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April 9, 2012

Hon. Charles E. Schumer, Chairman
Hon. Lamar Alexander, Ranking Member
Committee on Rules & Administration
United States Senate
305 Russell Senate Office Building
Washington, DC 20510

Re: S. 2219, The Democracy Is Strengthened by Casting Light On Spending in Elections Act ("DISCLOSE") Act of 2012

Dear Senators Schumer and Alexander:

On behalf of the Brennan Center for Justice at N.Y.U. School of Law,[1] we write to convey our strong support for the DISCLOSE Act of 2012, to rebut erroneous claims that have been made about this crucial legislation, and to stress that the DISCLOSE Act of 2012 stands on firm constitutional ground.

As we recently made clear in written comments filed in conjunction with the Committee's hearing on this proposed legislation,[2] robust disclosure of money in politics is an essential component of a healthy democracy.[3] Voters have a right to know the identities of those seeking to influence their vote. In addition, disclosure deters corrupt, back-room dealings and enables regulators to detect violations of other campaign finance laws, like contribution limits.[4] Accordingly, the U.S. Supreme Court and lower federal courts across the country have repeatedly upheld disclosure laws that further these goals.[5]

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[1] The views expressed herein are solely those of the authors and the Brennan Center for Justice, and do not necessarily reflect the views of the N.Y.U. School of Law.

[2] Testimony of Adam Skaggs, Senior Counsel, and Mimi Marziani, Counsel, Brennan Center for Justice at N.Y.U. School of Law on S. 2219, The Democracy Is Strengthened by Casting Light On Spending in Elections Act ("DISCLOSE") Act of 2012 (Mar. 28, 2012) [hereinafter Brennan Center Testimony], *available at* http://www.brennancenter.org/content/resource/testimony_in_support_of_the_disclose_2012_act

[3] Brennan Center Testimony at 8-9.

[4] *See* Brennan Center Testimony at 8-9.

[5] The constitutionality of robust campaign finance disclosure has been endorsed by the Court since *Buckley v Valeo*, 424 U.S. 1, 66-68 (1976). The Court recently reaffirmed this position in *Citizens United*, emphasizing that disclosure "provides the electorate with information and insures that the voters are fully informed about the person or group who is speaking." 130 S. Ct. 876, 915 (2010). Since *Citizens United*, lower federal courts have uniformly upheld

Despite the public's compelling interest in an effective disclosure scheme, and notwithstanding that such laws "impose no ceiling on campaign-related activities and do not prevent anyone from speaking,"[6] some opponents of campaign finance regulation have attempted to suggest that the Act is constitutionally suspect. As well-established and unambiguous precedent makes clear, these allegations have no basis in the law.

The Act's Expanded Reporting Period for Electioneering Communications Is Plainly Constitutional.

Under current law, persons who spend $10,000 on broadcast advertisements that "clearly identif[y] a candidate for federal office" and are "aired within 60 days of the general election or 30 days of a primary election" must promptly file a report with the Federal Election Commission ("FEC"), giving information about their electioneering activities and their underlying donors.[7] This scheme was expressly approved by eight Justices in *Citizens United*. Moreover, Justice Anthony Kennedy — writing for the majority — specifically praised the use of the Internet to facilitate "prompt disclosure" that "enables the electorate to make informed decisions and give proper weight to different speakers and messages" in advance of casting a ballot.[8]

Because the limited periods in which disclosure is required under existing law do not capture a substantial range of federal electioneering activities that now take place outside the 30- and 60-day windows, the Act would significantly expand the time period during which such "electioneering communications" would be subject to disclosure. Consistent with the extended campaign schedule seen unfolding in the current election cycle, the Act would require reporting throughout an election year. All reports would have to be filed with the FEC within 24 hours, and the FEC would be required to promptly post these reports online.

By expanding the time period required for reporting and accelerating the filing deadline, the Act would update federal disclosure law not only in light of existing campaign realities, but also to match the Supreme Court's expectations. During this election cycle, Super PACs have been able to avoid disclosure of their donors until after many voters

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disclosure laws. *See* Brennan Center Testimony at 8-9 & n.32 (citing more than a dozen cases). 2 U.S.C. § 434(f)(3)(A).

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[7] 2 U.S.C. § 434(f)(3)(A).

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

have cast their ballots,[9] denying the "prompt disclosure" the *Citizens United* Court had in mind. Moreover, by carefully running campaign advertisements outside of the narrow reporting window required by current law, many nonprofit organizations have been able to avoid disclosure altogether.[10] This too defies the Court's assumption that federal law would give voters the tools to hold political speakers accountable.

Moreover, as a practical matter, the reasonable reporting scheme envisioned by the Act would not burden or deter any constitutionally protected political speech. A person or organization that spends $10,000 on campaign advertisements certainly has the administrative capacity to complete the FEC's short, simple disclosure reports. And, the Act expressly encompasses only campaign-related speech; it does not apply to discussions about important issues of the day that does not reference candidates. Thus, groups engaged in pure issue advocacy will not be affected.

The Act's Requirement that Underlying Donors Are Disclosed Is Constitutional.

The Act's provisions on what information must be reported by organizations spending substantial sums on campaign advertisements encompass disclosure of major donors to the organizations. This requirement is plainly constitutional, and it is also of vital importance: Secret donors are a serious problem in today's political environment.[11] In recent years, donors have routinely circumvented current disclosure provisions by declining to earmark their donations for the purpose of a particular expenditure.[12]

Robust disclosure of money in politics — including the disclosure of those funding an organization's political activity — is decidedly constitutional.[13] In very rare situations, in which a group can carry the heavy burden of establishing "a reasonable probability that the group's members could face threats, harassment, or reprisals if their names were disclosed," particular groups may be entitled to an as-applied exemption from disclosing their supporters.[14]

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[9] *See* Brennan Center Testimony at 5-6.

[10] *See, e.g.*, Donald B. Tobin, *Campaign Disclosure and Tax-Exempt Entities: A Quick Repair to the Regulatory Plumbing*, 10 ELECTION L.J. 427, 435 (2011).

[11] *See* Brennan Center Testimony at 2-5.

[12] *See, e.g.*, Letter from J. Adam Skaggs & Elizabeth Kennedy, Brennan Ctr. for Justice, to Robert M. Knop, Assistant General Counsel, FEC (Aug 22, 2011), *available at* http://www.brennancenter.org/content/resource/comment_to_fec_on_van_hollen_independent_expenditure_petition/. *See also* Ctr. for Responsive Politics, Outside Spending by Disclosure, Excluding Party Committees, http://www.opensecr ets.org/outsidespending/disclosure.php (last visited Apr. 4, 2012) (explaining that about 25% of outside spending in 2008 and 44% of such spending in 2010 went undisclosed).

[13] Indeed, the Court in *McConnell v. FEC* expressly found that underlying funders of campaign advertisements can, and should, be revealed. 540 U.S. 93, 198 (2003).

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

In assessing whether such proof exists, courts apply a balancing test to determine whether "the threat to the exercise of First Amendment rights is so serious" that it outweighs the public's interest in the contested disclosure.[15] Due to the compelling interests supporting robust transparency of money in politics, the Supreme Court has consistently rejected claims that such disclosure laws unduly burden constitutional rights. Indeed, the Court has only *once* found cause to exempt a group from campaign finance disclosure requirements due to alleged possible harassment.[16]

Here, the Act is carefully structured to protect individual privacy and there is no evidence that anyone would be subject to harassment.[17] Only major donors, namely those giving more than $10,000 during the election cycle, would ever have to be disclosed. Most significantly, no donor to an organization — regardless of the amount of support provided — is *ever* required to have their identity disclosed if they would prefer to remain anonymous.

The Act provides two alternative means for shielding the identities of contributors who wish to remain anonymous. *First*, major donors can protect their privacy by instructing that their donations not be used for electioneering expenditures,[18] thus allowing donors to provide general operating funds to organizations they support, while ensuring their contributions are not used to underwrite political advertisements in which the public has a strong interest in transparency. *Second*, an organization may set up a separate, segregated fund for its political fundraising and spending, and limit its disclosure to those who donate to this fund.[19] These provisions provide a second and independent means by which general donors may remain anonymous.

The Act's Robust Disclaimer Requirements Are Constitutional.

The Act's enhanced disclaimer requirements for campaigns ads are also clearly constitutional. Under the Act, the head of the sponsoring organization must appear in the ad and state that he or she approves the broadcast message — just as candidates must do

[15] *See Buckley*, 424 U.S. at 71. This balancing test was first used in *NAACP v. Alabama*, a case concerning the disclosure of membership lists, not campaign finance records. 357 U.S. 449, 451, 466 (1958).

[16] *Compare Brown v. Socialist Workers Party '74 Campaign Comm.*, 459 U.S. 87, 101-102 (1982) (finding that Ohio's campaign finance disclosure laws could not be constitutionally applied to Socialist Workers Party due to substantial evidence of past harassment, including by government officials) *with Citizens United*, 130 S. Ct. at 916 (rejecting request for harassment exception from campaign finance disclosure laws); *McConnell*, 540 U.S. at 198 (same); *Buckley*, 424 U.S. at 69-74 (same).

[17] Of course, intimidating or harassing someone based on their political beliefs is reprehensible. Strong criminal laws should deter and punish such conduct.

[18] DISCLOSE Act of 2012, S. 2219, 112th Cong. §324(a)(3)(B) (2012).

[19] *Id.*, at §324(a)(2)(E)

under current law. This practice is now well-established and, as here, gives rise to no constitutional concerns.

In addition, an organization must list its primary donors, either, in the case of television advertisements, by revealing its top five funders or, for radio ads, by identifying its top two funders. The *Citizens United* Court found that disclaimer requirements of this type "provide the electorate with information and insure that the voters are fully informed about the person or group who is speaking."[20]

Under the Act's carefully calibrated provisions, these new disclaimers would not be burdensome. Organizations sponsoring television advertisements need not use substantial portions of their airtime to list the five donors, as critics have wrongfully suggested; rather, advertisers are free to have the information "in a crawl along the bottom of the communication."[21] This provision strikes an appropriate balance between concerns that the new rules would unduly compel speech and concerns that voters have sufficient information to make informed choices in the political marketplace. Voters are routinely exposed to written information included in televised material; written captions are already a staple of political advertising, and "crawls" at the bottom of communications are a commonplace element viewers' experiences from news and sports programming. Similarly, the Act's less extensive requirements for radio advertising are calibrated to that medium, and address voters' informational interest without inappropriately burdening advertising content.[22]

Conclusion

There can be no credible doubt that the DISCLOSE Act of 2012 is constitutional. While facilitating greater disclosure of political spending to enhance voters' knowledge and root out corruption, the Act would strengthen our democratic processes and should be adopted as soon as possible.

We appreciate the opportunity to provide these comments to the Committee, and would be happy to provide additional information if it would be of any further assistance.

Sincerely,

J. Adam Skaggs
Senior Counsel

Mimi Marziani
Counsel

[20] 130 S. Ct. at 915.

[21] *See* S. 2219 § 3(e)(3)(B)(i).

[22] The Act also allows certain exceptions from its radio disclaimer requirements when such would cause a demonstrated hardship.

Cc: Senator Roy Blunt
Senator Saxby Chambliss
Senator Thad Cochran
Senator Richard Durbin
Senator Dianne Feinstein
Senator Kay Bailey Hutchison
Senator Daniel Inouye
Senator Patrick Leahy
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