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June 21, 2011

Via Electronic Mail

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

Re: Revocation of Advisory Opinion 257

Dear Mr. Goldsmith:

On behalf of the Brennan Center for Justice at NYU School of Law, we write to urge the Board to revoke Advisory Opinion 257, which concluded that the disclosure requirements that apply to unregistered associations under Minnesota law do not apply to corporations. The Brennan Center supports revocation because Minnesota's disclosure requirements should apply equally to similarly-situated associations—including both corporations and unregistered associations—whether they are participating in candidate elections or ballot campaigns.

To assist the Board's consideration of Advisory Opinion 257, we write to rebut various unfounded legal arguments being presented by opponents of disclosure. In particular, there are two specious arguments that the Board should reject: (1) that disclosure is less valuable or less protected in the context of ballot question campaigns, and (2) that corporations should not be subject to the same requirements as other associations. Neither of these claims has any legal or constitutional merit.

The Supreme Court and other courts have repeatedly reaffirmed the value of disclosure for ballot campaigns.

A May 26, 2011 letter to the Board submitted by counsel to the National Organization of Marriage and Minnesota Family Council (collectively, "NOM") asserts that Minnesota has only a limited interest in providing for disclosure of political spending in the context of a ballot measure campaign. This is wrong. In fact, courts have repeatedly praised—and affirmed the constitutionality of—disclosure requirements in ballot campaigns, because of disclosure's ability to educate voters about the sources of political spending.

NOM argues that there is no risk of corruption in a ballot referendum campaign and, therefore, limited constitutional justification for disclosure in that context. This argument ignores the evidence that the funding for candidate and ballot elections is often intertwined. *See, e.g.,* Briana Bierschbach, *House GOP vote on marriage amendment was defining issue of session's last days*, Politics in Minnesota, May

25, 2011 (reporting that Republican legislators were promised campaign contributions if they successfully passed the anti-gay marriage amendment measure).[1] Even if NOM were correct, however, any distinction between the risk of corruption in ballot and candidate elections does not diminish Minnesota's authority to require disclosure of political spending in both contexts. Both the Supreme Court and the Eighth Circuit Court of Appeals have held that the voters' informational interest in knowing the sources of political spending is sufficient *on its own* to justify disclosure. *See Citizens United v. FEC*, 130 S. Ct. 876, 915-16 (2010) (holding that the "informational interest alone is sufficient to justify application" of disclosure to political spending and advertising); *Minnesota Citizens Concerned for Life, Inc. v. Swanson*, 640 F.3d 304, 316 (8th Cir. 2011) (upholding Minnesota's disclosure laws after concluding "that the regulations are substantially related to Minnesota's important interest in providing information").

Disclosure of financial contributions and spending in ballot measure elections is necessary to allow voters to evaluate political arguments—and decide how to vote. As the Supreme Court explained in *First National Bank of Boston v. Bellotti*, "the people in our democracy are entrusted with the responsibility for judging and evaluating the relative merits of conflicting arguments. They may consider, in making their judgment, the source and credibility of the advocate." 435 U.S. 765, 791-92 (1978) (footnotes omitted); *see also Human Life of Wash., Inc. v. Brumsickle*, 624 F. 3d 990, 1008 (9th Cir. 2010) (same). Thus, the *Bellotti* Court emphasized—in the context of a ballot referendum campaign—that "[i]dentification of the source of advertising may be required as a means of disclosure, so that the people will be able to evaluate the arguments to which they are being subjected." 435 U.S. at 792 n.32.

The Supreme Court has repeatedly described the importance of robust disclosure in the clearest possible terms. As the Court explained in *Citizens United*:

> With the advent of the Internet, prompt disclosure of expenditures can provide shareholders and citizens with the information needed to hold corporations . . . accountable for their positions . . . . 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.

130 S. Ct. at 916; *see also id.* at 915 (explaining that disclosure ensures "'that the voters are fully informed' about the person or group who is speaking" (quoting *Buckley v. Valeo,* 424 U.S. 1, 76 (1976))); *Citizens Against Rent Control v. City of Berkeley*, 454 U.S. 290, 298 (1981) ("[T]here is no risk that the . . . voters will be in doubt as to the identity of those whose money supports or opposes a given ballot measure since contributors must make their identities known.").

Numerous concrete examples illustrate the public's interest in the disclosure of political spending in ballot elections. The recent *Brumsickle* case is one. It involved the "emotionally charged battle" surrounding Initiative 1000, a 2008 Washington State ballot initiative that legalized physician-assisted suicide in certain instances. *See Brumsickle*, 624 F.3d at 995. The public debate over Initiative 1000

[1] *Available at* http://politicsinminnesota.com/blog/2011/05/house-gop-vote-on-marriage-amendment-was-defining-issue-of-session%E2%80%99s-last-days/.

included media reports on the funding behind the campaigns to support and oppose the ballot initiative. *Id.* at 997.

This reporting illustrated that Washington had become "a national battleground in the fight over assisted suicide," with hundreds of thousands of dollars pouring in from constituencies that included "death with dignity" activists, advocates for the disabled, doctors, pro-life groups and the Catholic Church. *See* Richard Roesler, *Support pours in for assisted suicide measure*, Spokesman Review, Apr. 30, 2008, *available at* http://www.spokesmanreview.com/breaking/story.asp?ID=14745. Campaign finance disclosures allowed voters to understand the powerful forces on both sides of the issue, and to consider how their vote on the ballot initiative might connect to other political debates and contests.

In short, disclosure of campaign financing is necessary to educate voters fully before they cast their ballots. As the Ninth Circuit explained in *Brumsickle*:

> Campaign finance disclosure requirements . . . advance the important and well-recognized governmental interest of providing the voting public with the information with which to assess the various messages vying for their attention in the marketplace of ideas. An appeal to cast one's vote a particular way might prove persuasive when made or financed by one source, but the same argument might fall on deaf ears when made or financed by another.

Id. at 1008. These justifications apply in the context of a ballot referendum campaign just as they do in a candidate election.

For these reasons, the Board should reject NOM's erroneous claim that the value of disclosure is diminished in the context of ballot measure campaigns.

Corporations are associations, not individual "persons."

Published reports indicate that, at a recent Board hearing, NOM's counsel argued that corporations are "legal persons" who should not be subject to the same disclosure regulations as associations. *See* Eric Roper, *On amendment issues, reveal corporate donors?*, Star Tribune, June 14, 2011, *available at* http://www.startribune.com/politics/statelocal/123880589.html.

This argument is unfounded—and it is also wholly foreclosed by *Citizens United*. Despite common misconceptions, *Citizens United* never held that a corporation has First Amendment rights because it is literally the same as a "person"—or a "legal person." To the contrary, *Citizens United* based its First Amendment analysis on the definition of corporations as *associations* of people. *See Citizens United*, 130 S. Ct. at 900 ("The Court has thus rejected the argument that political speech of corporations *or other associations* should be treated differently under the First Amendment simply because such associations are not 'natural persons.'" (citation omitted and emphasis added)); *id.* at 904 ("If the First Amendment has any force, it prohibits Congress from fining or jailing citizens, *or associations of citizens*, for simply engaging in political speech." (emphasis added)); *id.* (describing speaker as "an association that has taken on the corporate form"); *id.* at 906-07 (again describing corporations as "associations of citizens"); *id.* at 908 (describing Citizens United and similar advocacy organizations as "associations of citizens . . . that have taken on the corporate form").

Corporations *are* associations, and should be treated as such under Minnesota law. *See* Minn. Stat. 10A.01 subd. 6 (defining "association" as "a group of two or more persons, who are not all members of an immediate family, acting in concert"). The notion that corporations are "legal persons"—and therefore not subject to the same disclosure requirements as other associations—lacks any basis in law or common sense. The Board should reject it.

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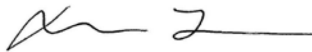
We greatly appreciate the opportunity to submit these comments, and look forward to the opportunity to comment further at such time as the Board proposes to issue further guidance.

Respectfully submitted,



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