June 30, 2011

Gary Goldsmith
Executive Director
Minnesota Campaign Finance and Public Disclosure Board
190 Centennial Office Building
658 Cedar Street
St. Paul, Minnesota 55155-1603

Dear Mr. Goldsmith:

On behalf of Common Cause Minnesota, the League of Women Voters Minnesota, and the Brennan Center for Justice at NYU School of Law, we urge the board to vote to adopt the resolution and statement of guidance as recommended in the staff memo dated June 23, 2011 (although we do recommend one minor amendment to the draft position statement on exemptions for disclosure, described in more detail below). These recommendations will provide the enhanced disclosure of corporate campaign contributions regarding Minnesota ballot questions that is necessary to give voters the information they need to make informed decisions before casting their ballots.

Disclosure Serves a Critical Public Interest during a Ballot Campaign:

The Supreme Court has repeatedly found that disclosure is valuable for informing the public during an election. As the Court has explained, "transparency enables the electorate to make informed decisions and give proper weight to different speakers and messages." *Citizens United v. FEC*, 130 S. Ct. 876, 916 (2010). This observation comports with our own experience. Every day we evaluate the content of speech based on its source. To say the author is irrelevant, as opponents of the staff recommendations have suggested, is plainly wrong. There are at least three main ways that this information is valuable to voters.

First, knowing the author and funder of an ad campaign can help voters evaluate the credibility of the messenger, especially in the absence of active media scrutiny of the issue. Voters would like to know: Is the majority of the money coming from out of state? Is the support from a large base of supporters or a few wealthy individuals? What interests do those contributing individuals represent? Knowing who is likely to benefit, or lose, from the outcome of a ballot question will help voters to evaluate both sides of a ballot initiative debate.

Second, voters traditionally use cues like party affiliation and a voting record to help decide among a field of candidates. Those cues are not present when it comes to a ballot question. Having information about contributors can fill that information gap and help voters make more informed decisions on

complex ballot questions. As one court has explained, "Voters rely on information regarding the identity of the speaker [in a ballot campaign] to sort through this 'cacophony,' particularly where the effect of the ballot measure is not readily apparent." *ProtectMarriage.Com v. Bowen*, 599 F. Supp. 2d 1197, 1208 (E. D. Cal. 2009) (quoting *CPLC v. Getman*, No. 00-1698, slip op. at 17:12-28 (E. D. Cal. February 22, 2005)).

Third, disclosure prevents special interests from hiding behind misleading names or other disguises in their political advertising and ballot campaigns. For example, in a recent Colorado election, a group called "Littleton Neighbors Voting No" spent $170,000 to defeat a restriction that would have prevented Wal-Mart from coming to Littleton. Only when the disclosure reports for these groups were filed was it was revealed that "Littleton Neighbors" was exclusively funded by Wal-Mart, and not a grassroots organization at all. Similarly, big tobacco companies masqueraded as a small grassroots organization of the working class in order to overturn a working-place smoking ban through California Proposition 188 in November 1994. Ballot campaigns that have misleading titles or disguised content may not be exposed without effective disclosure.

Groups such as large tobacco firms may introduce a measure with a name like "Consumer Rights Protection" and hide behind that mask, passing their legislation off as a measure to protect citizens. Interest groups have also been known to create shell companies or faux non-profit groups to hide their true goals as a pretense to garner support for their measures. Effective disclosure can defeat these efforts with transparency—and accountability.

The board should support the staff recommendations in order to ensure robust disclosure by political committees and funds participating in ballot question campaigns.. This move will help fulfill the board's mission to "promote public confidence in state government decision-making." If the board fails to act, millions of dollars of undisclosed contributions will flow to both sides of the marriage debate. It is difficult to see how inaction will instill public confidence in state government.

The Board Should Clarify that the Burden of Proof Lies with a Party Seeking Exemption from Disclosure:

While we generally urge the Board to adopt the recommended Statement of Guidance, there is one modification that we recommend to the Board.

The staff memo urges the Board to recognize a "judicial exemption" to disclosure for individuals who can show "that there is a reasonable probability that disclosure would expose the individual to threats, harassment, or reprisals." This proposal is based on the standard set forth by the Supreme Court in *Buckley v. Valeo* and subsequent cases. But the Board should make clear that disclosure is the rule, not the exception. The Board should amend this language to clarify that the burden of proof is on any individual or entity seeking to avoid disclosure— and that parties unable to carry this burden should not be exempted from the disclosure requirements that apply to all other donors in Minnesota.

Much like the boy who cries "wolf," it has become routine for groups like the National Organization for Marriage to complain that disclosure will leave them vulnerable to threats and harassment. The evidence shows otherwise. In reality, groups like NOM are largely complaining about the ordinary rough and tumble of political debate, particularly on an issue that touches people as personally and deeply as same-sex marriage.

NOM and its allies raised similar harassment claims in California to avoid disclosure of political donors in the campaign around Proposition 8. The court reviewed an extensive record of evidence, and concluded that NOM was largely complaining about the types of actions, such as peaceful boycotts, that have been "relied upon, both historically and lawfully, to voice dissent." *ProtectMarriage.com*, 599 F. Supp. 2d at 1218. Actual threats of violence—while certainly inexcusable—were rare, and could be appropriately punished through criminal liability. *Id.* at 1217-18. The court explained that the status of NOM and its allies, who raised and spent millions of dollars on a successful campaign to persuade over seven million voters to support their cause, , was a far cry from the plight of NAACP members in 1958 Alabama, who were exempted from disclosure by the Supreme Court in order to ensure their physical safety in the face of government-sanctioned violence and discrimination. *See id.* at 1214. The same is true in Minnesota today.

Moreover, such claims must be found wanting compared to the voters' substantial interest in knowing the sources of funding behind public debates. These interests are described above, and in the signatories' prior letters to the Board, and need not be repeated here.

Accordingly, we recommend that the Board change the proposed subpart B in its draft position statement on a harassment exemption to reflect this balance of interests properly. We recommend the following language (with new changes in bold):

> B. Subject to the requirements of Section 10A.20, subd. 10, the Board may grant an exemption to an individual if the individual shows that there is a reasonable probability that disclosure would expose the individual to threats, harassment, or reprisals. Under this standard, the Board **must** weigh the burden on the individual's First Amendment rights against the state's **compelling** interest in obtaining the disclosure. Only if the **probable threats, harassment or reprisals are sufficiently severe to outweigh the voters' substantial interest in disclosure** may the waiver request be **granted**.

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Finally, we also urge the Board to reject the recommendations submitted by NOM's counsel in a letter dated June 27, 2011. First, as explained here and in the signatories' prior letters to the Board, there is absolutely no basis for the claim that the voters' interest in disclosure is "attenuated" in a ballot measure election. Second, the proposal to limit disclosure only to "designated" contributions is designed solely to create a loophole so that corporations and political committees can avoid Minnesota's disclosure laws altogether. The proposals submitted by NOM's counsel are not required or favored by the First

Amendment. The Board should reject those proposals in favor of the Board staff's thoughtful and comprehensive analysis of the relevant legal issues.

Sincerely,

Mike Dean
Common Cause Minnesota

Laura Fredrick Wang
League of Women Voters, Minnesota

J. Adam Skaggs
Brennan Center for Justice

Mark Ladov
Brennan Center for Justice