BRENNAN
CENTER
FOR JUSTICE

Brennan Center for Justice
at New York University School of Law

161 Avenue of the Americas
12th Floor
New York, New York 10013
212.998.6730 Fax 212.995.4550
www.brennancenter.org

July 13, 2012

Re: *Democracy is Strengthened by Casting Light on Spending in Elections Act of 2012, the "DISCLOSE Act of 2012"*

Dear Senator:

On behalf of the Brennan Center for Justice at NYU School of Law, I write to reiterate our support for the Democracy is Strengthened by Casting Light on Spending in Elections (DISCLOSE) Act of 2012, S. 3369, and to urge you to support this crucial legislation. We commend Senator Sheldon Whitehouse for his continuing leadership, and urge you to support his effort to increase transparency and accountability in American elections.

The amount of outside money spent in the 2012 election will shatter historical records, and the majority of this money will not be subject to meaningful disclosure.

Even at this relatively early stage in the 2012 election cycle, voters have already been inundated with a record amount of outside election spending. As of July 13, third-party groups have reported spending $168 million, more than four times the amount reported by similar groups at the same point during the 2010 midterm elections, and more than double that reported by such groups at the same point during the 2008 election cycle.[1]

This reported total represents only a fraction of the money that is actually being spent to influence the outcome of the election. Because of current deficiencies in federal disclosure rules, a broad range of advertisements aired by political non-profit groups are not reported—despite the fact that voters uniformly interpret these advertisements as appeals to vote for or against federal candidates. These advertisements make up a large portion of the political ads that voters are exposed to: data from the Campaign Media and Analysis Group indicates that two-thirds of advertising bought by the biggest outside spenders during this election cycle originates from tax-exempt non-profits, which are not subject to federal disclosure policies.[2] Similarly, analysis of the public files of Michigan broadcasters by the

---

[1] Ctr. for Responsive Politics, *Total Outside Spending by Election Cycle, Excluding Party Committees*, OPENSECRETS.ORG, http://www.opensecrets.org/outsidespending/cycle_tots.php?cycle=2012&view= Y &chart=N (last visited July 13, 2012).

[2] Mike McIntire & Nicholas Confessore, *Tax-Exempt Groups Shield Political Gifts of Businesses*, N.Y. TIMES, July 7, 2012, at A1.

Michigan Campaign Finance Network revealed that a group of political non-profits coordinated a roughly $6 million barrage of attack ads targeting the Obama administration before and after Michigan's presidential primary—all of which were carefully tailored to avoid triggering *any* disclosure.[3]

These developments are consistent with the outside-spending pattern established during the 2010 election, when 501(c)(4) "social welfare" organizations that generally do not disclose donors outpaced super PACs that do disclose, by a three-to-two margin.[4] Nearly ninety percent of 501(c)(4) spending came from groups that never publicly revealed their funders.[5] More undisclosed spending flows into our elections from 501(c)(6) trade organizations like the U.S. Chamber of Commerce, which spent $50 million in the 2010 elections (though it reported only $32 million in spending),[6] and by 501(c)(5) labor organizations—none of which are required to report who funds their political spending.

The DISCLOSE Act of 2012 would bring disinfecting sunlight to elections, and is carefully crafted to avoid any constitutional problems.

The DISCLOSE Act of 2012 would rectify the loopholes in federal law that prevent citizens from knowing who is funding the millions of dollars in political ads that seek to influence their votes. It would do so by requiring disclosure of contributors who donate more than $10,000 to any 527 or 501(c) organization engaged in electioneering activity.[7]

DISCLOSE would achieve this transparency without imposing any unconstitutional burdens on political speakers. The Supreme Court has twice recently upheld disclosure requirements by near unanimous, eight-to-one votes. First, in *Citizens United v. FEC*, the Court identified disclosure as the remedy to any concerns over a potential surge in outside spending by moneyed interests in the wake of the decision. "[D]isclosure," Justice Kennedy wrote, "is a less restrictive alternative" to other campaign finance regulations and "provides shareholders and citizens with the information needed to hold corporations and elected officials accountable for their positions and supporters."[8] Shortly thereafter, in *Doe v. Reed*, the Court again embraced disclosure. Justice Scalia observed that disclosure of political speech

---

[3] Press Release, Michigan Campaign Finance Network, Nonprofits Blast Obama with $6M "Issue Ad" campaign: 90% of Campaign Avoids Accountability (July 7, 2012), http://www.mcfn.org/press.php?prId=151.

[4] Michael Beckel, *Nonprofits Outspent Super PACs in 2010, Trend May Continue*, IWATCHNEWS.ORG (June 18, 2012, 3:35 PM), http://www.iwatchnews.org/2012/06/18/9147/nonprofits-outspent-super-pacs-2010-trend-may-continue.

[5] *Id.*

[6] Brody Mullins, *Impact of Money Mixed in Midterm*, Wall St. J., Nov. 8, 2010, at A4; Peter H. Stone, *U.S. Chamber Boosts Election Budget to $75 Million*, IWATCHNEWS.ORG (July 1, 2010, 6:56 PM), http://www.iwatchnews.org/2010/07/01/2629/us-chamber-boosts-election-budget-75-million.

[7] S. 3369, 112th Cong. § 324(a)(2) (2012).

[8] *Citizens United v. FEC*, 130 S. Ct. 876, 915-916 (2010).

requires people to stand behind their political speech and thus "fosters civic courage, without which democracy is doomed."[9]

In light of this clear constitutional guidance, arguments DISCLOSE would violate the First Amendment are profoundly misguided. Critics like Senator Mitch McConnell, who recently claimed that DISCLOSE would "violate[] the Constitution, as it would discourage people from freely associating with a cause or group,"[10] have their history—and constitutional law—backwards.

Senator McConnell has improperly tried to justify his opposition to disclosure by citing a case from the civil rights era, *NAACP v. Alabama*—suggesting that those spending millions of secret dollars to sway the 2012 election are similar to members of the NAACP in 1950s Alabama, who feared severe discrimination, violence, and even death. The comparison could not be further from the truth: "The NAACP case was decided in a time of extraordinary racial violence and discrimination . . . [and] [t]he Supreme Court recognized that if disclosure were applied to this dissident, historically unpopular group, it would cease, entirely, to engage in political speech."[11] The Supreme Court reasoned that an exemption from disclosure was needed for the NAACP as a "shield from the tyranny of the majority."

Those resisting disclosure today, like the U.S. Chamber of Commerce—which has vowed to spend $100 million on political ads this year[12]—are well within the political mainstream, and could not be more different from the dissident, civil-rights era NAACP. The comparison is inapt and wholly inconsistent with Supreme Court precedent.

Senator McConnell is also incorrect to characterize DISCLOSE as "an attempt to get around the court's decision in *Citizens United*."[13] In fact, *Citizens United* embraced disclosure, and DISCLOSE is fully consistent with the case. Praising the virtues of election transparency, the Supreme Court explained in the case that disclosure "enables the electorate to make informed decisions and give proper weight to different speakers and messages."[14] To suggest that seeking greater disclosure somehow undermines *Citizens United* turns the case on its head.

* * *

---

[9] *Doe v. Reed*, 130 S. Ct. 2811, 2837 (2010) (Scalia, J., concurring).

[10] Mitch McConnell, *The Dangers Disclosure Can Pose to Free Speech*, WASH. POST, June 22, 2012, at A15.

[11] David Earley, *Malloy Should Stand Up for Election Transparency*, CONN. MIRROR, June 19, 2012, http://www.ctmirror.org/node/16673.

[12] Mike Allen & Jim Vandehei, *GOP Groups Plan Record $1 Billion Blitz*, POLITICO (May 30, 2012, 4:34 AM), http://www.politico.com/news/stories/0512/76849.html.

[13] Sen. Mitch McConnell, *Fighting for the First Amendment*, POLITICO (June 15, 2012, 1:00 AM), http://www.politico.com/news/stories/0612/77455.html.

[14] *Citizens United*, 130 S. Ct. at 916.

Since 2010, secret spending through tax-exempt non-profits has exploded, and now accounts for the majority of outside spending in federal elections. The DISCLOSE Act of 2012 would bring transparency to our elections, and ensure that voters have the information they need to make informed decisions at the ballot box. DISCLOSE would establish a disclosure system that is fully consistent with the Supreme Court's repeated recognition that transparency is necessary to enhance voters' knowledge and root out corruption in the political system.

I urge you to support this essential piece of legislation.

Sincerely,

J. Adam Skaggs
Senior Counsel