

**Testimony of  
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**Submitted to the  
MARYLAND HOUSE OF DELEGATES  
WAYS AND MEANS COMMITTEE**

**For the hearing on  
HOUSE BILL 93**

**February 15, 2011**

Ms. Chairwoman and members of the Committee:

As an attorney with the Brennan Center for Justice and a native Marylander, I am here to express my strong and enthusiastic support for enhancing transparency in Maryland's elections. As detailed below, robust disclosure of money in politics is crucial to ensure the accountability of our elected officials to their constituencies. But Maryland's current campaign finance disclosure regime is not adequate. Substantial sums of money can be spent to influence this state's elections without any public knowledge – or accountability. As the Attorney General's Advisory Committee on Campaign Finance concludes in a recent report,<sup>2</sup> the legislature should take immediate action to shed light on independent electoral spending. For the reasons set forth below, House Bill 93 – most notably, by requiring reporting of independent expenditures – would strengthen Maryland's disclosure law substantially. Passing that legislation can be the first step towards raising Maryland state politics out of the shadows.

**Disclosure of Money in Politics is a Necessary Component of the Electoral Process**

There is no doubt that disclosure of money in politics is a necessary component of a well-functioning democracy. In *Buckley v. Valeo*, the U.S. Supreme Court's 1976 seminal case on this topic, the Court explained that campaign finance disclosure serves three vital governmental interests:

- (1) “disclosure provides the electorate with information as to where political campaign money comes from and how it is spent;”
- (2) “disclosure requirements

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<sup>1</sup> Mimi Marziani serves as counsel for the Brennan Center's Democracy Program where her work focuses on money in politics.

<sup>2</sup> See MARYLAND ATTORNEY GENERAL'S ADVISORY COMMITTEE ON CAMPAIGN FINANCE, CAMPAIGN FINANCE REPORT (2011), available at <http://www.oag.state.md.us/Reports/campaignfinance.pdf>.

deter actual corruption and avoid the appearance of corruption by exposing large contributions and expenditures to the light of publicity;” and (3) “disclosure requirements are an essential means of gathering the data necessary to detect violations” of other campaign finance regulations.<sup>3</sup>

In the decades following *Buckley*, the Court has repeatedly affirmed that, in our First Amendment tradition, secrecy is the exception and transparency the constitutional rule. Or, in the Court’s words, “debate on public issues should be uninhibited, robust, and wide-open.”<sup>4</sup> Thus, the Court has affirmed federal laws requiring disclosure of independent expenditures – *i.e.*, political communications that are produced independently of any candidate and expressly urge voters to either elect or reject a federal candidate.<sup>5</sup> The Court has also upheld disclosure of federal “electioneering communications,” broadcast communications that refer to a clearly identified candidate and are widely disseminated to the candidate’s electorate right before a federal election.<sup>6</sup>

In fact, while invalidating longstanding restrictions on corporate political spending, the Court’s recent *Citizens United* decision affirmed that disclosure and disclaimer requirements for political advertisements are presumptively valid. In doing so, eight Justices agreed that “[d]isclaimer and disclosure requirements . . . impose no ceiling on campaign-related activities, and do not prevent anyone from speaking.”<sup>7</sup> And, the Court went on to praise transparency of money in politics, explaining:

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.<sup>8</sup>

### **Maryland’s Current Campaign Finance Disclosure Regime is Not Adequate**

Currently, Maryland law requires meaningful disclosure of election-related spending only from candidates and those groups that file as a political committee with the State Board of Elections. Generally speaking, these provisions encompass candidate-controlled committees and groups organized for the specific and primary purpose of influencing Maryland state elections. It excludes, however, all other individuals or groups that spend money to influence a campaign, even if they

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<sup>3</sup> *Buckley v. Valeo*, 424 U.S. 1, 66-68 (1976) (citations and internal quotation marks omitted).

<sup>4</sup> *Id.* at 14 (quoting *NY Times Co. v. Sullivan*, 376 U.S. 254, 270 (1964)).

<sup>5</sup> *See id.* at 76. “The term independent expenditure means an expenditure by a person for a communication expressly advocating the election or defeat of a clearly identified candidate that is not made in cooperation, consultation, or concert with, or at the request or suggestion of, a candidate, a candidate’s authorized committee, or their agents, or a political party committee or its agents . . . .” Independent Expenditure, 11 C.F.R. § 100.16 (2011). *See also* 2 U.S.C. § 431(17).

<sup>6</sup> *See Citizens United v. FEC*, 130 S. Ct. 876, 914-16 (2010); *McConnell v. FEC*, 540 U.S. 93, 194-96 (2003). An electioneering communication is “any broadcast, cable, or satellite communication that (1) Refers to a clearly identified candidate for Federal office; (2) Is publicly distributed within 60 days before a general election for the office sought by the candidate; or within 30 days before a primary or preference election, or a convention or caucus of a political party that has authority to nominate a candidate, for the office sought by the candidate, and the candidate referenced is seeking the nomination of that political party; and (3) Is targeted to the relevant electorate . . . .” Electioneering Communication, 11 C.F.R. § 100.29(a) (2011). *See also* 2 U.S.C. § 434(f)(3).

<sup>7</sup> *Citizens United*, 130 S. Ct. at 914 (citations and internal quotation marks omitted).

<sup>8</sup> *Id.* at 916.

spend significant amounts of money on political advertisements, provided that their spending is not formally coordinated with any particular campaign. In other words, Maryland law does not require disclosure of independent expenditures.<sup>9</sup>

This is a significant problem with real consequences. In recent years, it has become obvious that candidates and political parties are no longer the exclusive – or even primary – electoral spenders.<sup>10</sup> In many state and federal elections, independent groups, including out-of-state organizations, increasingly devote substantial resources to influence the outcome of elections. Indeed, residents of Maryland’s First Congressional District experienced this phenomenon first hand last November during the hotly-contested race between Frank M. Kratovil and state senator Andrew P. Harris. In total, more than \$4.1 million was spent by independent groups to influence that election, almost as much as the \$5 million spent by the actual candidates.<sup>11</sup> And, as is typical, the vast majority of the outside spending was used to produce negative television commercials – or, as they are more commonly called, attack ads.<sup>12</sup>

In today’s elections, it is not unusual for expensive media blitzes by independent organizations to overwhelm candidate spending.<sup>13</sup> Yet, without laws requiring these groups to promptly disclose their political spending, Marylanders cannot know who is funding these advertisements, or even begin to understand why. Given the voters’ acute interest in this information, it is no surprise that only six states, of which Maryland is one, fail to require this type of reporting.<sup>14</sup>

Clearly, Maryland must update its campaign finance law to require robust disclosure of independent spending. To paint a full and accurate picture of electoral spending, disclosure requirements must identify the spender *and* the people or entities providing the underlying funding (over a reasonably low threshold amount). Otherwise, corporate or other political actors seeking to veil their involvement in partisan politics may seek to funnel their funds through another organization, evading meaningful disclosure and thus any public accountability. This, too, has been a substantial problem nationwide.<sup>15</sup>

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<sup>9</sup> There has been at least one exception to this general rule: Maryland required disclosure of independent expenditures of \$10,000 or more made in connection with a 2008 constitutional referendum on slot machines.

<sup>10</sup> See CENTER FOR RESPONSIVE POLITICS, 2010 OUTSIDE SPENDING BY RACES (last visited Feb. 14, 2011), <http://www.opensecrets.org/outsidespending/summ.php?disp=R>.

<sup>11</sup> See *id.*

<sup>12</sup> *Id.*

<sup>13</sup> See *id.*; PUBLIC CITIZEN, OUTSIDE JOB: WINNING CANDIDATE ENJOYED ADVANTAGE IN UNREGULATED THIRD-PARTY SPENDING IN 58 OUT OF 74 PARTY-SHIFTING CONTESTS (2010), available at <http://www.citizen.org/documents/Outside-Job-Report-20101103.pdf>; Gail Russell Chaddock, *Outside Spending Fuels Negative Ads in Tight Colorado Senate Race*, CHRISTIAN SCI. MONITOR, Nov. 1, 2010, <http://www.csmonitor.com/USA/Election-2010/Senate/2010/1101/Outside-spending-fuels-negative-ads-in-tight-Colorado-Senate-race>. See also David Harrison, *Big Money Invades Small Legislature Districts*, STATELINE (Oct. 28, 2010), <http://www.stateline.org/live/details/story?contentId=523939> (noting that in Ohio state legislative elections, candidates raised approximately \$134,000 compared to estimated \$1 million spent by anonymous, outside sources in just two races).

<sup>14</sup> Alabama, Indiana, Maryland, New Mexico, North Dakota, and Wyoming are the only states that currently fail to require disclosure of independent expenditures. See THE CAMPAIGN DISCLOSURE PROJECT, GRADING STATE DISCLOSURE (last visited Feb. 15, 2011), <http://campaigndisclosure.org/gradingstate/lawfindings.html>.

<sup>15</sup> See Megan R. Wilson, *Who’s Buying This Election? Close to Half the Money Fueling Outside Ads Comes from Undisclosed Donors*, OPENSECRETS BLOG (Nov. 2, 2010, 6:09 PM), <http://www.opensecrets.org/news/2010/11/whos-buying-this-election.html> (indicating that as of Election Day 2010, 42% of outside spending in election cycle was made by organizations with anonymous funders).

On top of its scarce disclosure requirements, Maryland’s existing definition of independent expenditures is too narrow.<sup>16</sup> It encompasses only independent spending for express advocacy – historically defined by the inclusion of certain “magic words of express advocacy” like “vote for,” “elect,” and “support,” or “vote against,” “defeat,” and “reject.”<sup>17</sup> This means that “sham issue ads” – advertisements that avoid the language of express advocacy, but mention a candidate by name in an attempt to influence the outcome of an upcoming election – could fall outside of the scope of any new regulation.

Sham issue ads have been widespread at the federal level and in many states for years; typically driven by a desire to avoid disclosure under narrow definitions of independent expenditure. Accordingly, federal law and the laws of seventeen states have created a new category of independent expenditures – electioneering communications. Generally speaking, electioneering communications are mass-media communications that refer to a clearly identified candidate and are widely disseminated shortly before an election. Like disclosure of independent spending, disclosure of electioneering communications is necessary to keep voters apprised of who has been attempting to influence their vote. Otherwise, it may be impossible for the electorate to exercise an informed vote on Election Day. Voters have a right to know who is attempting to influence their elections.

In addition, current Maryland law does not require disclaimers that clearly identify the sponsor and main funders of independent political advertisements. Disclaimers – or “stand-by-your-ad” requirements – are an important way to instantly provide voters with key information. Indeed, in *Citizens United*, the Supreme Court explained that federal disclaimer requirements are necessary to “insure that . . . voters are fully informed about the person or group who is speaking,” and “avoid confusion by making clear that the ads are not funded by a candidate or political party.”<sup>18</sup> Disclaimer requirements are thus a critical component of any comprehensive disclosure regime.

Finally, Maryland allows business corporations to spend money without informing their shareholders. As federal law does not currently require disclosure from publicly-held corporations (or any others), an average shareholder has little hope of fully understanding the scope of the companies’ political expenditures – leaving them in the dark about how the political use of their investment dollars may be in conflict with their own opinions and with the corporations’ bottom line. This can have troubling constitutional ramifications: Without disclosure, shareholders may unwittingly fund political spending at odds with their own political philosophies. Accordingly, Maryland should also ensure that shareholders receive the information they need to hold corporations accountable.

### **House Bill 93 Would Enhance Disclosure in Several Significant Ways**

House Bill 93 would address several of the loopholes in Maryland’s current law. Most significantly, the Bill would require periodic reporting of independent expenditures once any particular person or entity spends \$10,000 or more in an election cycle on political advertisements.<sup>19</sup> After a person or

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<sup>16</sup> Under Md. Code Ann., Elec. Law § 1-101 (bb), an independent expenditure is “an expenditure by a person to aid or promote the success or defeat of a candidate if the expenditure is not made in coordination with, or at the request or suggestion of, the candidate, a campaign finance entity of the candidate, or an agent of the candidate.”

<sup>17</sup> The Supreme Court in *Buckley* established these guideposts. See 424 U.S. at 44 n.52.

<sup>18</sup> *Citizens United*, 130 S. Ct. at 915 (citation and internal quotation marks omitted).

<sup>19</sup> See House Bill 93, available at <http://mlis.state.md.us/2011rs/bills/hb/hb0093f.pdf>. Specifically, reporting is required once a person or entity has spent over \$100,000 on “campaign material that is a public communication,” defined as “a

entity exceeds the \$10,000 threshold, additional reports would be required for each subsequent \$10,000 spent. Each report must: identify the spender; account for the date and amount of each expenditure; note the candidate or ballot initiative that was supported or opposed by the advertisement; and identify those who contributed funds to the spender during the relevant time period.

In addition, any entity that files an independent expenditure report and “submits regular, periodic reports to its shareholders, members, or donors on its finances or activities” must include information about political spending in its regular report. And, if that entity maintains a website, it must include a link to its independent expenditure report from its homepage.

Clearly, House Bill 93 would significantly enhance disclosure by remedying current deficiencies in Maryland’s campaign finance law. Moreover, the proposed reforms stand on firm constitutional ground. As noted, the Supreme Court has repeatedly held that robust reporting of independent spending meant to influence electoral results is constitutional. Requiring an entity to post information about political spending online and to include that information in its regular public reports is also well within a state’s regulatory power – indeed, as noted above, Maryland could go farther and require disclaimers on the face of political advertising as well.

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For the reasons set forth above, the reforms contained in House Bill 93 should be embraced by the House of Delegates and quickly advanced into law. This Committee should, however, continue to explore additional ways to promote transparency in Maryland politics – in particular, by regulating electioneering communications and by requiring that prominent disclaimers be placed on the face of all political advertising. There is no doubt that Maryland voters are entitled to complete and accurate information about political spending in their elections.

Please do not hesitate to contact me for further information.

Respectfully submitted,

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communication by means of any broadcast, cable, satellite communication, newspaper, magazine, outdoor advertising facility, mass mailing, or telephone bank to the general public, or any other form of general public political advertising.”