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**Testimony of
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**On New York Attorney General Eric Schneiderman's
Proposed Regulations Regarding Political Spending by Nonprofit Organizations**

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My name is David Earley and I am Counsel in the Democracy Program at the Brennan Center for Justice at NYU School of Law. On behalf of the Brennan Center, I would like to thank the Attorney General for giving us the opportunity to comment on his proposal to require disclosure of information about political spending by nonprofit organizations.

As I wrote recently in an op-ed published in the Albany Times Union,² the Attorney General deserves praise for his leadership on this very important issue. Organizations that do not disclose their donors have spent increasingly large amounts in elections since the U.S. Supreme Court issued its *Citizens United v. FEC* decision in 2010.³ According to the Center for Responsive Politics, the percentage of outside spending done by organizations that do

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 counsel 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.

² David Earley, *State Fights Secret Spending*, TIMES UNION, Dec. 31, 2012, <http://www.timesunion.com/opinion/article/State-fights-secret-spending-4158668.php>.

³ *Citizens United v. FEC*, 130 S. Ct. 876 (2010).

not disclose their donors increased from a rate of just 1% in 2006 to 43% in 2010 — or about \$127 million.⁴ And while final totals have not yet been calculated for the 2012 election, at least \$317 million was spent in the most recent election cycle by groups that conceal their donors.⁵ Our democracy suffers when voters are left in the dark about who is behind the millions of dollars in political ads aiming to influence their votes.

How 501(c)(4) Organizations Avoid Disclosure of Their Donors

One of the primary ways big political spenders hide their donors from the public is through abuse of the tax code's provisions for nonprofit organizations, especially those organized under the tax code's section 501(c)(4).⁶ The 501(c)(4) designation was originally designed to bridge the gap in the law between 501(c)(3) organizations — charitable nonprofits which can engage in no political activity whatsoever — and 527 organizations — entities whose purpose is purely political. According to the tax code, 501(c)(4)s are supposed to operate “exclusively for the promotion of social welfare,” but are permitted to occasionally get involved in politics so long as it is not their primary purpose.⁷ But the IRS's record on enforcement of these rules has been spotty, and unscrupulous groups have exploited this lax enforcement, claiming (c)(4) status while spending substantial sums on politics and promoting no apparent “social welfare” goals at all.

⁴ Ctr. for Responsive Politics, *2006 Spending by Disclosure for Non-Party Committees*, OPENSECRETS.ORG, <http://www.opensecrets.org/outsidespending/summ.php?cycle=2006&chrt=D&disp=O&type=P> (last visited Jan. 14, 2013); Ctr. for Responsive Politics, *2010 Spending by Disclosure for Non-Party Committees*, OPENSECRETS.ORG, <http://www.opensecrets.org/outsidespending/summ.php?cycle=2010&chrt=D&disp=O&type=P> (last visited Jan. 14, 2013).

⁵ Ctr. for Responsive Politics, *2012 Spending by Disclosure for Non-Disclosing Groups*, OPENSECRETS.ORG, <http://www.opensecrets.org/outsidespending/summ.php?cycle=2012&chrt=D&disp=O&type=U> (last visited Jan. 8, 2013)

⁶ 26 U.S.C. § 501(c)(4).

⁷ *Id.*

Federal law requires that so-called 527 groups that have an exclusively political purpose — including the super PACs that received so much attention in the last election cycle — disclose both all their political spending and their donors.⁸ In comparison, the funding of political spending by 501(c)(4) groups is entirely opaque.

Federal law *does* require 501(c)(4) groups to report the amounts they spend on certain types of political advertising. If these groups make expenditures on express advocacy — communications that include words like “vote for,” “elect,” “support,” “cast your ballot for,” “Smith for Congress,” “vote against,” “defeat,” and “reject,” then they must report that spending to the Federal Election Commission.⁹ They must also report spending on what federal law calls “electioneering communications.”¹⁰ These are broadcast advertisements aired in the days just before an election that avoid the aforementioned “magic words” but reference clearly identifiable candidates: say, an advertisement that says “Call Senator Smith and tell her to be tough on crime.” Such electioneering communications are often referred to as “sham issue ads.” In one particularly egregious example cited by the U.S. Supreme Court, an organization called “Citizens for Reform” ran an ad that described how a candidate “took a swing at his wife” and urged viewers to call the candidate and “tell him to support family values.” As the Court correctly explained, “[t]he notion that this advertisement was designed purely to discuss the issue of family values strains credulity.”¹¹

Although federal law requires disclosure of the donors whose funds are used for express advocacy and electioneering communications, toothless rules adopted by the FEC have eviscerated this requirement, allowing most politically active 501(c)(4)s to avoid publicly

⁸ 26 U.S.C. § 527(j).

⁹ 2 U.S.C. §§ 431(17), 434(c)(1).

¹⁰ 2 U.S.C. § 434(f).

¹¹ *McConnell v. FEC*, 540 U.S. 93, 193 n.78 (2003).

reporting *any* of their donors. The FEC's loophole-opening rules on donor reporting provide that, with respect to both express advocacy and electioneering communications, a donor need only be reported if the donor specifically *earmarked* the donation for a particular political advertisement.¹² Such earmarking very rarely happens in practice because savvy donors and donation recipients know how to easily avoid disclosure in this way. Hence, while a 501(c)(4) must disclose the amount it spends on political ads, it can easily avoid disclosing its underlying donors, leaving the public in the dark about who is paying for advertisements designed to sway their votes.

It is worth taking a moment to emphasize that section 501(c)(4) organizations are not to be confused with purely charitable nonprofits organized under section 501(c)(3) of the federal tax code. 501(c)(3)s are purely community-serving organizations, such as houses of worship, homeless shelters, or other charitable human service and educational organizations, with missions in the public interest.¹³ 501(c)(3) nonprofits are strictly prohibited from doing any electioneering of any kind for any candidate and the 501(c)(3) status of a nonprofit organization can be revoked if it violates this prohibition.¹⁴ Because of these special rules, 501(c)(3)s are the only type of nonprofit allowed to accept donations that are tax deductible by the donor.¹⁵ 501(c)(3) nonprofits are not involved in the widespread political spending typical of some 501(c)(4)s in the 2010 and 2012 election cycles.

The bottom line here is that big spenders are aware of the 501(c)(4) loophole and exploit it ruthlessly. As the executive director of one 501(c)(4) said to potential donors, "We

¹² 11 C.F.R. § 104.20(c)(9); Electioneering Communications, 72 Fed. Reg. 72,899 (Dec. 26, 2007).

¹³ 26 U.S.C. § 501(c)(3).

¹⁴ *See id.*

¹⁵ 26 U.S.C. § 170(a)(1), (c)(2).

don't make our donors' names available. We can take corporate money, personal money, cash . . . whatever you got."¹⁶ I couldn't sum it up better myself.

Undisclosed Political Spending in the States

As I've explained, hundreds of millions of dollars in anonymous political spending have poured into federal elections since *Citizens United* was decided. But nonprofits have also targeted state elections, including some in New York, and all signs suggest such spending will only increase in the near future.

In New York, a 501(c)(4) called Common Sense Principles, based in Richmond, Virginia, sent a slew of mailers to many voters attacking three state senate candidates.¹⁷ Other 501(c)(4)s, such as American Action Network, American Bridge 21st Century Foundation, and Crossroads GPS, may have been involved in state elections this past cycle as well.¹⁸

The trend toward secretive spending in state elections is already being documented in other states. A recent Politico article detailed how millions are expected to be spent in the upcoming gubernatorial elections in Virginia and New Jersey. One 501(c)(4), the Committee for Our Children's Future, spent \$6 million on New Jersey elections during 2011 and 2012,

¹⁶ Kim Barker, *How Nonprofits Spend Millions on Elections and Call It Public Welfare*, PROPUBLICA (Aug. 18, 2012, 10:25 PM), <http://www.propublica.org/article/how-nonprofits-spend-millions-on-elections-and-call-it-public-welfare>.

¹⁷ Thomas Kaplan, *Attack Ads, by Outside Groups with Murky Ties, Shape 3 New York Senate Races*, N.Y. TIMES, Oct. 16, 2012, http://www.nytimes.com/2012/10/17/nyregion/3-new-york-senate-races-flooded-by-money-from-outside-groups.html?_r=0; Press Release, Citizens Union, Schneiderman Should Investigate Common Sense Principles' Failure to Register with Charities Bureau (Nov. 7, 2012), *available at* <https://app.e2ma.net/app/view:CampaignPublic/id:1407871.12948486697/rid:298bfcdd591b7f81c8b1da715543eed6>.

¹⁸ Jimmy Vielkind, *AG Seeks Details About Political Spending by Non-profits*, TIMES UNION, Dec. 14, 2012, <http://www.timesunion.com/local/article/AG-seeks-details-about-political-spending-by-4117332.php>.

with some of those advertisements running in New York.¹⁹ In California, an organization called Americans for Responsible Leadership donated \$11 million to a super PAC to run ads about two ballot initiatives. Only after the California Attorney General, representing the state's Fair Political Practices Commission, convinced the California Supreme Court to order the release of the organization's donors were they disclosed.²⁰

Misleading Solicitations

In spite of their undeniably political nature, some organizations solicit funds with messages that are misleading at best and clearly obscure the groups' true intentions. For example, Americans for Prosperity, a 501(c)(4) organization, bills itself on its website as "lead[ing] the grassroots fight for economic freedom."²¹ The organization claims it is "winning critical policy victories not just in Washington, D.C., but in city halls and statehouses all across the country" and advises donors that the organization "can advocate for and against specific legislation at the state and federal levels." Yet, the organization's donation page makes no mention of its political ads,²² even though Americans for Prosperity spent over \$39 million on political ads in the 2012 federal elections.²³ According to a

¹⁹ Tarini Parti, *Outside, Secret Money Likely to Flow in 2013*, POLITICO (Jan. 6., 2013, 6:29 PM), <http://www.politico.com/story/2013/01/outside-secret-money-likely-to-flow-in-2013-85422.html>.

²⁰ Aaron Sankin, *California's \$11 Million Campaign Donation Source Tied to Koch Brothers, Research Reveals*, HUFFINGTON POST (Nov. 5, 2012, 6:09 PM), http://www.huffingtonpost.com/2012/11/05/california-11-million-campaign-donation_n_2078917.html.

²¹ See AMERICANS FOR PROSPERITY, <http://americansforprosperity.org/> (click "DONATE" button at top of page) (last visited Jan. 7, 2013).

²² See *id.*

²³ Ctr. for Responsive Politics, *Americans for Prosperity*, OPENSECRETS.ORG, <http://www.opensecrets.org/outsidespending/detail.php?cmte=Americans+for+Prosperity&cycle=2012> (last visited Jan. 11, 2013).

spokesman for the organization, they expected to spend about 39% of their funds on political advertising in 2012.²⁴

The previously-mentioned Crossroads GPS frames itself in similar terms, saying “Every dollar that you contribute to Crossroads GPS will enable us to get critical information out to everyday American citizens and mobilize them to speak out on the issues that will shape our nation’s future for years to come.”²⁵ Crossroads GPS spent over \$70 million on political ads in federal elections last year and “Crossroads GPS’s policy is to not provide the names of its donors to the general public.”²⁶

Priorities USA, another 501(c)(4), explains on its website that it is “dedicated to mobilizing Americans to preserve, protect and promote the middle class, and to ensure opportunity and freedom for the next generation.”²⁷ The organization took in about \$2.3 million in 2011, with \$1.9 million of that coming from a single anonymous donor.²⁸ Priorities USA spent over \$700,000 creating two ads.²⁹

Some donating members of the public may not be aware of the baldly partisan nature of these politically active 501(c)(4) groups and may be fooled by the organizations’ “grassroots” messages only to later discover they’re inadvertently funding large political machines. While informed observers may understand the primarily political role of well-

²⁴ 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>.

²⁵ *Donate to Crossroads GPS*, CROSSROADS GPS, <https://www.crossroadsgps.org/donate/> (last visited Jan. 14, 2013).

²⁶ Ctr. for Responsive Politics, *Crossroads GPS*, OPENSECRETS.ORG, <http://www.opensecrets.org/outsidespending/detail.php?cmte=C90011719&cycle=2012> (last visited Jan. 11, 2013); *Donate to Crossroads GPS*, *supra* note 25.

²⁷ *About Us*, PRIORITIES USA, <http://www.prioritiesusa.org/about> (last visited Jan. 14, 2013).

²⁸ Robert Maguire, Ctr. for Responsive Politics, *Obama’s Shadow Money Allies File First Report*, OPENSECRETS BLOG (Jan. 8, 2013, 11:17 AM), <http://www.opensecrets.org/news/2013/01/obamas-shadow-money-allie.html>.

²⁹ *Id.*

known groups like Americans for Prosperity, Crossroads GPS, and Priorities USA, the public is especially vulnerable to solicitations by lesser-known 501(c)(4) organizations that use similar honey-laden language to describe their efforts. As a result, the Attorney General's proposed regulations will make a significant difference by ensuring that members of the public are not misleadingly solicited to make contributions to groups purporting to advance the public good while, in reality, amassing funds for purely political advertising.

The Regulations are Legal

Beyond protecting New Yorkers from misleading solicitations from duplicitous groups claiming to be genuine social welfare organizations, the Attorney General's proposed regulations also promote the constitutionally vital goals of a fully informed and educated citizenry. The proposed regulations are fully consistent with relevant legal and constitutional principles and should withstand any legal challenge.

First, the proposed regulations are undoubtedly consistent with the First Amendment. The U.S. Supreme Court first upheld the constitutionality of disclosure requirements in *Buckley v. Valeo*, decided in 1976.³⁰ In its landmark *Citizens United* decision from 2010, the Supreme Court upheld the constitutionality of strong disclosure provisions by an 8-1 vote. Speaking for the eight justice majority, Justice Anthony Kennedy wrote that “disclosure requirements may burden the ability to speak, but they impose no ceiling on campaign-related activities, and do not prevent anyone from speaking.”³¹ Indeed, the Court has explained that disclosure of political spending serves important government interests, including informing the public about “where political campaign money comes from and how

³⁰ *Buckley v. Valeo*, 424 U.S. 1, 64-68, 84 (1976).

³¹ *Citizens United v. FEC*, 130 S. Ct. 876, 914 (2010) (internal quotation marks and citations omitted).

it is spent,” deterring corruption and the appearance of corruption, and enabling detection of the violation of other campaign finance laws.³² Without question, disclosure of political spending like that the proposed regulations would accomplish is constitutional.³³

Nor do federal campaign finance laws, such as the Federal Election Campaign Act and the Bipartisan Campaign Reform Act, conflict with the regulations. Those laws govern only federal elections, in contrast to the proposed regulations’ focus on New York state and local elections. Indeed, Congress only has limited power to regulate state elections and can only do so under specific constitutional grants of power, such as the Fifteenth Amendment’s prohibition on race-based voting requirements.³⁴ Instead, the regulation of state elections is generally left to the states.

The Attorney General has broad power to require disclosures from charitable organizations operating in New York and the proposed regulations do not infringe upon any prerogative of either the legislature or the New York State Board of Elections. To the contrary, the Attorney General is tasked with making “rules and regulations necessary” for administering the registration and annual reports of charities in order to protect both the public and the funds they donate from unscrupulous organizations.³⁵ Note that duplicative disclosures cannot result from these regulations because they exempt a covered organization from complying if it already publicly discloses this information pursuant to another law.³⁶

³² *Buckley*, 424 U.S. at 66-68.

³³ See also 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 8-10 (Mar. 28, 2012), *available at* http://brennan.3cdn.net/2b0c3765a118b5b6ad_6km6ii7nb.pdf; Letter from Adam Skaggs & Mimi Marziani, Brennan Ctr. for Justice, to Senator Charles R. Schumer & Senator Lamar Alexander, Comm. on Rules & Admin., U.S. Senate (Apr. 9, 2012), *available at* http://brennan.3cdn.net/3a0b04468bbaecae0f_bvm6bh97q.pdf.

³⁴ See U.S. CONST. amend. XV. See also, e.g., *Oregon v. Mitchell*, 400 U.S. 112, 118 (1970) (holding that Congress does not have the power extend the franchise to 18 year olds in state elections).

³⁵ See N.Y. EXEC. LAW §§ 172-b(1), 177(1); N.Y. EST. POWERS & TRUSTS LAW § 8-1(4)(h).

³⁶ Proposed N.Y. CODES R. & REGS. tit. 13, § 91.6(d).

Specific Provisions

Before closing, I would like to offer a few brief comments on a few specific provisions in the proposed regulations.

The \$10,000 spending threshold for requiring additional disclosures in subpart (c)(1) strikes an appropriate balance that ensures that the donors of big spenders are disclosed while not burdening organizations that are only incidentally politically involved in elections with additional reporting requirements. The threshold is the same as that found in federal disclosure law³⁷ and is certainly constitutional; the U.S. Supreme Court has explained that courts have “no scalpel” to determine whether one threshold is as good as another,³⁸ and the federal rule provides a model that rests on firm legal ground. Indeed, given the relative cost of state elections versus federal races, the Attorney General likely could adopt a lower disclosure threshold without making the rules vulnerable to legal challenge.

The \$100 underlying donor disclosure threshold set forth in subpart (c)(2) is also appropriate. As with the \$10,000 spending threshold, this amount is largely a matter of discretion, and while the Attorney General could have chosen a slightly higher reporting threshold, the \$100 level makes the new regulations consistent with existing state law. The New York legislature has chosen to require the disclosure of contributors who give more than \$99 to political committees, making it appropriate to import the same value in the proposed regulations.³⁹

³⁷ 2 U.S.C. § 434(f)(1) (requiring disclosure of electioneering communications once \$10,000 is spent); 2 U.S.C. § 434(g)(2) (requiring disclosure of \$10,000 independent expenditures within 48 hours).

³⁸ *Buckley v. Valeo*, 424 U.S. 1, 30 (1976) (internal quotation marks and citation omitted).

³⁹ N.Y. ELEC. LAW § 14-102(1).

Significantly, the proposed regulations include not one, but two ways for donors who do not want their funds used for electioneering purposes to ensure that their names are not disclosed. First, an organization can set up a segregated political fund to support its electioneering, in which case only donors to that fund would be disclosed; donations to the group's general treasury would not be.⁴⁰ Second, individual donors can simply prohibit the organization from using their money for political purposes at the time of the donation.⁴¹ It is also worth noting that groups and donors who fear harassment as a result of the disclosure of contributions can seek an exemption from the Attorney General.⁴²

I offer a final thought regarding the 180 day "election targeted issue advocacy" window, which requires the disclosure of certain spending in the six months prior to an election.⁴³ At the federal level, such communications are required to be disclosed in a more limited time frame: 30 days before a primary election and 60 days before a general election.⁴⁴ Experience has shown that these federal windows, while a good start, are inadequate. Contemporary elections are conducted long before these windows open; indeed during the most recent election cycle, organizations spent substantial funds 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 Hence, the current federal disclosure window is too short. A disclosure

⁴⁰ Proposed N.Y. CODES R. & REGS. tit. 13, § 91.6(c)(2).

⁴¹ See Proposed N.Y. CODES R. & REGS. tit. 13, § 91.6(a)(9) (defining "covered donations" to include only those that are "available to be used for a New York election related expenditure"); *Id.* tit. 13 § 91.6(c)(1)(i) (requiring disclosure only of those who gave "covered donations").

⁴² Proposed N.Y. CODES R. & REGS. tit. 13, § 91.6(h).

⁴³ Proposed N.Y. CODES R. & REGS. tit. 13, § 91.6(a)(7).

⁴⁴ 2 U.S.C. § 434(f)(3)(A)(i)(II).

⁴⁵ See, e.g., D'Áte, *supra* note 24; 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->

window broader than that set at the federal level is constitutional and is appropriate to ensure that the money behind sham issue ads is revealed to the public. Reasonable minds can differ on what the best window is, but there is no requirement that states adhere to the inappropriately short federal standard.

Conclusion

The Brennan Center commends Attorney General Schneiderman for his leadership in bringing transparency and accountability to our elections. The proposed regulations represent sound policy which promises to protect not only the state's elections, but also the reputations of nonprofit organizations and the confidence of the donor community. I would be glad to take any questions you might have. Thank you.

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.”).