specific provisions of H.B. 4463, a disclosure bill proposed during the last legislative session. As a whole, the Brennan Center believes H.B. 4463 is a strong bill that includes many important improvements, such as requiring top donor disclaimers, expanding the electioneering communications window, and ensuring that the original sources of political donations are ultimately revealed. The Brennan Center believes the bill could be strengthened by requiring all underlying donors to be disclosed, requiring all artificial entities to be subject to full disclosure, and increasing the amount of time disclosing entities have to file their reports.

I. Money in Politics Trends

A. Outside Spending Has Exploded

In 2010, the U.S. Supreme Court held in *Citizens United* that independent political spending cannot corrupt and therefore cannot be limited, regardless of the identity of the spender.² Outside spending has skyrocketed in the wake of the decision. The 2010 federal elections included \$300 million in non-party outside spending while the 2012 federal elections had over \$1 billion.³ These amounts are far greater than the \$69 million and \$338 million in non-party outside spending that occurred in 2006 and 2008, respectively.⁴ So far in the 2014 cycle, \$395 million in non-party outside spending has occurred.⁵

In West Virginia state races, over \$33 million was contributed to candidates and committees in both 2010 and 2012—amounts far greater than the \$15 million contributed in 2008, which included a gubernatorial race.⁶ Non-party outside spending has increased in recent cycles,

² *Citizens United v. FEC*, 558 U.S. 310, 357 (2010) (“[I]ndependent expenditures, including those made by corporations, do not give rise to corruption of the appearance of corruption.”). Foreign individuals and corporations can still constitutionally be prohibited from participating in American elections. *Bluman v. FEC*, 132 S. Ct. 1087, 1087 (2012), *summarily aff’g* 800 F. Supp. 2d 281 (D.D.C. 2011); 2 U.S.C. § 441e(a).

³ Ctr. for Responsive Politics, *Outside Spending 2010*, OPENSECRETS.ORG, http://www.opensecrets.org/outsidespending/fes_summ.php?cycle=2010 (last visited Sept. 10, 2014); Ctr. for Responsive Politics, *Outside Spending 2012*, OPENSECRETS.ORG, http://www.opensecrets.org/outsidespending/fes_summ.php?cycle=2012 (last visited Sept. 10, 2014).

⁴ *See* Ctr. for Responsive Politics, *Outside Spending 2006*, OPENSECRETS.ORG, http://www.opensecrets.org/outsidespending/fes_summ.php?cycle=2006 (last visited Oct. 9, 2014); Ctr. for Responsive Politics, *Outside Spending 2008*, OPENSECRETS.ORG, http://www.opensecrets.org/outsidespending/fes_summ.php?cycle=2008 (last visited Oct. 9, 2014).

⁵ *See* Ctr. for Responsive Politics, *Outside Spending 2014*, OPENSECRETS.ORG, http://www.opensecrets.org/outsidespending/fes_summ.php?cycle=2014 (last visited Oct. 19, 2014).

⁶ Nat’l Inst. on Money in State Politics, *Election Overview - West Virginia 2010*, FOLLOWTHEMONEY.ORG, <http://www.followthemoney.org/election->

going from over \$2.2 million in 2008 and \$300,000 in 2010 to \$6.0 million in 2011 and \$4.1 million in 2012.⁷ Notably, electioneering communications dwarfed independent expenditures, making up over 74% of outside spending in every completed election cycle since 2008.⁸ As of October 17, \$417,000 in outside spending had occurred during this election cycle.⁹

B. Inadequate Disclosure

Beyond this, further sums likely went completely unreported, both at the federal level and in West Virginia, due to inadequate statutory definitions of political spending. As will be explained below, sham issue statements that are intended to influence elections, but are published outside the so-called “electioneering communications window,” are entirely unregulated and unreported.

Additionally, spending by entities that reported the amounts they spent but not their underlying donors has increased in recent election cycles. Nondisclosing entities spent over \$135 million and \$ 308 million at the federal level in 2010 and 2012, respectively.¹⁰ The current election cycle has already seen more than \$100 million in spending by nondisclosing groups—an amount “well ahead of what was spent on congressional races at this point in any other cycle,” according to the Center for Responsive Politics.¹¹

overview?s=WV&y=2010 (last visited Sept. 10, 2014); Nat’l Inst. on Money in State Politics, *Election Overview - West Virginia 2012*, FOLLOWTHEMONEY.ORG, <http://www.followthemoney.org/election-overview?s=WV&y=2012> (last visited Sept. 10, 2014); Nat’l Inst. on Money in State Politics, *Election Overview - West Virginia 2008*, FOLLOWTHEMONEY.ORG, <http://www.followthemoney.org/election-overview?s=WV&y=2008> (last visited Sept. 10, 2014).

⁷ See W. Va. Sec’y of State, Electioneering Communications & Independent Expenditures, 2006-2013, <http://apps.sos.wv.gov/elections/ecie/> (last visited Oct. 9, 2014).

⁸ *Id.* An electioneering communication is a political ad that mentions a candidate close to an election without expressly advocating for or against a candidate (i.e., uses words like “vote for,” “support,” or “oppose”).

⁹ W. Va. Sec’y of State, Electioneering Communications & Independent Expenditures, 2014, <http://cfrs.wvsos.com/#/ieec> (last visited Oct. 17, 2014).

¹⁰ Ctr. for Responsive Politics, *Outside Spending by Disclosure, Excluding Party Committees*, OPENSECRETS.ORG, <https://www.opensecrets.org/outsidespending/disclosure.php> (last visited Oct. 14, 2014).

¹¹ Robert Maguire, Ctr. for Responsive Politics, *Dark Money Hits \$100 Million With Help from Single-Candidate Groups*, OPENSECRETS.ORG (Oct. 9, 2014) <http://www.opensecrets.org/news/2014/10/dark-money-hits-100-million-with-help-from-single-candidate-groups/>.

Inadequate disclosure leaves the public in the dark about who is trying to influence their votes and the votes of their elected officials (which, in West Virginia, might include the justices of the Supreme Court) after the election is over.

II. The Benefits of Disclosure

Full disclosure furthers at least four distinct democratic interests: the voter informational interest, the anti-corruption interest, the anti-circumvention interest, and the due process interest. The U.S. Supreme Court has recognized the importance of all of these interests.

A. Voter Informational Interest

Disclosure informs the public about who is trying to influence their votes before the election, allowing them to vote with complete knowledge of the electoral debate.¹² Many advertisements not run by candidates are sponsored by organizations which are unknown to the public or that have misleading names that belie their true financial sponsors. Robust disclosure ensures that donors cannot hide behind these organizations' anodyne names; voters will know who is trying to influence them, and to whom their elected officials are likely to be responsive, before they go to the polls. Note that the voter informational interest, by itself, was sufficient to justify the federal disclosure and disclaimer requirements at issue in *Citizens United*.¹³

B. Anti-Corruption Interest

Disclosure helps prevent corruption and the appearance of corruption by allowing the public and regulators to monitor for improper arrangements between elected officials and political donors and spenders. The U.S. Supreme Court explained in its famous 1976 *Buckley v. Valeo* decision that disclosure "expos[es] large contributions and expenditures to the light of publicity [which] may discourage those who would use money for improper purposes either before or after the election."¹⁴ The Court added that "A public armed with information about a candidate's most generous supporters is better able to detect any post-election special favors that may be given in return."¹⁵

¹² See *Buckley v. Valeo*, 424 U.S. 1, 66-67 (1976).

¹³ See *Citizens United v. FEC*, 558 U.S. 310, 369 (2010). *Citizens United* upheld the requirements that federal electioneering communications include the disclaimer of "[sponsoring organization] is responsible for the content of this advertising," and that spenders of more than \$10,000 on electioneering communications within one calendar year report that spending, and the organization's underlying donors, to the Federal Election Commission. *Id.* at 366-67.

¹⁴ *Buckley*, 424 U.S. at 67 (internal citation omitted).

¹⁵ *Id.*

C. Anti-Circumvention Interest

Disclosure is necessary to ensure the enforcement of other campaign finance laws, such as contribution limits and contribution source bans (such as the ban on foreign contributions). The *Buckley* Court explained that “[R]ecordkeeping, reporting, and disclosure requirements are an essential means of gathering the data necessary to detect violations of the contribution limitations.”¹⁶ Without this information, it would be extremely difficult to discover violations of other campaign finance laws.¹⁷

D. Due Process Interest

Disclosure is needed to protect the due process rights of litigants before elected judges. In *Caperton*, the U.S. Supreme Court recognized that in exceptional circumstances, a judge must recuse himself or herself where there is a “serious risk of actual bias—based on objective and reasonable perceptions—when a person with a personal stake in a particular case had a significant and disproportionate influence in placing the judge on the case by raising funds or directing the judge’s election campaign when the case was pending or imminent.”¹⁸ Without full disclosure, it would be difficult or impossible for a litigant to successfully seek a judge’s recusal on this ground.¹⁹

Full disclosure protects our elections, the legislative process afterward, and the impartiality of our courts.²⁰

III. Robust Disclosure Provisions are Constitutional

As a general matter, requiring the disclosure of political contributions and spending is indisputably constitutional under U.S. Supreme Court precedent. In *Citizens United*, an 8-1 majority of the Court held that disclosure is constitutional, saying that “disclosure

¹⁶ *Id.* at 67-68.

¹⁷ The Fourth Circuit held that the anti-circumvention interest is inapplicable to disclosure of independent spending in West Virginia because contributions to independent-expenditure-only entities cannot be limited. *Ctr. for Individual Freedom v. Tennant*, 706 F.3d 270, 282-83 (4th Cir. 2013). However, if West Virginia banned foreign contributions and expenditures, this would not be the case. *See, e.g., SpeechNow.org v. FEC*, 599 F.3d 686, 698 (D.C. Cir. 2010) (“[R]equiring disclosure . . . deters and helps expose violations of other campaign finance restrictions, such as those barring contributions from foreign corporations or individuals.”).

¹⁸ *Caperton v. A.T. Massey Coal Co.*, 556 U.S. 868, 884 (2009).

¹⁹ *See also* CIARA TORRES-SPELLISCY, *TRANSPARENT ELECTIONS AFTER CITIZENS UNITED* 11-12 (2011), *available at* <http://www.brennancenter.org/publication/transparent-elections-after-citizens-united>.

²⁰ The electoral integrity interest, not discussed here, is also furthered by disclosure. *See id.* at 10-11.

requirements may burden the ability to speak, but they impose no ceiling on campaign-related activities and do not prevent anyone from speaking.”²¹ In its recent *McCutcheon* decision, the Court reaffirmed the constitutionality of disclosure requirements, explaining that “disclosure of contributions minimizes the potential for abuse of the campaign finance system.”²² Disclosure of political spending “enables the electorate to make informed decisions and give proper weight to different speakers and messages.”²³

Additionally, the U.S. Court of Appeals for the Fourth Circuit, the jurisdiction of which includes West Virginia, has upheld as constitutional state disclosure provisions that extend beyond their federal counterparts.²⁴ In other words, the federal provisions are not the outer constitutional limit of permissible disclosure requirements.

In the following section, I discuss specific provisions of H.B. 4463. As part of that discussion, I include relevant precedents and authorities discussing the constitutionality of each provision.

IV. Specific Provisions of H.B. 4463

A. Top Donors Disclaimer

H.B. 4463 would require that political television and radio ads include the names of the sponsor’s top donors in the ads.²⁵ Television ads would include the top five donors while radio ads would include the top two donors.²⁶ Many other states have implemented similar provisions.²⁷ Because only donors of at least \$10,000 in the past twelve months are eligible to be listed as a top donor on an ad,²⁸ there is no danger that an individual who gives \$20 to the National Rifle Association or Planned Parenthood will inadvertently have his or her name included on political ads as a top donor.

Transparency can be greatly improved by requiring outside spender political ads to include a list of top donors. Rather than being told that an ad is sponsored by a group with an anodyne name like “Mountaineers for Country Roads,” West Virginians would be able to

²¹ *Citizens United v. FEC*, 558 U.S. 310, 366 (2010) (internal citations and quotation marks omitted).

²² *McCutcheon v. FEC*, 134 S. Ct. 1434, 1459 (2014).

²³ *Citizens United*, 558 U.S. at 371.

²⁴ *See generally* *Ctr. for Individual Freedom v. Tennant*, 706 F.3d 270 (4th Cir. 2013)

²⁵ Proposed W. VA. CODE § 3-8-15(e)(1)(B), (C).

²⁶ *Id.*

²⁷ *See, e.g.*, ALASKA STAT. § 15.13.090(c); CAL GOV’T CODE §§ 84506; CONN. GEN. STAT. § 9-621(c)(1), (h); HAW. REV. STAT. § 11-393 (effective Nov. 5, 2014); WASH. REV. CODE ANN. § 42.17A.320(4).

²⁸ Proposed W. VA. CODE § 3-8-15(e)(4)(C), (D).

immediately know who is really behind the money. Under current West Virginia disclosure laws, outside spenders are only required to include the name of the sponsoring organization in the ad—not the organization’s funders.²⁹

Examples abound of groups using misleading names to shield their funders’ identities. The U.S. Supreme Court has explained that entities run “[A]dvertisements while hiding behind dubious and misleading names like: ‘The Coalition-Americans Working for Real Change’ (funded by business organizations opposed to organized labor) [and] ‘Citizens for Better Medicare’ (funded by the pharmaceutical industry)”³⁰ In one particularly egregious example, during a 2010 Colorado ballot measure election, a group called “Littleton Neighbors Voting No,” spent \$170,000 to defeat the ballot measure, which would have imposed a restriction that would have prevented Wal-Mart from coming to town. Disclosure reports later revealed that the group was exclusively funded by Wal-Mart.³¹

Finally, West Virginia has experienced this phenomenon first hand. In 2004, as part of the events leading up to *Caperton*, Don Blankenship spent about \$3 million supporting a candidate for justice of the West Virginia Supreme Court of Appeals.³² Just under \$2.5 million of this funded “And for the Sake of the Kids,” an organization created by Blankenship.³³ Due to inadequate disclosure at the time, not all West Virginians knew of Blankenship’s involvement until after voting had occurred. Though West Virginia’s disclosure laws have since improved, they still would not provide for Blankenship’s name being on the face of the organization’s ads if they were run in the same manner today.

The Brennan Center documented other examples of groups with misleading names in its testimony on the federal DISCLOSE Act of 2012.³⁴

Importantly, full underlying donor disclosure is necessary to ensure that this top donor disclaimer provision works effectively. As West Virginia law stands now, an organization’s underlying donors are disclosed only if those donors gave money “for the purpose of furthering” independent expenditures or if the donors’ money was “used to pay for”

²⁹ See W. VA. CODE §§ 3-8-2(e); 3-8-2b(e) (only requiring statement of identity of the spender and the fact that the ad isn’t authorized by a candidate).

³⁰ *McConnell v. FEC*, 540 U.S. 93, 197 (2003) (quoting *McConnell v. FEC*, 251 F. Supp. 2d. 176, 237 (D.D.C. 2003)).

³¹ See Def.’s Response Br. to Pls.’ Motion for Summary Judgment, *Sampson v. Coffman*, 06-cv-01858 at 43-44 (D. Co. 2007) (Dkt. #34).

³² *Caperton v. A.T. Massey Coal Co.*, 556 U.S. 868, 873 (2009).

³³ *Id.*

³⁴ Adam Skaggs & Mimi Marziani, Brennan Ctr. for Justice, Testimony On S. 2219, The Democracy Is Strengthened by Casting Light On Spending in Elections Act (“DISCLOSE”) Act of 2012, Submitted to the Comm. on Rules and Admin., U.S. Senate 6-7 (Mar. 28, 2012), *available at*

<http://www.brennancenter.org/sites/default/files/legacy/Democracy/CFR/Brennan%20Center%20DISCLOSE%20Testimony%203%2028%2012.pdf>.

electioneering communications.³⁵ This language potentially leaves open the so-called earmarking loophole where if a donor doesn't specifically state that he or she wants his or her donation to be used for a political purpose, it won't have to be disclosed.³⁶ This loophole is how organizations have spent hundreds of millions of dollars on political ads at the federal level without having to disclose their underlying donors.³⁷

The best way to address this problem is to require politically active organizations to disclose all of their donors who give amounts over a certain threshold. However, many politically active organizations engage in activities other than political spending, making it unreasonable to require the disclosure of all donors. There are two ways to address this problem. First, organizations can set up segregated accounts for their political expenditures. Only donors to the political account can be disclosed and only funds in the political account can be used for political spending. Second, the law can exempt donors from disclosure if they specify that their funds can't be used for political spending and the recipient organization agrees to abide by that restriction.

Looking at H.B. 4463, full underlying donor disclosure is provided for with respect to donors of at least \$10,000, but not for donors of smaller amounts.³⁸ To address this problem, W. Va. Code § 3-8-2(b)(1)(E) and § 3-8-2b should be amended to require the disclosure of all underlying donors who give over statutorily specified amounts and are not exempt in one of the manners described above.

Both the U.S. Supreme Court and the Fourth Circuit have upheld the disclosure of underlying donors in reports that are ultimately made available to the public.³⁹ Additionally, the U.S. Supreme Court and the Southern District of West Virginia federal court have upheld the constitutionality of the requirement that political ads identify their organizational sponsors.⁴⁰ While the Brennan Center is not aware of any court that has weighed in on the specific question of the constitutionality of requiring top donor names in ads,⁴¹ taking

³⁵ W. VA. CODE §§ 3-8-2(b)(1)(E), 3-8-2b.

³⁶ See Skaggs & Marziani, *supra* note 34, at 2-5.

³⁷ *Id.*

³⁸ See Proposed W. VA. CODE § 3-8-8a(a)(2)(E), (F).

³⁹ *McConnell v. FEC*, 540 U.S. 93, 194-96 (2003); *Ctr. for Individual Freedom v. Tennant*, 706 F.3d 270, 290-92 (4th Cir. 2013).

⁴⁰ *Citizens United v. FEC*, 558 U.S. 310, 366-67 (2010); *Ctr. for Individual Freedom v. Tennant*, 849 F. Supp. 2d 659, 715 (S.D. W. Va. 2011), *rev'd in part on other grounds*, 706 F.3d 270 (4th Cir. 2013).

⁴¹ However, the U.S. District Court for the Eastern District of California upheld as constitutional a California requirement that a nongovernmental organization with a name "that would reasonably be understood to imply that the organization is composed of, or affiliated with, law enforcement, firefighting, emergency medical, or other public safety personnel" disclose in its mailings the total number of members in the organization. *Landslide Commc'ns, Inc. v. California*, No. 2:13-cv-00716-GEB-KJN, 2013 WL 6844372 (E.D. Cal. Dec. 27, 2013) (upholding CAL. GOV'T CODE § 84305.7(c)).

disclosure to the next step by simply combining two clearly constitutional practices does not seem like it should raise significant issues. Professor Richard Briffault of Columbia Law School has explained that top donor disclaimers are likely constitutional so long as the resulting disclaimer is not “so long or time-consuming as to unduly eat into the campaign message.”⁴² Additionally, as noted above, many states have had top donor disclaimer requirements for years and no successful challenge has been made against those laws.⁴³

B. Expansion of the Electioneering Communication Window

Under H.B. 4463, the electioneering communications window would be expanded from its current size of 30 days before a primary election and 60 days before a general election to 90 days before a primary election and 120 days before a general election.⁴⁴ The electioneering communication window should be expanded to ensure disclosure applies to all political ads.

An electioneering communication is a political ad run close to an election that mentions a candidate but does not explicitly encourage the viewer to vote for or against a candidate by using words such as “vote for,” “support,” or “defeat.” The regulation of electioneering communications is necessary to ensure that a large percentage of political spending does not evade disclosure. If electioneering communications are not regulated, an entire swatch of political advertising could potentially be completely outside the campaign finance system,

⁴² Richard Briffault, *Nonprofits and Disclosure in the Wake of Citizens United*, 10 ELECTION L.J. 337, 360 (2011). Notably, H.B. 4463 includes an exception to the top donor disclaimer requirement when “including the top . . . contributors list in the communication would constitute a hardship . . . by requiring a disproportionate amount of the content of the communication to consist of the top . . . contributors list.” Proposed W. VA. CODE § 3-8-15(e)(1)(B), (C). “The Supreme Court has accepted the principle of disclaimer/attribution requirements, notwithstanding the interference with the ad sponsor’s message. The issue posed by these laws is whether the important public purpose of making disclosure more effective can justify including the names of top contributors in an ad Requiring nonprofits to include the names of their top funders in their ads could pass constitutional muster. With many electorally active nonprofits operating under nondescriptive names, the statement that a particular nonprofit paid for an ad may not actually tell the voters “who is speaking about a candidate.” Many electorally active nonprofits are operating in effect as pools of electorally active firms or wealthy individuals. If an individual firm or person were to pay for an independent expenditure or electioneering communication directly, that sponsor would have to make the necessary disclaimer. But if those firms or individuals pool their funds and channel their expenditures or communications through an intermediary organization with an anodyne name, the disclaimer does not disclose their role. Thus, extending the disclaimer to include the most significant funder or the top three to five donors is consistent with the principle supporting disclaimer, subject to the limitation that the required list not be so long or time-consuming as to unduly eat into the campaign message.” Briffault, *supra*, at 360.

⁴³ See *supra* note 27 and accompanying text.

⁴⁴ W. VA. CODE 3-8-1a(12)(A)(ii)(I)-(II); Proposed W. VA. CODE 3-8-1a(12)(A)(ii)(I)-(II).

meaning that not only are the amounts spent undisclosed, but also the sponsoring organization's name and that organization's donors.

While the 30 and 60 day thresholds may have been adequate at the time they were enacted at the federal level, the reality of today is that modern campaigns extend far beyond these periods. Indeed, many organizations have spent money on purported "issue ads" right up until the day before the 30- or 60-day window would have opened (and full disclosure would have been required), only to suddenly change strategies to avoid donor disclosure.⁴⁵ Estimates of how much is spent outside the windows are difficult to make precisely because there is no required disclosure of this spending, but the Center for Responsive Politics estimated that \$100 million was spent on sham issue ads outside the electioneering communications window before the federal 2012 primary elections.⁴⁶

The Fourth Circuit has held that West Virginia may constitutionally regulate electioneering communications in a way that goes further than the federal government.⁴⁷ The Fourth Circuit has also explained that legislatures have a fair amount of latitude in deciding how to implement disclosure compared to other campaign finance regulations.⁴⁸ In discussing how high or low contribution limits should be, the *Buckley* Court explained that so long as the court is satisfied that the limit is necessary, "a court has no scalpel to probe whether [one] ceiling might not serve as well as [another]. Such distinctions in degree become significant

⁴⁵ See, e.g., S.V. Dáte, *End of the 'Tell President Obama' Ads?*, NPR'S IT'S ALL POLITICS BLOG (Aug. 30, 2012, 4:52 PM), <http://www.npr.org/blogs/itsallpolitics/2012/08/30/160337319/end-of-the-tell-president-obama-ads>; Matea Gold, *Crossroads GPS tries to squeak past disclosure window*, L.A. TIMES, Aug. 1, 2012, <http://articles.latimes.com/2012/aug/01/news/la-pn-crossroads-avoids-spending-disclosure-20120731> ("Crossroads [GPS] has no plans to air ads that will trigger reporting in the [electioneering communications] window,' spokesman Jonathan Collegio said in a statement.").

⁴⁶ Robert Maguire, *Spending Reported by Nondisclosing Groups Well Ahead of 2010*, OPENSECRETS.ORG (Aug. 6, 2012), <http://www.opensecrets.org/news/2012/08/spending-reported-by-nondisclosing-groups-well-ahead-of-2010/>.

⁴⁷ *Ctr. for Individual Freedom v. Tennant*, 706 F.3d 270, 281-85 (4th Cir. 2013). In *Center for Individual Freedom*, the Fourth Circuit struck down West Virginia's then-existing electioneering communications definition because the state regulated some types of media while excluding others from regulation within a sufficient justification. *Id.* at 285. The Fourth Circuit held that the state could regulate electioneering communications in a manner that goes beyond the federal standards, and, in fact, expressly disclaimed the district court's contrary holding on this point. *Id.* at 285 ("[The district court's decision is] erroneous because it found that West Virginia could not regulate non-broadcast media as a general matter."). The legislature amended the law again in July 2013 after *Center for Individual Freedom*.

⁴⁸ *N.C. Right to Life Comm. Fund for Indep. Political Expenditures v. Leake*, 524 F.3d 427, 439 (4th Cir. 2008) (citing *Buckley v. Valeo*, 424 U.S. 1, 64, 80 (1976)) (requiring only that there be a "substantial relation" between the government interest and the information disclosed).

only when they can be said to amount to differences in kind.”⁴⁹ Similarly here, the courts have no scalpel to determine whether a 30 day threshold is proper while a 90 day threshold is not. Given recent history and the ever-expanding length of the campaign season, the legislature is well within its constitutional powers to require the disclosure of advertisements that mention candidates further out from the election than 30 or 60 days.

C. Covered Transfers

H.B. 4463 would require the disclosure of what are referred to as “covered transfers”—the transfer between two entities of large amounts of funds that are intended or expected to be used for a political purpose.⁵⁰ As disclosure provisions have become more robust, new methods of avoiding disclosure have developed. One of these methods has created the so-called “Russian doll problem,” where the imposition of multiple artificial entities between the original donor and the ultimate spender of political money prevents the donor from ever being disclosed.⁵¹ Regulating covered transfers is the best available solution to this problem.

For example, suppose that big donor A gives \$25,000 to shell corporation B, which in turn passes the money on to super PAC C, which then spends the money on a political ad. Under most disclosure regimes, including West Virginia’s, even if super PAC C must report its donors, only the immediately underlying donor—shell corporation B—will appear on super PAC C’s reports; big donor A’s identity is never revealed. In many cases, the pattern is reiterated as money is passed through a succession of artificial entities, further reducing the likelihood of discovering the original source of the money to essentially the point of impossibility.⁵²

⁴⁹ *Buckley*, 424 U.S. at 30 (internal citations and quotation mark omitted).

⁵⁰ The bill lists six specific situations where monetary transfers will be considered covered transfers. Namely, 1) if the donor suggests the money be used for political purposes, 2) makes the donation in response to a solicitation seeking money for political purposes, 3) discussed making political expenditures with the recipient, 4) knew or had reason to know that the recipient spent at least \$50,000 in the past two years on political expenditures, 5) knew or had reason to know that the recipient would spend at least \$50,000 on political expenditures in the next two years, or 6) had spent at least \$50,000 itself on political expenditures in the past two years. *See* Proposed W. VA. CODE § 3-8-8a(f).

⁵¹ The term “Russian doll problem” refers to the Russian nesting dolls, also called matryoshka dolls, in which a person opens one doll only to find another, smaller version inside, which in turn contains another doll, and so on.

⁵² For an example of a fairly complex web of inter-organizational giving, see Matea Gold, *Koch-backed political network, built to shield donors, raised \$400 million in 2012 elections*, WASH. POST (Jan. 5, 2014), http://www.washingtonpost.com/politics/koch-backed-political-network-built-to-shield-donors-raised-400-million-in-2012-elections/2014/01/05/9e7cfd9a-719b-11e3-9389-09ef9944065e_story.html; Ctr. for Responsive Politics, *The Koch Network: A Cartological Guide*, OPENSECRETS.ORG (Jan. 7, 2014), <http://www.opensecrets.org/news/2014/01/koch-network-a-cartological-guide/> (chart showing transfers between the dozens of entities in the network).

Indeed, many media investigations have sought to uncover the individuals behind some of these groups and gone far beyond public reports, yet have come up empty. In 2010, a group named “Coalition to Protect Seniors” spent over \$425,000 on independent expenditures at the federal level.⁵³ A *New York Times* reporter tracked the organization to an address at a Mail Boxes Etc. store in Wilmington, Delaware, but couldn’t learn anything more.⁵⁴ In 2011, a group named “Citizens for a Strong America” ran ads against a Wisconsin Supreme Court candidate, but provided no public information about its organization, leadership, or funders. The address listed for the group led to a mailbox at a local UPS store and its phone number led to a full voicemail box. The Center for Media and Democracy eventually discovered that the organization was controlled by a leader of Americans for Prosperity, a 501(c)(4) that spent over \$36 million on independent expenditures and electioneering communications in 2012.⁵⁵ The Brennan Center documented more examples in its testimony on the federal DISCLOSE Act.⁵⁶

The current version of H.B. 4463 limits those who potentially have to report covered transfers to “covered organizations”—a list that includes corporations, section 501(c) nonprofit entities (except for 501(c)(3) entities), section 527 political organizations, and political committees.⁵⁷ The list of covered entities should be expanded to include all artificial entities. Recent history has shown, especially at the federal level, that when particular types of entities are not subject to disclosure, political spenders who wish to avoid disclosure will funnel their money through those entities.⁵⁸ Notably, there has been concern that limited liability companies may become the new vehicle for anonymous political spending if 501(c) entities can no longer be used to circumvent disclosure requirements in the future.⁵⁹ The

⁵³ Ctr. for Responsive Politics, *Coalition to Protect Seniors*, OPENSECRETS.ORG, <http://www.opensecrets.org/outsidespending/detail.php?cycle=2010&cmte=Coalition%20to%20Protect%20Seniors> (last visited Oct. 9, 2014).

⁵⁴ Mike McIntire, *The Secret Sponsors*, N.Y. TIMES, Oct. 3, 2010, at WK1, *available at* <http://www.nytimes.com/2010/10/03/weekinreview/03mcintire.html>.

⁵⁵ Lisa Graves, *Group Called “Citizens for a Strong America” Operates out of a UPS Mail Drop but Runs Expensive Ads in Supreme Court Race?*, CENTER FOR MEDIA AND DEMOCRACY’S PRWATCH (Apr. 2, 2011, 6:37 PM), <http://www.prwatch.org/news/2011/04/10534/group-called-citizens-strong-america-operates-out-ups-mail-drop-runs-expensive-ad>; Ctr. for Responsive Politics, *Americans for Prosperity Outside Spending 2012*, OPENSECRETS.ORG, <http://www.opensecrets.org/outsidespending/detail.php?cycle=2012&cmte=Americans+for+Prosperity> (last visited Oct. 17, 2014).

⁵⁶ See Skaggs & Marziani, *supra* note 34, at 6-7.

⁵⁷ Proposed W. VA. CODE § 3-8-8a(e).

⁵⁸ See, e.g., Eliza Newlin Carney, *Will Taxable Groups Hide Political Cash?*, CQ WEEKLY (Mar. 8, 2014), <http://public.cq.com/docs/weeklyreport/weeklyreport-000004436511.html>.

⁵⁹ Letter from Lawrence Norden et al., Brennan Ctr. for Justice, to John A. Koskinen, Comm’r of Internal Revenue, Re: IRS-2013-0038, Guidance for Tax-Exempt Social Welfare Organizations on Candidate-Related Political Activities 1-2, 7 (Feb. 27, 2014), *available at* <http://www.brennancenter.org/sites/default/files/analysis/BrennanIRSRulemakingComments.pdf>.

current version of H.B. 4463 does not include limited liability companies within the ambit of the term “covered organization.” Section 501(c)(3) entities should also be included for similar reasons. Beyond this, the Fourth Circuit held that statutorily exempting 501(c)(3) entities from disclosure requirements is unconstitutional,⁶⁰ so including an exemption for 501(c)(3) might open the door to a constitutional challenge.

The proposal in H.B. 4463 closely resembles the covered transfer provisions in the federal DISCLOSE Act of 2014.⁶¹ According to the Brennan Center’s research, Connecticut is the only state to have enacted a law regulating covered transfers and enacted its law in June 2013.⁶² Because the regulation of covered transfers is relatively new, the constitutionality of doing so has not yet been tested. However, as explained above, the Supreme Court has strongly endorsed thorough disclosure and the disclosure of underlying donors. Covered transfers are likely to be upheld as constitutional for this reason.

Additionally, the proposal has a number of safeguards to ensure that it does not extend too far or become too burdensome to pass First Amendment muster. First, if an organization chooses to exclusively use a segregated bank account for its political spending, only donors to that account will be disclosed.⁶³ Second, only underlying donors of at least \$10,000 since the first day of the preceding calendar year will be subject to disclosure.⁶⁴ Through these safeguards, only the biggest of spenders and donors will be subject to the covered transfer disclosure requirements.

D. Accelerated Disclosure

H.B. 4663 provides for the accelerated disclosure of political activity. Under the proposal, each time a covered organization engages in \$10,000 worth of “campaign-related disbursements”—independent expenditures, electioneering communications, and covered transfers—that organization must disclose that activity within 24 hours to the Secretary of State.⁶⁵

⁶⁰ *Ctr. for Individual Freedom*, 706 F.3d at 289-90. The Fourth Circuit so held because the political activities that 501(c)(3) organizations are prohibited from engaging in by federal tax law are not necessarily coextensive with West Virginia’s definition of “electioneering communication.” *Id.*

⁶¹ See DISCLOSE Act of 2014, S. 2516, 113th Cong. § 2(b)(1) (2014) (proposed Federal Election Campaign Act of 1971 § 324(f)).

⁶² See CONN. GEN. STAT. § 9-601(29) (defining “covered transfer”); *id.* § 9-601d(f)-(g) (describing covered transfer disclosure report requirements); *id.* § 9-621(h), (j), (l) (utilizing covered transfers for more effective top donor disclaimers); 2013 Conn. Legis. Serv. P.A. 13-180 (H.B. 6580) (enacted June 18, 2013).

⁶³ Proposed W. VA. CODE § 3-8-8a(a)(2)(E).

⁶⁴ Proposed W. VA. CODE § 3-8-8a(a)(2)(E), (F).

⁶⁵ Proposed W. VA. CODE § 3-8-8a(1), (4).

Prompt disclosure is important. If disclosure takes too long or, worse, occurs after an election is over, it can leave voters uninformed and make it more difficult to monitor for improper relationships between political spenders and their beneficiaries.⁶⁶

However, requiring disclosure too quickly can cause courts to find disclosure requirements unduly burdensome.⁶⁷ While the interest in disclosure is great in the closing weeks before an election, there is not as much urgency when the election is still many months away. For this reason, the Brennan Center recommends that the state allow for a longer period of time—perhaps 48 hours—for the reporting of campaign-related expenditures which aggregate to \$10,000 and are made more than 60 days before an election.⁶⁸ The Southern District of West Virginia federal court upheld the constitutionality of 48-hour disclosure in 2011.⁶⁹

E. Disclosure to Shareholders and Members

H.B. 4463 would require that covered organizations include its campaign finance filings in their regular reports to their shareholders and members. As the Brennan Center explained in a 2012 report, while states can require that entities incorporated within the state disclose political spending to their shareholders and members, states generally cannot do the same

⁶⁶ See *Citizens United v. FEC*, 558 U.S. 310, 370 (2010) (“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. . . . [C]itizens 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.” (internal citations and quotation marks omitted)).

⁶⁷ See, e.g., *Ctr. for Individual Freedom v. Tennant*, 849 F. Supp. 2d 659, 714 (S.D. W. Va. 2011) (discussing 10th Circuit case striking down twenty-four hour deadline for all reports), *rev’d in part on other grounds*, 706 F.3d 270 (4th Cir. 2013).

⁶⁸ Currently, any person (which includes artificial entities, see W. VA. CODE § 3-8-1a(20)) who engages in \$1,000 in independent expenditures must register with the Secretary of State. W. VA. CODE § 3-8-2(b)(1). Each time a person spends \$10,000 on independent expenditures, those expenditures must be reported within 48 hours. W. VA. CODE § 3-8-2(d)(1). Within 15 days of an election, independent expenditures of at least \$1,000 (\$500 for some local offices) must be reported within 24 hours. W. VA. CODE § 3-8-2(c). A person who spends \$5,000 on electioneering communications must report that spending within 24 hours. W. VA. CODE § 3-8-2b(a)(1)-(2). Within 15 days of an election, electioneering communications of \$1,000 must be reported instead. W. VA. CODE § 3-8-2b(a)(2). See also W. VA. SEC’Y OF STATE’S OFFICE, ELECTIONS DIV., 2014 BEST PRACTICES GUIDE FOR CAMPAIGN FINANCE 17-18, *available at* <http://www.sos.wv.gov/elections/administrators/Documents/Guides/Campaign%20Finance%20Guide%202014.pdf> (describing independent expenditure reporting schedule).

⁶⁹ *Ctr. for Individual Freedom v. Tennant*, 849 F. Supp. 2d 659, 711-15 (S.D. W. Va. 2011), *rev’d in part on other grounds*, 706 F.3d 270 (4th Cir. 2013).

for entities incorporated in other states because of the internal affairs doctrine.⁷⁰ While such a requirement is constitutional and within the powers of the West Virginia Legislature,⁷¹ the provision is unlikely to have a significant impact because it is easily circumvented. The better method of achieving full disclosure is to ensure that all political contributions and expenditures are disclosed, regardless of which entity is engaging in the spending.

* * * * *

Transparency of political spending is essential to a healthy democracy. In the absence of disclosure, vast sums will be spent to seek influence with public officials and potentially mislead the public, which is left with no means of discovering who is behind the money. In an era when the Supreme Court has said that the “ingratiation and access” big spenders can buy are “not corruption” and “embody a central feature of democracy,”⁷² complete and prompt disclosure is more important than ever before. The Brennan Center strongly urges the West Virginia Legislature to enact a law strengthening the state’s campaign finance disclosure provisions.

I would be glad to take any questions that you might have. Thank you for the opportunity to testify today.

⁷⁰ See DAVID EARLEY & IAN VANDEWALKER, TRANSPARENCY FOR CORPORATE POLITICAL SPENDING: A FEDERAL SOLUTION 9-12 (2012), *available at* <http://www.brennancenter.org/publication/transparency-corporate-political-spending-federal-solution>.

⁷¹ *Id.* at 9-11.

⁷² *McCutcheon v. FEC*, 134 S. Ct. 1434, 1441 (2014) (internal citations and quotation marks omitted).