HEARING—THE DISCLOSE ACT (S. 2516) AND THE NEED FOR EXPANDED PUBLIC DISCLOSURE OF FUNDS RAISED AND SPENT TO INFLUENCE FEDERAL ELECTIONS

WEDNESDAY, JULY 23, 2014

UNITED STATES SENATE,
COMMITTEE ON RULES AND ADMINISTRATION,
Washington, DC.

The Committee met, pursuant to notice, at 10:00 a.m., in Room SR–301, Russell Senate Office Building, Hon. Angus S. King, Jr., presiding.

Present: Senators King, Schumer, Udall, Klobuchar, Roberts, McConnell, Blunt, and Cruz.

Staff Present: Kelly Fado, Staff Director; Veronica Gillespie, Elections Counsel; Ben Hovland, Senior Counsel; Sharon Larimer, Professional Staff; Julia Richardson, Senior Counsel; Abbie Sorrendino, Legislative Assistant; Phillip Rumsey, Legislative Correspondent; Leigh Schisler, Special Assistant; Jeffrey Johnson, Clerk; Benjamin Grazda, Staff Assistant; Mary Suit Jones, Republican Staff Director; Shaun Parkin, Republican Deputy Staff Director; Paul Vinovich, Republican Chief Counsel; Sarah Little, Republican Communications Director; Trish Kent, Republican Senior Professional Staff; and Rachel Creviston, Republican Senior Professional Staff.

OPENING STATEMENT OF SENATOR KING

Senator KING. Good morning. The Rules Committee will come to order. Good morning to everyone who has joined us. Senator Whitehouse is at the table.

This hearing is the Committee's second hearing following the Supreme Court's McCutcheon decision earlier this year that looks at issues surrounding money in our political system.

In April, the Committee met to hear from a panel of experts about the McCutcheon decision and how our campaign finance landscape has changed in recent years. We know that McCutcheon coupled with the Citizens United decision have created an environment where we will see record amounts of money spent to influence elections around the country. Today's hearing will focus specifically on the issue of campaign finance in American politics and the need for expanded disclosure.

Our constitutional system contains many provisions that are in tension with one another, important provisions which often touch our basic rights and responsibilities in sometimes conflicting and contradictory ways. One of these, which I wrestle with daily as a member of the Intelligence Committee, for example, is the tension between the fundamental charge of the Preamble that we are to provide for the common defense and ensure the domestic tranquility, while at the same time observing the privacy protections of the Fourth and Fifth Amendments.

Another example is the subject of today's hearing: How do we respect and enhance the freedom of expression enshrined in the First Amendment while protecting the Government from being corrupted by the unchecked flow of money to public officials? We have wrestled with this problem for well over 100 years through periodic scandals and periodic corrections, new laws and new ways to evade those laws. But as I observed at the outset of our Committee's hearing on this subject several months ago, we have never seen anything like what is happening today.

The average Senator now must raise more than $5,000 a day, 7 days a week, 365 days a year for 6 years in order to be prepared for the next election. But as disheartening as that is, it is only part of the story.

Over the last decade, and accelerating in the last 4 or 5 years, is a new phenomenon: the unchecked, unlimited, undisclosed gusher of money from individuals, interest groups, and shadowy organizations that has become a kind of parallel universe of essentially unregulated campaign cash.

In recent years, the Supreme Court has steadily chipped away at two of the three pillars of the campaign finance regulation concept, which goes back to the early days of the last century, and has effectively eliminated limits on sources and amounts. But the Court's fundamental basis for doing so was the assumption that the third pillar—disclosure of the source of contributions—remained as a bulwark against corruption which would otherwise threaten the heart of our political process.

Justice Roberts in the McCutcheon case said, "Disclosure of contributions minimizes the potential for abuse of the campaign finance system. Disclosure requirements are in part justified based upon a governmental interest in providing the electorate with information about the sources of election-related spending. They may also deter actual corruption and avoid the appearance of corruption by exposing large contributions and expenditures to the light of publicity."

That is Justice Roberts. And he makes total sense. But, sadly, this kind of disclosure, the disclosure which the Court relied upon as a principal justification for the McCutcheon and Citizens United decisions simply does not exist under today's campaign finance laws, and the result is an almost total loss of accountability, the hiding of vital information from voters—who it is that is trying to influence their votes—and an inevitable slide toward corruption and scandal.

I know that many consider this a partisan issue. I do not. Although the momentary advantage under the present system appears to favor the Republicans, the whim of a couple of liberal billionaires could change that perception overnight. This is a systemic issue which should be fixed with an eye to the long-term health of our democracy, not a fine calculation of who might gain an edge in the next election.

Today we meet to consider a bill to remedy the shortfall. Senator Whitehouse has been a leader on this issue for many years. His bill is not the only bill. I also have a bill, the Real Time Transparency Act, which would require Members of Congress, PACs, and political

committees to report $1,000 donations electronically within 48 hours.

Probably the purest form of free political speech in America is the traditional New England town meeting. It is a place where citizens from all walks of life gather together, usually on a cool Saturday morning in early March, to debate, argue, and decide the school budget, whether to buy a new police cruiser, or which roads will be paved in the coming year. I have been to those meetings in Maine, and I have heard the spirited debates and seen some folks go home angry and hurt when their point of view did not prevail.

But everyone speaks up for themselves in Maine, and I have never seen someone stand to speak in disguise. I have never seen someone stand to speak in disguise. We know who is doing the talking, and that in itself is valuable information. And so it should be in November. Because what is an election but a big town meeting where the people decide the future of their community or their country? And an essential part of the debate, an essential part of how we make decisions is knowing who is doing the talking.

Senator Roberts.

OPENING STATEMENT OF SENATOR ROBERTS

Senator ROBERTS. Well, thank you, Mr. Chairman.

For those of us who opposed the McCain-Feingold bill, it is always an interesting experience to hear concerns being expressed about the current state of our campaign finance system. I opposed that legislation, along with most of my Republican colleagues, because we feared it would make our system worse, not better. We feared it would not get money out of the system but would simply divert it to other sources. That has now come to pass. It was not hard to predict.

Unfortunately, instead of recognizing the folly and the futility of the last regulatory scheme, the majority seeks to impose a new one, this time under the guise of disclosure.

Now, that sounds harmless enough. It sounds very reasonable, especially when it is articulated by my good friend. The bill before the Committee today has been introduced in one form or another in each of the last three Congresses. Though the provisions have varied in some respects, the goal has been consistent: to suppress speech by imposing costly and burdensome regulations on its exercise.

While other efforts to achieve this goal have been struck down as unconstitutional by the courts, the majority has attempted to use disclosure as a means to erect a new regulatory scheme to silence their opponents. This effort must be seen in the context of their larger goal to amend the First Amendment to permit even more regulation of political speech.

I have here the Constitution of the United States and also the First Amendment: "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof, or abridging the freedom of speech." It also mentions the press and the right of the people peacefully to assemble and to petition the Government for a redress of grievances, whether it be in Kansas or in New England.

This effort must be seen, again, in the context of the larger goal to amend the First Amendment to permit even more regulation of political speech. I repeated that on purpose.

The Judiciary Committee has reported a constitutional amendment, which our Majority Leader has said we will be voting on in September that would allow the Congress to impose reasonable restrictions on speech. Luckily, previous considerations of the DISCLOSE Act provide some insight into what the majority regards as reasonable.

For starters, when the DISCLOSE Act was considered by the House in 2010, the restrictions and obligations it imposed were applied to groups disfavored by the majority. A number of corporations were simply prohibited from speaking. Government contractors and TARP recipients were prohibited from making independent expenditures. During floor consideration, an amendment was added to also prohibit speech by companies that explore and produce oil and gas on the Outer Continental shelf. What is that all about? Well, the bill was on the floor soon after the Deepwater Horizon spill, you see, so this was an easy target.

Not surprisingly, the majority thought it was perfectly reasonable to prevent any of these companies from speaking, but did not think it was necessary to extend those restrictions to the unions that might represent the workforce in these companies. Republican amendments to extend the restrictions to these unions were rejected. The majority did not find them reasonable, apparently. In some cases, groups were excluded from the disclosure obligation solely because the votes were not there to include them.

That is what happens once the Congress starts to impose speech restrictions. The restrictions get applied to whoever does not have enough votes in the Congress to prevent them. That is why the First Amendment begins, "Congress shall make no law . . . " Imposing speech regulations based on the whims of whatever party happens to be in the majority in Congress at a given time is not a reasonable exercise, but it is exactly what happens once we start down this path.

I give this little recent history lesson, Mr. Chairman, because I think it is important we not try to fool ourselves or anybody else about what is going on here. There is no mystery about the purpose of the DISCLOSE Act, this version or any other prior one. We know the majority is upset about the ads that are attacking them and their agenda. We know they want those ads to stop. We know they hope new disclosure requirements will achieve that goal. We know they think the requirements they want to impose are reasonable. We just do not agree.

We do not believe new regulations will improve our system. We do not think imposing new costs on the exercise of free speech rights will improve our democracy.

If the IRS targeting scandal has taught us anything, it should be that giving Federal bureaucrats control over the political activity of American citizens is a recipe for disaster. It is time to admit the failure of the regulatory model and reverse the mistake we made when we passed McCain-Feingold and the Federal Election Campaign Act before it. I know my friends in the majority want to silence their opponents by any available means, but they should stop

trying. New regulations will not make our system better. Getting rid of the regulations we have will.

If we really want disclosure, we should be advancing proposals that will redirect resources to the candidates and the parties. That is long overdue. They are fully accountable and fully disclose everything they spend and receive. Getting rid of the limits on parties and candidates would increase transparency and enhance disclosure. If disclosure is the goal, that is the way to achieve it. Unfortunately, the DISCLOSE Act has another goal, one no American who supports the Constitution should support.

Thank you, Mr. Chairman.

Senator KING. We are pleased to have join us this morning the distinguished Republican Leader, Senator McConnell. Senator McConnell, a statement?

OPENING STATEMENT OF SENATOR McCONNELL

Senator MCCONNELL. Thank you, Mr. Chairman, Senator Roberts. I appreciate the opportunity to be here to talk about the DISCLOSE Act, and I will get right to it.

The proposal is not new. This is the third time we have seen it. But it is precisely because of the doggedness of the proponents of this bill that I have come here today to make my observations.

For more than two centuries, we have had regularly scheduled elections in our country. Every 2 years, the major parties present a vision for the future with confidence in the people, with confidence that the marketplace of ideas, the best arguments, will win out. And yet every 2 years now, with near metronomic regularity, our friends on the other side can now be expected to propose some new attempt to silence their critics, or in the case of the DISCLOSE Act, an old attempt to silence critics.

Sadly, it has now come to the point where you can set your clock to the Democrats' attempt to stifle the free speech rights of the American people. To me, this means they have either lost confidence in the centuries-old bargain that said the best political argument will prevail or they have simply lost faith in the First Amendment itself.

But either way, it is now fairly clear that our friends on the other side have given up on the power of their governing vision alone to carry the day electorally. That is not just a shame; it is not just a commentary on the left, and it is not simply some political stunt aimed at exciting the base in an election year, because if that is all it was, we could just dismiss it and move on.

But it is actually far worse than all that. Collectively and individually, these continued efforts to weaken voter participation in our elections poses a real threat to the right of free speech in this country, something which is guaranteed by the First Amendment to the Bill of Rights and which has ensured the integrity of the political process in this country for more than two centuries. We have not always lived up to the promise of the First Amendment as a Nation, but we have always had recourse to it in correcting past mistakes. And no one—no one—should be tampering with it.

Yet again and again in recent years, that is just exactly what we have seen. We saw it on shameful display at the IRS, as detailed in the IG report on the agency's activities leading up to the 2012

election and in the administration's subsequent efforts to codify through regulation just the kind of targeting that took place. We saw it in recent efforts by Democrats to empower Congress, as Senator Roberts pointed out, through a constitutional amendment to limit the free speech rights of individuals and groups—a truly radical proposal that would end all arguments about what little regard our friends on the other side have for the rights of free citizens to set the direction of our country. And we have seen it three times now in the biennial revival of the DISCLOSE Act.

Let me be blunt. This proposal is little more than a crude intimidation tactic masquerading as good government. And the fact that we have been forced to consider it once again is the clearest proof yet that our friends on the other side are fixated—on suppressing speech.

It is no secret that the First Amendment has been a consuming passion of mine for many years. I have fought hard to defend it on the Senate floor and in the highest Court of the land. It has pitted me at times against members of my own party, including President Bush. And in its defense, I have occasionally formed alliances with some unlikely allies. Among them is the American Civil Liberties Union, and I would like to ask, Mr. Chairman, consent to enclose a letter from the ACLU opposing the DISCLOSE Act in the record at this point.

Senator KING. Without objection.

[The letter was submitted for the record:]

Senator MCCONNELL. It is to the great credit of the ACLU that, even though largely not aligned with most members of my party on most issues, they have stood strong in opposition to the DISCLOSE Act. I am grateful for their efforts on this issue yet again.

Some might say that the arguments on both sides of this proposal hardly need repeating since Democrats have now proposed it on three separate occasions, but I see it differently. In my view, it is precisely when we stop speaking out against proposals like this that we are in the greatest danger of ceding our rights to those who would deprive us of them.

Whenever our friends spring from behind closed doors with a bill like this one, we need to be ready to respond in kind. And in this case, the first part of that response should be to point out the obvious. At a time when millions of Americans are struggling to find work, small businesses are sputtering under the weight of an increasingly brazen regulatory state, our VA system is failing our veterans, and tens of thousands of unaccompanied minors have been flowing across the border without any clear policy solution from either the White House or Democratic leaders in Congress, Democratic leaders should not be focused on a bill the primary purpose of which is to silence their critics. Their persistence at this particular moment is eloquent testimony to where the priorities lie.

The second thing I would like to say about this proposal is that the entire premise for it is utterly baseless. The supposed justification of this bill is the need to "do something" about certain people in voluntary associations participating in the political process. But this, of course, gets it exactly backwards. We should not be trying to think of ways to keep people from participating in the political process. We should be encouraging more of it. As veteran columnist

George Will has noted, the political process is not some private club in which the parties and candidates control the membership. And yet that is precisely what the DISCLOSE Act aims to do.

Now, I know our Democratic friends are frustrated. Prior attempts to pass a constitutional amendment limiting political speech have failed spectacularly, hitting a high watermark of 40 votes in 2001.

The Supreme Court has also spoken clearly and emphatically that, under the Constitution, free speech is not limited to corporations that own liberal media outlets.

The purpose of the DISCLOSE Act is to get around all of that. If the supporters of this proposal cannot suppress individuals or groups, the thinking on the left goes, then they should just go after the funding that amplifies the message, and they will do it in the old-fashioned way, through donor harassment and intimidation.

We have seen this kind of thing before, my friends, perhaps most vividly in the 1950s when the State of Alabama tried to get its hands on the donor list of the NAACP. The Supreme Court knew what that was about, which is why they ruled against forced disclosure then. They knew that the forced disclosure of donors mitigated against the rights of free association, because if people have reason to fear that their names and reputations will be attacked because of the causes they support, well, then, they are less likely to support them, of course. And that is the last thing we should want in a free society.

The FEC, interestingly enough, has applied this same principle, by the way, in protecting the donor list of the Socialist Workers Party, which most of you probably did not even known existed. The FEC has supported protecting the donor list of the Socialist Workers Party since 1979. So we have seen what the loudest proponents of disclosure have intended in the past, and it is not good government.

The President likes to say that the only people who oppose disclosure are people who have something to hide. History tells us otherwise. The sad fact is this kind of Government-led intimidation is part of a much broader effort that has been underway within the Obama administration for years. We have seen parallel efforts at suppressing speech at the FCC, the SEC, the IRS, DOJ, and HHS. And the tactics we saw during the 2012 campaign speak for themselves, from the enemies list of conservative donors on the Obama campaign's Web site to the strategic name dropping of conservative targets by the President's political advisers. And that is what this proposal is about. It is about harvesting the names of donors in the hopes of driving them off the playing field. We have seen it before, and we are seeing it now.

So let me just repeat today what I have said elsewhere on this entire effort. No individual or group in this country should have to face harassment or intimidation or incur crippling expenses defending themselves against their own Government simply because that Government does not like the message they are advocating. It is pretty simple, really. If you cannot convince people of the wisdom of your policies, it is time to come up with better arguments.

But tampering with our First Amendment rights is a dangerous business, and that is what this legislation before us aims to do. It

is an unprecedented requirement for groups to publicly disclose their donors, stripping a protection recognized and solidified by the courts. From the NAACP to the Sierra Club to the Chamber of Commerce, every one of them would now be forced to subject their members to the kind of public intimidation we have seen at other moments in our history.

The authors of this bill have sought bipartisan cover for this latest effort by claiming that labor unions would also be required to disclose their donors under this bill. Upon closer inspection, however, it becomes clear that through a cynical and elaborate scheme of thresholds and triggers, these unions are given, of course, a free pass, and that just underscores who the true targets of this legislation are. The targets are anyone who criticizes Democrats.

Which brings me to the final point. For 4 years now, we have heard how the Supreme Court unleashed a torrent of corporate money into the political process through the Citizens United ruling. Well, here is the truth. Individuals from New York to California have given tens of millions of dollars to candidates and causes, as is their First Amendment right. But the big money, it turns out, is coming from the same unions that are exempted from this bill, which, by one count, have spent nearly $4.5 billion over the past 9 years on politics, including $800 million in 2008 alone.

So for those who want to "do something," allow me to make a humble suggestion. Instead of suppressing free speech, let us look to State models for guidance. The endless web of campaign finance laws we have seen at the Federal level have done nothing but sow confusion. But they have been good for one group: The election lawyers are doing great.

A simpler, more reasoned approach would be for us to adopt the Virginia plan: remove the limits, allow candidates to accept and report all contributions, and let the citizens decide what is proper or not. Money will never be removed from politics. It is just like trying to put a rock on Jell-O. It just moves somewhere else. The intellectually honest approach is to remove the rock.

So, in closing, Mr. Chairman, I will continue to do everything in my power to protect the First Amendment rights from this latest iteration of the DISCLOSE Act and every other effort to suppress the free speech rights of the American people. And I sincerely hope my colleagues, all of whom swore the same oath to support and defend the Constitution that I did, will stand up. The First Amendment undergirds all other rights. We need to defend it with everything we have got.

Thank you.

Senator KING. Thank you. Thank you, Senator McConnell.

Senator Udall.

OPENING STATEMENT OF SENATOR UDALL

Senator UDALL. Thank you, Chairman King, and it is good to see my good friend Senator Whitehouse here, who has always been a champion of open and fair elections. And I very much support his DISCLOSE Act and hope that we can move it forward.

We have a serious problem and a great challenge. Our campaign finance system is failing and it is broken. It is being dismantled step by step by a narrow majority of the Supreme Court, taking us

back to Watergate-era rules, the same rules that fostered corruption, outraged voters, and prompted campaign finance regulations in the first place, from 1976 in Buckley v. Valeo, when the Court first tied campaign cash to free speech, to Citizens United, when the tortured logic reached its peak and corporations became people. The Court's McCutcheon decision in April was the latest blow, further opening the floodgates for wealthy individuals to donate to an unlimited number of candidates. At this point, five conservative Justices have said preventing outright bribery is the only legitimate basis for regulation.

This is not about free speech, and the American people know it. It is about wealthy interests trying to buy elections, in secret, with no limits, period. Because the speech we are talking about here is not free, Citizens United and McCutcheon are not about the grassroots small donor. It is about the big guys, the really big guys—billionaires and millionaires.

Politico reporter Ken Vogel has come out with a book about the new era of campaign spending. He calls the book "Big Money." He reports that outside groups, super PACs, and other independent outfits spent $2.5 billion in the 2012 campaign. Open a newspaper. We are seeing more and more political coverage about which billionaires are spending tens of millions of dollars on the political system. This is all coming at the expense of middle-class citizens and the challenges they face. It is a broken system based on a flawed premise that spending money on elections is the same thing as free speech.

There are only two ways to fix this: the Court overturns Buckley, which is not likely, or amend the Constitution to overturn previous misguided Court decisions and prevent future ones. That is why I built on bipartisan efforts going back decades and introduced S.J. Res. 19 last June to restore the historic authority of Congress to regulate the raising and spending of money for Federal political campaigns. This would include independent expenditures and would allow States to do the same at their level. It would not dictate any specific policies or regulations, but it would allow Congress to pass sensible campaign finance reform laws that withstand constitutional challenges.

We are seeing momentum. S.J. Res. 19 was just reported by the Judiciary Committee last month. It now has 46 cosponsors. And a companion measure has been introduced in the House with more than 110 cosponsors. I will continue to push for a constitutional amendment. We need comprehensive reform, but then in the interim we also need to follow the money, which is exactly what Senator Whitehouse and the DISCLOSE Act intend to do.

The DISCLOSE Act of 2014 asks a basic and more than fair question: Where does the money come from, and where is it going? The American people deserve to know who is spending all this money to influence their vote, and they deserve to know before, not after, they head to the polls. That is what the DISCLOSE Act will achieve. It is practical, sensible, and long overdue. We have a broken system. McCutcheon is the latest misguided decision. It will not be the last. Congress needs to take back control by passing a constitutional amendment. We all know that it will take time. In

the meantime, the checkbooks will be out, the money will keep flowing. We should pass the DISCLOSE Act.

Billionaires may keep spending, but they cannot keep hiding. Americans are losing faith in our electoral system. There is just too much money hidden in the shadows. It is time to restore that faith. The DISCLOSE Act is a step in the right direction.

You know, it was said here several times over and over again that somehow this is about free speech. What DISCLOSE is about is the basic core principle of the voters knowing where the money is coming from. Hundreds of millions of dark money—and I see a chart here on the table that I know Senator Whitehouse is going to talk about. Hundreds of millions of dark money in 2012 and in 2010 are infiltrating the system. Nobody knows who gives that money except the billionaires and millionaires who are doing it.

So thank you, Senator Whitehouse, for being here today, and thank you very much, Chairman King, for holding this very, very important hearing on our democracy.

Senator KING. Thank you, Senator Udall.

We have two panels today. The first is Senator Whitehouse, who is the principal sponsor of the DISCLOSE Act, and he has been involved in this issue for some years. And, Senator Whitehouse, we look forward to your testimony.

STATEMENT OF THE HONORABLE SHELDON WHITEHOUSE, A UNITED STATES SENATOR FROM THE STATE OF RHODE ISLAND

Senator WHITEHOUSE. Thank you very much, Chairman King and Ranking Member Roberts, for convening this important hearing on the need for public disclosure of who is behind the funds raised and spent to influence Federal elections, not to silence or limit that speech, to be clear, just to have the public know who is behind the funds raised and spent to influence Federal elections.

I am pleased to testify about the DISCLOSE Act, which I introduced with 50 colleagues last month, to end the toxic scourge of massive, undisclosed spending in elections, a scourge that is undermining public faith in our democracy, happily for the special interests who want to pull strings behind the scenes and who profit from a discouraged citizenry.

The Supreme Court's 2010 Citizens United decision opened the floodgates to unlimited corporate in elections. Every day it becomes clearer that this decision will go down as one of the Court's worst, like such discredited rulings as Lochner v. New York. Citizens United is so far the crowning achievement of a set of politicized, activist judges who are acting, to quote Justice Breyer, "like junior varsity politicians."

This term's McCutcheon decision, which struck down aggregate limits on individual donations, has compounded the need for this transparency. This year, the toxic influence of Citizens United can be seen in the country's most competitive Senate races. According to the Wesleyan Media Project, roughly 90 percent of all television ads in both the Michigan and North Carolina Senate races have been run by outside groups. Many of these independent groups mislead voters and give no clear idea of who is supporting or opposing the candidates.

When groups can run ad campaigns without disclosing their true identities, they freely resort to vicious and dishonest attack ads with no fear of anyone being held accountable for those claims.

The DISCLOSE Act would help rein in what one Kentucky columnist has dubbed this "Tsunami of Slime." The bill, which is unchanged from the version introduced in July 2012, would require organizations spending money in elections, including super PACs and tax-exempt 501(c)(4) groups, to promptly disclose donors who have given $10,000 or more during an election cycle. The bill includes robust transfer reporting requirements to prevent political operatives from using shell corporations to hide donor identities. Provisions such as the high disclosure threshold protect membership organizations from having to disclose their member lists and allow organizations to exempt donors who do not wish their contributions to be used for political purposes.

We do have to do this together. We tried to get this legislation passed in 2010, and Republicans filibustered. We tried again in 2012, and again Republicans filibustered. It will take Republicans to join us to get this done.

There is a chance of that. It was not too long ago that Republicans supported disclosure. Here is what Republican colleagues have said about disclosure in the past:

"I do not like it when a large source of money is out there funding ads and is unaccountable," one said.

As another put it, "I think the system needs more transparency so people can more easily reach their own conclusions."

A third colleague summed it up nicely: "Virtually everybody in the Senate is in favor of enhanced disclosure, greater disclosure. That is really hardly a controversial subject."

Leader McConnell back in the day said, "Virtually everybody in the Senate is in favor of enhanced disclosure. Public disclosure of campaign contributions should be expedited," he said, "so voters can judge for themselves what is appropriate."

They were right then, and Americans know it now.

Americans of all political stripes are disgusted by the influence of unlimited, anonymous cash in our elections and by campaigns that prize billionaire backers and secretive slush funds. We need to pull together and solve this.

Passing the DISCLOSE Act would at least make transparent the anonymous money pouring into elections and would signal to the American people that Congress is committed to fairness and openness. As a Republican former Federal Election Commission Chairman, Trevor Potter, has said, this bill is, and I will quote him, "appropriately targeted, narrowly tailored, clearly constitutional, and desperately needed."

In 2010 we came within one vote in this chamber of passing the DISCLOSE Act. This year, let us redouble our efforts to contain the damage done by Citizens United with transparency. We must preserve Government of the people, by the people, and for the people from this tide of unlimited, unaccountable, and anonymous money polluting our elections from this tsunami of slime.

Thank you very much, Mr. Chairman. Thank you for the opportunity to testify.

Senator KING. Thank you, Senator Whitehouse. I appreciate your testimony, and I appreciate your sponsorship and strong support of this legislation.

I would like to ask our second panel to take their seats at the table, please. We will now hear from our second panel.

First, Ms. Heather Gerken, who is the J. Skelly Wright Professor of Law at Yale Law School and a Commissioner on the Bipartisan Policy Center's Commission on Political Reform.

And, second, Mr. Bradley A. Smith, Chairman of the Center for Competitive Politics.

I see that Senator Schumer, the Chair of the Committee has joined us. Senator Schumer?

Chairman SCHUMER. Yes, I was going to congratulate Senator Whitehouse on his great work here, so I will do that and now turn it back over to you, Mr. Chairman. And I will be back in a minute.

Senator KING. Thank you.

And Mr. Daniel Tokaji, the Robert M. Duncan/Jones Day Designated Professor of Law at the Ohio State University, Moritz College of Law, was planning to be here today, but a plane delay has kept him from joining us. But his testimony will be inserted into the record. He will be available to answer questions for the record.

[The prepared statement of Mr. Tokaji was submitted for the record:]

Senator KING. Thank you both for joining us today, and I would like to ask each of you to limit your statements to 5 minutes, and then we can ask questions. And I know that you both have submitted longer written statements, which will be submitted into the record of the Committee, without objection.

Ms. Gerken, could you proceed, please? You need to press the button, I think, to start your microphone.

STATEMENT OF HEATHER K. GERKEN, J. SKELLY WRIGHT PROFESSOR OF LAW, YALE LAW SCHOOL, NEW HAVEN, CONNECTICUT

Ms. GERKEN. Thank you very much, Chairman King and Senator Roberts.

Robust disclosure mechanisms are an essential foundation for any campaign finance system, and ours are neither adequate nor effective. Dark money flows freely through the system and grows in significance each election cycle. The need for adequate disclosure mechanisms has become even more important as the Supreme Court dismantles much of our current campaign finance system, leaving American politics even more vulnerable to money's hidden influence than before.

I want to make three points today.

First, disclosure rules have garnered considerable bipartisan support, and with good reason. Disclosure sits at the sweet spot in policymaking, where democratic idealism and political realism meet. These rules provide the American people with the information they need to make informed decisions without placing restrictions on where and how donors spend their money.

As a result, outside of Washington's tight circles, transparency measures enjoy a high level of support among policymakers, academics, and the American people.

As one of the 29 Commissioners on the Bipartisan Policy Center's Commission on Political Reform, which was chaired by Senators Trent Lott, Olympia Snowe, and Tom Daschle, Secretary Dan Glickman, and Governor Dick Kempthorne, I witnessed firsthand what happens when a bipartisan and savvy group debates about transparency.

After a lively debate, the Commission recommended the disclosure of "all political contributions, including those made to outside or it groups," and I would like to emphasize that it did so unanimously.

My academic work has also convinced me of the importance of robust disclosure rules. What I have called "shadow parties" have emerged—independent organizations like 501(c)(4)s and super PACs that exist outside of the formal party structures and closely cooperate with campaigns even if they do not, as a legal matter, coordinate with them. These shadow parties enjoy substantial advantages over the formal parties in terms of fundraising capacity. But many—specifically, 501(c)(4)s—also offer donors another significant advantage: anonymity.

These shadow parties are shifting the center of gravity away from the formal party apparatus into private and non-transparent organizations. An important report authored by Professor Tokaji and Renata Strause offers compelling evidence of the new problems associated with this regime, and I would be happy to discuss that during questions and answers.

Second, transparency mandates stand on firmer constitutional footing than any other type of campaign finance regulation. Do not let cases from the 1950s, when lynching and murders occurred, mislead you. While the First Amendment limits Congress' ability to regulate campaign finance generally, the Court has concluded that transparency rules promote First Amendment values by providing Americans with the information they need to evaluate the ads that they watch. With the exception of Justice Thomas, the Justices who are the most skeptical of campaign finance regulations generally have consistently voted to uphold transparency measures and have authored many of the touchstone opinions in this area.

Finally, there are a variety of models for ensuring that disclosure requirements remain robust and efficacious over many election cycles. Wade Gibson, Webb Lyons, and I have proposed a new one aimed at the central problem in campaign finance law which Senator Roberts mentioned, which is keeping up with the ever changing strategies that donors use to conceal their influence. Whenever regulations make it harder for wealthy donors to fund politics through one outlet, they tend to find another. And Congress and the FEC have long struggled with this question as each new election cycle new organizations emerge. We think of it as the carnival equivalent of Whack-A-Mole.

Our proposal avoids what Senator Roberts is worried about, which is the Whack-A-Mole problem because it regulates the ad, not the organization. Rather than trying to guess which organizations will emerge in the next campaign cycle, we offer a very simple fix. Any advertisement funded, directly or indirectly, by an organization that does not disclose its donors must simply acknowl-

edge that fact with a truthful disclaimer: "This ad was paid for by X," which does not disclose the identity of its donors.

The fix is universal and flexible enough to accommodate changes in future election cycles, and because it offers universal disclosure, it guarantees that regulations will keep pace with politics.

For all these reasons, now is the right moment for Congress to pass new disclosure requirements. This is one of the rare instances where the need for change is significant, the time is ripe, and the American people are ready.

Thank you very much.

[The prepared statement of Ms. Gerken was submitted for the record:]

Senator KING. Our next witness is Mr. Brad Smith, Bradley Smith, who is the Chair of the Center for Competitive Politics. Mr. Smith, we are delighted to have you here. I read your testimony in full, and I must say very impressive and thoughtful testimony. I appreciate the effort that you have put forth to discuss this issue with us. Mr. Smith?

STATEMENT OF BRADLEY A. SMITH, CHAIRMAN, CENTER FOR COMPETITIVE POLITICS, ALEXANDRIA, VIRGINIA

Mr. SMITH. Thank you, Mr. Chairman, for your kind words, and thank you, Senator Roberts, as well.

Let us start with the basic fact. There are currently more laws mandating public disclosure of politically related spending than at any time in our Nation's history. None of these disclosure laws have been altered in any way by the Supreme Court in Citizens United, in McCutcheon, or in any other decision. Candidates, political parties, PACs, super PACs already disclose all of their donors and expenditures beyond the most de minimus amounts. Federal law also requires reporting of all independent expenditures over $250 and of all "electioneering communications" of over $10,000, including the names of donors who contribute for those purposes. This information is all publicly available on the FEC Web site. 527 organizations that are not State- or FEC-registered PACs also report all donors to the Internal Revenue Service, which makes that information available to the public.

Additionally, the FCC requires broadcast ads to include the identity of a spender to be made public within the ad itself and requires further information to be made available through the political file each station is compelled to maintain.

Given this extensive disclosure regime, it is simply a misnomer to talk of dark money or non-disclosing groups. Rather, what we have is a system in which some politically related spending occurs with less information than some people would like about the spenders' members, donors, and internal operations.

Assuming that this is a problem, the question is how big a problem is it. The FEC reports that $7.3 billion was spent on Federal races in 2012. Approximately $311 million of that was spent by organizations that did not itemize and disclose all of their donors; that is, a bit under 4.5 percent of total spending came from groups that did not itemize their donors.

Even this number tends to overstate the issue because many of these groups are well known to the public, groups such as the

League of Conservation Voters and the United States Chamber of Commerce. But some still ask, Why not seek still more information? Why not dig further into the disclosure well? Well, there are several reasons.

First, studies show that compulsory disclosure disproportionately limits smaller grassroots organizations, particularly organizations that rely on volunteers. This is simply because of the regulatory compliance issues.

Second, transfer provisions of the DISCLOSE Act would create a fundraising nightmare for nonprofits, even those that do no political work at all, hindering general nonprofits' social welfare activity in society at large.

Third, the DISCLOSE Act creates a great deal of junk disclosure. Much of the disclosure required by the act would actually confuse the public. It would be unfair to persons who would have their names attached to speech they did not intend to or did not actually fund, and it would be misleading as to the amounts actually spent on political activity by requiring double, triple, and even more frequent counting of the same money.

Finally, we cannot overlook the costs in privacy that come with excessive compulsory disclosure, costs which have led the Supreme Court to repeatedly strike down excessive disclosure laws, including in the 1970s, 1990s, and 2000s. DISCLOSE, if passed, will certainly be challenged on constitutional grounds. But even if it were to withstand those challenges, this body should recognize and show consideration for the privacy and other interests that would justify such a challenge. The purpose of disclosure is to allow citizens to monitor their Government. It is not to allow the Government to monitor the political activity of its citizens.

As the ACLU has put it, "Absent anonymity, some donors on both the left and right will simply not donate out of a legitimate fear that they will be harassed or retaliated against for their advocacy."

We cannot have a serious hearing today without recognizing the cost that compulsory disclosure has for unpopular speakers and new, often unpopular, ideas—that may in later years become quite popular, as was the case with abolition or more recently same-sex marriage. The CEO of a consumer business in West Virginia or Kentucky who believes that coal should be more heavily regulated; the small-town Alabama businessman who wants to fund a suit by the ACLU challenging prayer in the area's public schools; a Montana businesswoman who favors gun control—these people should not be compelled by the Government to put forward information that will lead others to boycott them and destroy their businesses.

Rightly or wrongly, and regardless of what some members of this panel may want to hear, millions of Americans already believe that their Government is inappropriately spying on them. Tens of millions of Americans do believe—and I think there is enough evidence that this is hardly irrational, even if some think it is incorrect—that the IRS is being used as a tool to harass points of view that are critical of the current Executive. There are millions of Americans who hear a Senator publicly call for criminal prosecutions of political activity, and they see themselves as the intended target of that Senator's wrath.

Too often today, disclosure is not used to evaluate messages; rather, people admit that they openly hate the message and seek to use disclosure to stop the speech altogether. As one organizer stated a while back, years ago we would never have been able to get a blacklist together so fast and quickly. Thanks to compulsory disclosure and computers, it is much easier to blacklist fellow Americans than in the past, but many Americans will not see this as progress.

Frankly, the approval of this bill is unlikely to improve trust in Government precisely because many people do not trust the Government now. If you wish to increase that trust and create a climate in which serious improvements, bipartisan improvements in disclosure laws can be considered, then you must at least appear to take seriously the fact that the Inspector General for Treasury has found that the IRS targeted speakers on the basis of their political activity, that the key IRS employee involved has pleaded the Fifth Amendment and similarly lost a large cache of e-mails in what a poll shows a substantial majority of Americans believe are highly suspicious circumstances.

We must stop proposing to amend the Constitution for what appears to millions of Americans to be nothing more than short-term partisan gain, and we must no longer tolerate the disgraceful, ongoing vilification on the floor of the United States of individual citizens because of their lawful political activity.

In other words, if we wish to create improved trust in Government and create a climate favorable to meaningful and serious revision of disclosure laws, we must first act within this body to create a climate of trust. This bill is not helpful.

Thank you.

[The prepared statement of Mr. Smith was submitted for the record:]

Senator KING. Thank you, Mr. Smith.

We will have 7-minute rounds and questions for both witnesses.

Ms. Gerken, you mentioned the NAACP case, and I believe Senator McConnell mentioned it as well, where the Supreme Court recognized in that case the importance of protecting donor lists. Can you distinguish that case from the situation that we are talking about here this morning?

Ms. GERKEN. So it has always been true that the Supreme Court has made sure that there are protections for people who are likely to suffer a real threat of harassment, and the case involving the NAACP is, of course, the quintessential version of that. We all know what was going on in the Deep South in the 1950s. It was a dangerous time to be seen as donating and supporting the NAACP.

The Supreme Court continues to reaffirm that precedent, so anyone who is concerned about this level of harassment need only show a reasonable probability of harassment.

What we have not seen, however, is many people succeeding under these standards. The National Socialist Workers Party has done so, but in two recent high-profile cases, which are often invoked as examples of harassment, when Federal courts look at the facts, they have concluded that that level of harassment is not actually a problem. People taking signs off of your doorstep, and

mooning on one occasion someone, does not constitute a sufficient harassment to undermine disclosure rules.

And I should just note that oftentimes when people talk about what constitutes harassment, they talk about consumer boycotts. If we are going to talk about the civil rights movement, we should remember, consumer boycotts have long been a robust and treasured tool of those who believe in the First Amendment and use their power as consumers in order to pursue their aims.

So harassment of the sort that the National Socialist Workers experienced is grounds for suspending disclosure rules. Harassment of the sort that we have seen in recent years has not been.

Senator KING. Thank you.

Mr. Smith, you talk very movingly about the plight of the small donor, but doesn't this bill only apply to $10,000 and above? I would not call that necessarily a grassroots donation. Isn't there a distinction to be had? This bill that is before us has a $10,000 and above cutoff and does not deal with small contributions.

Mr. SMITH. Well, obviously most Americans cannot afford to contribute $10,000 to any type of cause. However, millions of Americans can, and in fact do, and they often speak for other Americans of more modest means who share their points of view. And many of these people I think will be dissuaded from participating in the system.

The academic literature is really pretty clear on this that disclosure does dissuade people from spending—not everybody, not most people, but it does discourage some people from participating in campaigns.

Senator KING. But what about the issue of information? Part of the—it goes back to the beginning of the country. It goes back to the statement that Chief Justice Roberts made in McCutcheon, that knowing who is doing the talking is part of the information voters need in order to assess the message. Isn't that a legitimate public interest?

Mr. SMITH. I think that is, and I think that is why we have as much disclosure as we have. But the Court has never approved, for example, it has never given its blessing to something like this act. It might do so if given this act, but there is good reason to think that it would not. Again, in Buckley v. Valeo, for example, it vastly trimmed down the disclosure statutes, in McIntyre v. Ohio Election Commission. And so I think that we cannot assume that the Court is going to approve this, and there are reasons why we should be hesitant about it. What we see more and more now is that, as I mentioned, people are not saying, "Boy, I need to understand this ad." Rather, people are saying, "I hate that speech. I want to stop that speech."

A group called "Media Matters" is out raising funds specifically promising to distort and harass people's speech, i.e., their giving and the speech that it funds, in order to gin up public backlash against them and "dissuade" them from participating. And I do not think Congress should be a party to forcing people to provide information that their political opponents will use to harass and vilify them and try to dissuade them from participating in democracy.

Senator KING. Well, on the constitutional question, the issue of disclosure was specifically endorsed very strongly by both Kennedy

in Citizens United and Roberts in McCutcheon, and it was not a minor matter because Justice Thomas dissented on that issue. So it clearly looks to me like eight members of the Supreme Court have asked us to enact greater disclosure requirements because that is the only thing left after they have dismantled the other protections. They have said it is okay that we are doing this because we have disclosure, which, of course, we do not.

Mr. SMITH. Well, I think that that would be something that you would undertake at your peril. I mean, they have not endorsed this particular item. What they have said is we have a disclosure regime and that is adequate. They have not said if Congress did more we would have an adequate disclosure regime. They have specifically talked about what we have on the books and viewed that as significant enough.

It is true, however, that I think the courts—let us put it this way: Without those statements, I would tell you flat out I think this bill is unconstitutional, and I can only tell you that there would be a serious challenge made to it. We should remember, though, that anonymity has a long history in the United States, from the Federalist Papers; former Chief Justice John Marshall used to fund anonymous political speech; Thomas Jefferson used to fund anonymous political speech; Abraham Lincoln used to fund anonymous political speech. We know that now only years after their death, and we should be aware that, again, you can dissuade and discourage people from speaking, and we need to be sensitive to that. And I think at this point we have a great deal of disclosure, and one of the reasons people are hostile to the idea of extending it further is that they see this as a partisan effort and they see the IRS investigations and they say this is exactly why I do not want to disclose.

Senator KING. I can assure you that this Senator does not view this as a partisan issue. As I said in my opening statement, I think this is a democracy issue. And all we need is a couple of liberal billionaires to start spending in a way that others are, and suddenly you would see a change in the atmosphere around here.

Ms. Gerken, Professor Gerken, is there a disclosure problem? Mr. Smith makes the case that we really do not have a disclosure problem; we have got lots of disclosure. But what about what has been happening in the last 5 years?

Ms. GERKEN. No, I appreciate Professor Smith acknowledging what the Court said in Citizens United. I have a lot of trouble imagining the Court finding this type of regulation to be a problem because all it is doing is leveling the playing field. Right now, super PACs and political parties have to do a great deal of disclosure. No one has suggested that this violates the First Amendment or burdens speech unduly. And so now all we are doing is extending—all that the Congress is proposing to do is extending this idea to organizations like 501(c)(4)s. And it is incredibly important to do that. If you do not level the playing field, then as we have seen over time, the (c)(4)s will become increasingly important players because they offer something that no one else can offer, which is unlimited fundraising ability and anonymity in doing so.

So this is in some ways the game of regulatory Whack-A–Mole. This is imperative. If you do not stop the money here, it is just

going to keep moving into the (c)(4)s, which is exactly what we have seen. Between 2008 and 2012, the amount of money spent in the system by undisclosed dark money is roughly three times what it was before.

So this is just simply extending a set of regulations that we have lived with for a long time that have never been subject to any serious constitutional doubt to the new organization on the block which is spending money in a new way in campaigns.

Senator KING. Thank you.

Senator Roberts.

Senator ROBERTS. Well, thank you, Mr. Chairman. Thank you both for coming and for giving excellent testimony.

Ms. Gerken, your testimony did not endorse the DISCLOSE Act, or at least that is how I read it, but I think in terms of your commentary, you probably support it. Do you endorse it?

Ms. GERKEN. You know, actually no one has ever asked me if I have endorsed anything because I am not a Senator. So I do think that, one, we need more disclosure rules for the 501(c)(3)s. I think, two, this act is constitutional. It is narrowly tailored and sensibly targeted at the right opportunities.

Senator ROBERTS. So you support it.

Ms. GERKEN. I would support it. If I were in your shoes, I would vote for it.

Senator ROBERTS. Okay. Well, you are not in my shoes.

Chairman SCHUMER. Maybe one day.

Senator ROBERTS. They would be a little different shoes, Mr. Chairman.

You like cowboy boots?

[Laughter.]

Ms. GERKEN. I am a New Englander. We do not wear cowboy boots.

Senator ROBERTS. That is part of your problem.

[Laughter.]

Senator ROBERTS. Your bio indicates you were a senior legal adviser to the Obama campaign in 2008 and 2012. The President has been criticized for attending fundraisers in the midst of a number of international crises. Last week, he was in Manhattan to attend a fundraiser for the House Majority PAC. That is a super PAC dedicated to electing a Democratic majority in the House.

The House Majority PAC is one of a number of groups that gets support from the Democracy Alliance. Another group that gets support from the Democracy Alliance is the Scholars Support Network. You are a member of that. Is that correct?

Ms. GERKEN. That is right.

Senator ROBERTS. Following its annual meeting at the Ritz Carlton in Chicago this year, Politico reported on a memo to the board of the Democracy Alliance that contained the recommendations on how to deal with media inquiries about the conference and its participants. This is what the memo said:

"As a matter of policy, we do not make public the names of our members. Rather," the memo went on, "the Alliance abides by the preference of our members. Many of our donors choose not to participate publicly, and we respect that. The Democracy Alliance ex-

ists to provide a comfortable environment for our partners to collectively make a real impact."

Why would disclosure make some of the members of this alliance uncomfortable?

Ms. GERKEN. So I actually do not know the reason for that. I am simply one member of the organization. But I will just say that there is a fundamental difference between many of the organizations that we are talking about here and those that are trying to affect politics with large amounts of money. The reason why——

Senator ROBERTS. All right. Would you——

Ms. GERKEN [continuing]. Justice Kennedy——

Senator ROBERTS. Would you agree—I am sorry to interrupt, but we have got 4 minutes here, although the Chairman has been very liberal with his time allowance. Do you agree this desire to remain comfortably anonymous should be respected?

Ms. GERKEN. I will say that if you are trying to use large amounts of money to influence politics, then you should do exactly what Justice Scalia says, which is to have the civic courage to have your name publicly listed. And so I am in support of this bill, and if the Scholars Strategy Network started to try and influence politics with large quantities of money, I would be in favor of disclosure.

Senator ROBERTS. Does the Scholars Support Network publicly disclose its donors?

Ms. GERKEN. I do not actually—I do not think it does, but I do not know the answer to that question. As I said before, it is not trying to influence——

Senator ROBERTS. Shouldn't that be respected?

Ms. GERKEN. It is not trying to influence Federal elections. And if it were, this bill would ensure that it, in fact, disclosed all of the donors that were trying to do so. That is the key to this bill. This bill allows for the privacy of groups engaged in a variety of public-oriented activities to remain anonymous——

Senator ROBERTS. All right.

Ms. GERKEN [continuing]. But when they try to influence elections, that money——

Senator ROBERTS. I got it.

Ms. GERKEN [continuing]. And donor must be disclosed. And I support that heartily.

Senator ROBERTS. I got it.

As a 501(c)(3), it is not supposed to engage in any political activity. Is that right?

Ms. GERKEN. A 501(c)(3) has—there are a variety of requirements about 501(c)(3), about what it means. But as a general matter, they are not supposed to.

Senator ROBERTS. Well, how is it then that the Scholars Support Network has been supported by the Democracy Alliance which stipulates that each organization it supports be politically active and progressive?

Ms. GERKEN. So the Scholars Strategy Network is a very simple thing. It is designed to do something that academics are very bad at, which is to figure out how to convey their ideas to the broader public and to policymakers. You have thousands of universities across the country generating good idea after good idea by people

who barely go outside during the day, who have never talked to a reporter, who have certainly never spoken to a Senator, and have no idea how to convey their ideas in a broader way. That network is designed to take a bunch of people who are basically nerds and help them figure out how to convey their ideas to the real world. That is a useful——

Senator ROBERTS. Sort of a nerd network?

Ms. GERKEN. It is a nerd network, but it is a policy-oriented network to get ideas that are already in the public arena to policymakers. That is a very——

Senator ROBERTS. I have every confidence that the Chairman of the Committee sitting to my right gets calls a lot from nerds and all sorts of other people. I do, even in Kansas, the University of Kansas, Kansas State, Wichita State University. We have got a lot of nerds. New England has nerds, don't they?

Senator KING. I do not think there are any in Kansas.

Senator ROBERTS. I can testify there are nerds in Kansas.

[Laughter.]

Senator ROBERTS. What about the American Constitution Society? At the Chicago conference it took credit for helping to make possible the Senate rule changes imposed by the Majority Leader that led to the confirmation of "progressive judges" to the D.C. Circuit. You have also been involved with the American Constitution Society. Is that correct?

Ms. GERKEN. Yes, I have.

Senator ROBERTS. Do they publicly disclose their donors?

Ms. GERKEN. I do not believe that they do, but they also—if the DISCLOSE Act were passed, if they were engaged in using large sums of money to influence politics, they would be required to disclose their donors, and that would be a good thing for democracy.

Senator ROBERTS. Well, my point is you would recognize the Senate rules changes in the appointments to the D.C. Circuit were somewhat politicized. Would you agree with that?

Ms. GERKEN. You know, in this world almost everything is politicized, I suppose.

Senator ROBERTS. I understand. Would the DISCLOSE Act apply to 501(c)(3)s?

Ms. GERKEN. The DISCLOSE Act is going to apply to any organization that uses money to influence politics. If 501(c)(3)s are engaged in some politicking, then they do something very simple, which is they segregate their funds. This is a traditional strategy used by many organizations to keep separate these two kinds of donations. That means that donors, for example, who want to support the American Constitution Society's general activities can give money without having it go to politics. But if they want ACS to use that money to influence politics, to influence the election system, then they have to have a segregated fund. That is a very simple—it is a simple and elegant solution to the kind of problem that you are describing here.

Senator ROBERTS. I do not know—oh, I have been informed here that it does not apply to (c)(3)s. So should it?

Ms. GERKEN. So this goes back to the—if a 501(c)(3) would like to start to influence—to do the things that are outside the usual ambit and it starts to take in large quantities of money that are

going to be used to influence elections, then it is going to have to disclose those activities. It would pull itself outside of 501(c)(3)s. They would become 501(c)(4)s, presumably.

Senator ROBERTS. I think you are talking about a regulatory morass, but at any rate, thank you so much for answering my questions.

Senator KING. Thank you, Senator Roberts.

I understand a vote has just gone, and Senator Schumer wants to have a few words, and then Senator Cruz. We will adjourn to vote, and we will be coming back. You all will talk among yourselves while we go and vote, and we will be back. If you can get this settled while we are gone, that would be good.

Senator Schumer.

Chairman SCHUMER [presiding.] Well, thank you. And first let me thank Senator King. He has been chairing a series of hearings on this very important issue and has done it in his able, fair, and independent way. So thank you very much.

First, I just wanted to note Senator McConnell came and spoke as a member of the Committee and talked about being against the DISCLOSE Act. I recall during the days when we debated McCain-Feingold, Senator McConnell was a leading advocate of disclosure and said that is what we should do, we should not limit contributions but disclosure would be enough. And that was true of most of my colleagues who were opposed to McCain-Feingold from the other side of the aisle. And then, of course, now all of a sudden they are against disclosure, and I would argue that is for political advantage. There is no principled reason to be against disclosure. This is a democracy. Things are disclosed. Justice Scalia's statement makes the same.

And I would just ask my friend Brad Smith, who I know has been involved in this for a long time and opposed McCain-Feingold and every other limitation on campaigns that is here, why wouldn't the same argument apply to voting? I vote. I get protested all the time. Some of those protests are pretty loud and noisy and raucous. Maybe we should keep voting secret, what our legislators do, because it might intimidate them. How can you make the distinction between the two? Both are participating in the political process. The public has a right to know.

You know, for 200 years it has been regarded as progress that there is more and more openness in Government. People decry closed-ness in Government. In fact, there is a bipartisan bill coming about—I think Senator Cornyn in the Republican sponsor, along with Senator Leahy—to make Government more open and available in terms of the bureaucracy.

It is just confounding and strikes me as perhaps self-interested that people are actually against disclosure. There are all kinds of arguments about limitations, what you should limit and what you should not. And Senator Cruz and I have had an ongoing argument about the First Amendment in this regard. That is not what we are discussing today because, clearly, you would say there is no First Amendment block or any sort of First Amendment right to not disclose. Is that right? Or do you think the First Amendment argues for non-disclosure?

Mr. SMITH. Well, you have a bunch of questions, and I appreciate it.

Chairman SCHUMER. Yes, so you can answer them all.

Mr. SMITH. And I do want to say, by the way—and you and I have not been face to face in, I think, 14 years, but I still remember the great courtesy you showed to my children at my confirmation hearing 14 years ago, and I appreciate that.

Chairman SCHUMER. Your kids were cute then. Now they are probably grown up, right?

Mr. SMITH. They are.

Chairman SCHUMER. But to parents, they are always cute, right?

Mr. SMITH. That is right.

Chairman SCHUMER. Okay.

Mr. SMITH. You asked about voting, to begin with, and that draws, I think, a key distinction that we make at the Center for Competitive Policy. The purpose of disclosure is for the public to keep tabs on its legislators, so when legislators vote, of course, the public needs to know that. And that is why we support disclosure of contributions to candidates, parties, and so on.

However, when you are talking about citizens talking to other citizens, I am less sure that there is a compelling Government interest there. Of course, we note that another type of voting is entirely secret. You are not required to display your vote in any State in the United States anymore. Now, Justice Scalia does not believe that is a constitutionally protected right to a secret ballot, and I think he has got, you know, a solid argument there. But as a policy matter, whether it is constitutionally required or not, we have agreed that people should have the ability to keep their political views quiet. And that goes to the question, when we talk about, you know, people are against disclosure. I think everybody is in favor—pretty much everybody—of some degree of disclosure, and the question is: What should be disclosed?

And I think part of the colloquy between Senator Roberts and my colleague here relates to the question of what should be disclosed, and Heather would say, well, if they are engaged in political activity. But what is political activity? A great many (c)(3) organizations, such as some of the ones Senator Roberts was discussing, are doing things—the American Constitution Society is clearly trying to affect how people think about political issues, and that may ultimately affect how those people vote.

When I was Chairman of the Federal Election Commission, I used to note that if you tell me, you know, what groups you want to silence, I can come up with a neutral method that will get mainly those groups and not many——

Chairman SCHUMER. Well, why would disclosure silence people?

Mr. SMITH. Well, studies——

Chairman SCHUMER. I mean, we are a democracy here, and you can always say that somebody could argue you are wrong. But that is not—I mean, if you—that is the most slippery slope argument I have heard. It just says anytime someone thinks they might be intimidated they do not have to disclose anything.

Mr. SMITH. Well, it does not necessarily go that far. But, again, you might ask, why do we have a secret ballot? Why were the Federalist Papers published anonymously? Why has the Supreme

Court in cases like Buckley v. Valeo, McIntyre v. Ohio Elections Commission, Watchtower Bible & Tract v. Village of Stratton, Thomas v. Cullens repeatedly protected citizens' anonymity when engaged in various types of political activity? Studies do show that disclosure, mandatory, compulsory disclosure, has a deterrent effect on some people participating in politics.

Chairman SCHUMER. But the Supreme Court—no court that I am aware of has made the argument that there is any constitutional requirement for that. Is that right?

Mr. SMITH. Well, the Court has repeatedly struck down overly broad disclosure laws. Whether it would strike this down——

Chairman SCHUMER. But not on a First Amendment basis.

Mr. SMITH. But I have to say, Senator——

Chairman SCHUMER. Right? Is that right? Not on a First Amendment basis?

Mr. SMITH. No. On First Amendment grounds, it has narrowed statutes or struck them down. And I have to say, Senator, that you yourself, when you earlier introduced a version of this act, you stated that, "The deterrent effect should not be underestimated." So I think you do recognize that there can be a deterrent effect.

Chairman SCHUMER. Oh, let me tell you, I think it is good when somebody is trying to influence Government for their purposes, directly, with ads and everything else. It is good to have a deterrent effect. If you cannot stand by publicly what you are doing, then you probably think something is wrong.

Mr. SMITH. So——

Chairman SCHUMER. I do not think you are afraid of being protested or picketed or something like that.

Mr. SMITH. So the author of "Common Sense," the authors of the Federalist Papers——

Chairman SCHUMER. You know, we did not have a democracy then. That is not fair. The British were running the show. Tom Paine was worried he would be arrested. We are not worried that if you publish something here in America you would be arrested.

Mr. SMITH. Well, I can only, again, go back to saying that a great many people feel that they have fears of excessive disclosure, that the Supreme Court has recognized this in many, many contexts, including the context of political giving. And I think it is common sense to all of us that there are times when one would rather not have to be publicly identified with certain political views, such as, again, the examples I gave in my testimony. For example, a person, a small business owner in Kentucky or West Virginia who favors increased regulation of the coal industry might be very concerned about what that could do to his business if he were to voice those views.

Chairman SCHUMER. Well, but different if he gives money to a political campaign to influence the candidate. The disclosure here is not based on what we should know about the individual but the effect on an elected official, and that is the distinction that I think you sometimes fail to make.

Mr. SMITH. But if he gives money——

Chairman SCHUMER. I will give you the last word before we are out of time.

Mr. SMITH. If he gives money to a political campaign, then it is disclosed. It is only—we are talking about giving money to a nonprofit (c)(4) at this point.

Chairman SCHUMER. Okay. I want to thank the witnesses. We are going to be in temporary recess, and Chairman King will come back, and I guess Senator Cruz will come back. Thank you both.

[Recess.]

Senator KING [presiding.] The hearing will resume. The hearing of the Rules Committee on the DISCLOSE Act will resume.

Senator Cruz, your questions.

Senator CRUZ. Thank you, Mr. Chairman, and I want to say thank you to both the witnesses for joining us today.

You know, before we broke, I thought the exchange with Senator Schumer was actually quite revealing where Senator Schumer asked Mr. Smith, well, gosh, why can't we restrict the freedom of American citizens? Because, after all, when Members of Congress vote, our votes are public. And I think that really reveals the issue here, that the votes of Members of Congress are public because we are supposed to be public servants. We are supposed to be accountable to the American people. And indeed what this effort is about and what much of the efforts of this Senate is about is trying to have politicians hold the American people accountable, which is backwards from the way it is supposed to work.

Jefferson famously said when leaders fear the citizens, there is liberty; but when citizens fear their leaders, there is tyranny.

We are just a few months away from an election, and so often Congress will devolve into the silly season where we will have a series of votes that are not intended to pass but are intended somehow to be messaging votes because the majority party thinks it will be beneficial for the upcoming election.

Related to this legislation is a proposal that has been voted on by the Senate Judiciary Committee that 47 Democrats have put their name to a constitutional amendment that would repeal the free speech provisions of the First Amendment. It is the most radical legislation the Senate has ever considered.

In 1997, when the Senate considered a constitutional amendment along similar lines, then-Senator Ted Kennedy said the following: "In the entire history of the Constitution, we have never amended the Bill of Rights, and now is no time to start."

I emphatically agree with Senator Ted Kennedy.

Likewise, Senator Russ Feingold, not exactly a right-wing conservative, said the following: "Mr. President, the Constitution of this country was not a rough draft. We must stop treating it as such. The First Amendment is the bedrock of the Bill of Rights." And he continued, in 2001, "I want to leave the First Amendment undisturbed."

For 47 Senators to put their name to a constitutional amendment that would repeal the free speech protections of the Bill of Rights is astonishing. And it ought to be disturbing to anyone who believes in free speech, to anyone who believes in the rights of the citizenry to express their views and politics.

And, Mr. Smith, I want to ask a question to you: At the Constitution Subcommittee's hearing on that proposed national amendment—I am the Ranking Member on that Subcommittee; the

Chairman is Senator Durbin—I asked Chairman Durbin three questions about the amendment that he had introduced.

The amendment, by the way, provides that Congress can put reasonable restrictions on all political speech.

I would note, by the way, the First Amendment right now does not entrust determinations of reasonableness to Members of Congress. Congress thought the Alien and Sedition Acts were reasonable, and indeed the heart of the First Amendment is about protecting unreasonable speech, not reasonable speech.

When the Nazis wanted to march in Skokie, Illinois, Nazi speech is the very definition of unreasonable speech. It is hateful, bigoted, ignorant, and yet the Supreme Court rightly said the Nazis had a First Amendment right to express their hateful, bigoted, ignorant, unreasonable speech. And then all of us have a constitutional right, and I would say a moral obligation, to denounce that speech, because as John Stuart Mill said, the best cure for bad speech is more speech, not restricting it.

So the three questions that I asked Chairman Durbin, I said: Do you believe Congress should have the constitutional authority to ban movies? Do you believe Congress should have the constitutional authority to ban books? And do you believe Congress should have the constitutional authority to ban the NAACP from speaking about politics?

And what I observed is that for me the answer to all those three questions is easy: Absolutely no, in no circumstances. And yet in the amendment that every single Senate Democrat on the Judiciary Committee voted for, Congress would have the constitutional authority to do all three of those.

My question to you, Mr. Smith, is: What is your view of the dangers of giving Congress the constitutional power to ban movies, to ban books, and to ban groups like the NAACP from speaking about politics?

Mr. SMITH. Well, thank you, Senator. You know, I think the danger is obvious, and it goes to the core of why we have a First Amendment. And you have hit the point I think very well when you said, you know, the precise idea of the First Amendment is to prevent Congress from deciding what is reasonable. There is a view that this was too dangerous a power to cede to the Government.

During the first panel, Senator Whitehouse mentioned that he did not want to dissuade anybody from speaking; he just wanted to have people disclose their information. But if you look at, for example, this bill, many parts of it require a regulatory regime that will dissuade people from speaking, including the possibility of prosecution if people make mistakes in knowing what other folks they are going to give money to will do. And Senator Whitehouse has been very vocal in urging criminal prosecutors against political speakers.

So, you know, I think the First Amendment is there precisely to say this is just too dangerous a power to give to the Government. As Chief Justice Roberts said in the McCutcheon decision, the last people we want deciding, you know, who needs to speak more or who needs to speak less in a campaign or what is reasonable regulation is the Government itself, the people who have a vested interest in being returned to office.

And as I have often pointed out, even assuming the good faith of all actors, if rules and regulations tend to favor the party in power and the incumbents, then they will remain in place. And if they tend to disadvantage those people, then they will be changed. So we do not have to assume bad faith to see the danger in giving Government that kind of power.

Senator CRUZ. Well, and we have seen—in the Senate Judiciary Committee there were some Democratic cosponsors of the amendment who said, "It is not our intention to ban movies or ban books or ban the NAACP from speaking." And at that hearing I observed this is the Judiciary Committee of the United States Senate. The inchoate intentions of members of this Committee that may be buried in their hearts are not terribly relevant when 47 Senators are proposing a constitutional amendment to the Bill of Rights that would explicitly, under the language of the amendment, give Congress the power—and the amendment says—"to prohibit speech from any corporations." Paramount Pictures is a corporation. Under the language of that amendment, you could prohibit Paramount Pictures from publishing a movie critical of a politician.

Indeed, Citizens United, which is the subject of so much demagoguery, was the Federal Government trying to find a movie maker who dared to make a movie critical of Hillary Clinton. I think the movie maker has a constitutional right to do so, just like Michael Moore has a constitutional right to make movies that I think are pretty silly, but he has got a constitutional right to continue to make them for all time.

As regard to books, Simon & Schuster is a corporation. Under the text of the constitutional amendment, Congress could prohibit Simon & Schuster from speaking. As the ACLU said—for those of you who are here today who may say, "Well, Cruz is a Republican. I am skeptical of what Republicans say." If you are skeptical of what I say, perhaps you are not skeptical of the ACLU. The ACLU said in writing, this amendment would fundamentally abridge the free speech protections of the First Amendment, and they said it would give Congress the power to ban Hillary Clinton's book, "Hard Choices."

There is a reason that I have referred to the proponents of this amendment as the "Fahrenheit 451 Democrats," because they are literally proposing giving Congress the power to ban books. That ought to trouble everyone.

And with respect to the NAACP and La Raza and the Human Rights Committee and Sierra Club and Planned Parenthood, who are all corporations—and they should not be prohibited from speaking—we should be empowering the free speech of the citizens, not empowering the IRS and Congress and Government to silence and regulate the speech of the citizenry.

Thank you, Mr. Chairman.

Senator KING. Thank you, Senator.

As one of the sponsors of that amendment, I am not sure we are talking about the same document, because the one I sponsor talks about regulating campaign contributions. It does not talk about banning books or movies or in any way abridge the free speech. But I am sure that is a debate that you and I can have at a later date. Thank you for your questions.

Senator——

Senator CRUZ. Mr. Chairman, just in response to the question you ask, I would note that the text of the amendment says, "Congress and the States shall have the power to implement and enforce this article by appropriate legislation, and may distinguish between natural persons and corporations, or other artificial entities created by law, including by prohibiting such entities from spending money to influence elections." And since book publishers are almost always corporations, under the explicit text of that constitutional amendment, Congress would have the power to prohibit corporations like Simon & Schuster from publishing books, which I would note is exactly what the ACLU said in response to it as well.

So that is the plain text of the amendment that has been introduced, and I think it is a very dangerous suggested addition to the Bill of Rights of our Constitution.

Senator KING. A discussion which we shall undoubtedly continue at a later date. Thank you, Senator.

Senator Klobuchar.

Senator KLOBUCHAR. Thank you very much, Mr. Chairman. Thank you to our witnesses. Good to have you back, Ms. Gerken. I remember the hearing that I chaired. You did a good job.

Ms. GERKEN. Thank you very much for having me again.

Senator KLOBUCHAR. Okay. Very good. Thank you, Mr. Smith. Mr. Smith goes to Washington. You can say that now, I guess, at the hearing. That was a little joke.

It is good to be here. Obviously Senator Cruz and I disagree, and I wanted to refocus this, first of all, on the bill before us, the DISCLOSE Act, which, it is my understanding, having looked at these cases, the Supreme Court, the Roberts Court, actually anticipated that we might have some limits on disclosure and that those would not be allowed. Is that right, Ms. Gerken?

Ms. GERKEN. Yes. In fact, I actually think it would be fair to say that Citizens United at least was premised on the idea that there would be adequate disclosure. So Justice Kennedy, the author of the opinion, notes that as long as you have adequate disclosure, you need worry much less about independent expenditures. What Justice Kennedy may not have contemplated was the possibility that $310 million in the last election cycle was being spent independently by groups that were not disclosing the identity of their donor.

But Kennedy was absolutely clear that disclosure promotes First Amendment values, the ability of everyday people to make decisions to hold their representatives accountable. That is why disclosure rules are consistent with the First Amendment.

Senator KLOBUCHAR. So he specifically used the words "disclosure rules" in the opinion?

Ms. GERKEN. He not only specifically used the words. He actually specifically affirmed them and rejected the kinds of challenges that have been levied against the DISCLOSE Act by noting that because disclosure rules are not stopping someone from spending their money and are not putting the kinds of hard caps on that you see in other parts of the campaign finance regime, that they are subject to a much more generous constitutional standard, that Con-

gress has much more leeway to impose them, precisely because they further First Amendment values rather than undermine them.

Senator KLOBUCHAR. And I bring this up because Senator Cruz's long speech there was mostly focused on the constitutionality of this. First of all, he was talking about the amendment, which I support, and I will get to that maybe a little later, but this is about the DISCLOSE Act today. And that the Court clearly contemplated the DISCLOSE Act—the disclose rules—I am not going to say this act—that rules could be constitutional.

Ms. GERKEN. Yes, exactly. And if you begin to sort of think a little bit about the sorts of arguments that are being made against the constitutionality of this provision, of this act, they would, I would think, also prevent you from regulating super PACs and the political parties. That is, there are all sorts of instances where we require donors to have the civic courage to acknowledge that they have given money to support a political candidate or influence elections. And that is all that the DISCLOSE Act does. It levels the playing field, subjecting (c)(4) organizations, which have become immensely powerful in the elections process, to the same kinds of regulations we see for super PACs and parties.

Senator KLOBUCHAR. Which have been allowed as reasonable limits in the past.

Ms. GERKEN. I mean, the statement—the kinds of arguments that would be made that would knock those down are so radical that——

Senator KLOBUCHAR. That you would not be able—that they could not go after you for yelling "Fire" in a theater.

Ms. GERKEN. Well, I will just say that the First Amendment law that exists on the books, written by the Justices who have been the most skeptical of campaign finance regulation, have, with all but one exception—eight of them have affirmed these kinds of disclosure rules, and with good reason.

Senator KLOBUCHAR. Good. Well, then, let us go from there.

What I am concerned about here—and I talked about it when you were here; I talked about it at the Judiciary Committee—is just the fact that, in fact, the situation we have now with these hundreds of millions of dollars drowns out the speech of regular people so that they cannot speak because they are not going to be able to have a voice if you have a regular person running for office that basically cannot bring in millions into the campaign, has to raise money, let us say they do what they are supposed to, I know what this was like, calling, calling, calling, raising $500, raising $1,000, and then all of a sudden someone could just come in and plow in hundreds of millions of dollars, or in the case, I think, of some of these recent races, $25 million so far against individual candidates, to the point where it almost becomes ridiculous for you to raise your own money because you could be plowed down and stamped on by this outside money.

And so the purpose of this bill is to simply make sure that we have adequate disclosure to know that money is coming from, to give that person an adequate fighting chance, to say look who is funding the attacks against me. Is that right?

Ms. GERKEN. Yes. In fact, a lot of my research has been on what I call the "rise of the shadow parties," these organizations outside

the formal party structure, which are having an increasingly large influence over the elections process. And the trouble with shadow parties is that unlike your party and unlike the Republican Party, they are not open to average and everyday people; that is, the price of admission to a 501(c)(4) is money, money, money, and more money. That means that the everyday people who inhabit our parties, the party faithful and the voters, are losing the chance to influence the shape of the political process precisely because all the power is moving in the direction of the shadow parties. This is a step toward halting that flow. It will not fix it entirely, but at least it will do something to help us hold these groups accountable.

Senator KLOBUCHAR. One of the things that the Supreme Court pointed to in its recent McCutcheon decision was that now more things are online for people to take a look at. They may be true, but as you know, not everything is written online. It is very hard for people sometimes to find things.

Do you think that improving the technology that we use for disclosing money—this is outside of—it is part of the DISCLOSE Act but not in the bill—in elections to help make it easier for groups to report on this and for the public to know what is really happening?

Ms. GERKEN. I think that anything that can be done to make it easier on the public to figure out the source of an ad is helpful, which is one of the reasons why we made the proposal that we did, that for ads that are essentially paid for by groups that do not disclose their donors, that should be on the ad, because citizens have a right to know who is behind the money. And I will say that for the average citizen, even the system we have now requires an inordinate amount of work for them to figure out who is behind some of these ads and who is not.

So, yes, anything that can be done, both in terms of putting labels on the ads and increasing the transparency of the way money flows through the system, is a good thing, in my view.

Senator KLOBUCHAR. I totally know this because even how I have not had a lot of independent ads run against me, they have had issue groups do it sometimes. I have tried to figure out who is financing when my name is in it, and I cannot figure it out.

Ms. GERKEN. No, I actually once made a joke in my election law class that you could have a group called "Americans for America," and then one of my students proposed—I do not know if this is true—that, in fact, that group exists. So you never know who is behind it.

Senator KLOBUCHAR. There you go. So one of the things that has intrigued me with this is that this just has not been a partisan issue in the past. People have come together on trying to find a way to regulate campaign contributions, understanding that it becomes actually corrupt when there is so much outside money and people cannot tell where it is coming from. And I truly believe the integrity of our electoral system is at stake, and from what I am seeing, there is a bipartisan support in the public for doing something about all this outside money, but we are not seeing it here.

Why do you think that is? How do you think we can change that?

Ms. GERKEN. Well, I do think that there is actually generally bipartisan support. The American people overwhelmingly favor

transparency. I also think that when you move a little bit outside of Washington, you find that people on both sides of the aisle are in support of transparency.

Certainly when McCain-Feingold was debated, virtually everyone on both sides of the aisle was in favor of transparency, and I had the pleasure of working on a commission with Senator Trent Lott, with Representative Henry Bonilla, with Senator Olympia Snowe, and we unanimously decided to endorse transparency rules for independent funding. And in many ways, I think that one way to understand what that commission's purpose was to think about the relationship between elections and governance, because governance is breaking down in Washington. And the group as a whole was deeply concerned with that. Transparency rules are part of what makes governance work. It helps the American people hold their representatives accountable. And it helps us all figure out where the money is flowing and how power is working in Washington.

Senator KLOBUCHAR. Mr. Smith, you know, one of the witnesses that we had at the Judiciary Committee was—actually I pushed him a little, and he said when—remember, this is not about the DISCLOSE Act. This is about the constitutional amendment that Senator Cruz was referring to. And he basically said he thought we should not have any limits at all on—any kind of limits on contributions. Do you share that view?

Mr. SMITH. You are asking me?

Senator KLOBUCHAR. Yes.

Mr. SMITH. I am sorry. Well, let us put it this way: I think we should have good, reasonable limits on contributions. The current limits on contributions are substantially less than what they would be had they even been raised for inflation since they were first enacted in 1974, and it is worth noting that, prior to 1974, we never had any limits on direct contributions by individuals to campaigns. Individuals up to 1974 were free to contribute $20 million directly to a campaign if they wished to do so.

Several States still allow that, and there is nothing that indicates to me that it has had detrimental effect. In fact, those States consistently rank near the top of the best governed and least corrupt States in America.

So I guess the better question to me would be, you know, what really—how strong is the justification for limits, especially limits at the low levels that we have them now? When people ask me, you know, would I do away with all limits, I guess I always say, you know, might, but, look, I understand why people want limits. I think what we need are more reasonable limits. That would be a good starting place.

Senator KLOBUCHAR. But do you think it would be—it is constitutional to have those limits in place?

Mr. SMITH. Well, the Supreme Court has repeatedly said that it is constitutional to have limits on contributions.

Senator KLOBUCHAR. Right.

Mr. SMITH. There are several Justices, both now and former Justices, who have disputed that, but it has never been a majority position on the Court.

Senator KLOBUCHAR. And then do you think there is a constitutional issue then with actually disclosing the names of those people that there are limits——

Mr. SMITH. They are disclosed. I mean, if you give money to a campaign, your name is disclosed.

Senator KLOBUCHAR. But you have an issue with the DISCLOSE Act then?

Mr. SMITH. Yes, I do, because I think we need to recognize, first, the Roberts Court has not said that rules like "this" are constitutional. It has said—it has been generous toward disclosure. It has never ruled on rules like this. In Citizens United, in McCutcheon, it is ruling against a background of existing disclosure rules. And as I mentioned in my prepared testimony, we have more disclosure now than at any time in American history. And the Court has looked at that and said this is the solution, this is adequate. It should not be read to suggest that the Court is saying go ahead and do whatever things more you want to do.

Senator KLOBUCHAR. But what is so wrong with disclosing the people that give these kinds of contributions?

Mr. SMITH. Well, the question, again——

Senator KLOBUCHAR. Why would that make it different than the other rules?

Mr. SMITH. The question is who or what is going to be disclosed. For example, this act does not require disclosure by the American Constitution Society of its donors. Maybe it should. The American Constitution Society would escape it because it is a (c)(3). It does not engage in a certain type of political activity. But anybody who says that it is not out there trying to influence politics is not serious. I mean, that is what a lot of groups do.

So, again, the question is not that people are opposed to disclosure as if this is some clear, obvious thing. The question is: What should be disclosed—right?—when and how? And to what extend do we want to tie our system up trying to get, you know, the last little bit of disclosure out of the system?

501(c)(4)s have long done very, very hard-hitting issue ads. The NAACP ran ads in 2000 that re-enacted the lynching of a man named James Byrd, and the narrator specifically blamed it on then-Governor George W. Bush. It ran these ads in October just before the election. They did not disclose their donors. Nobody got upset about it at the time. This is not something new in that respect. It is not new since Citizens United. It has only been viewed as a crisis, so to speak, since Citizens United, and I think that really is a reaction to Citizens United rather than a serious, you know, re-evaluation of the need for added discussion in this area.

So, you know, again my organization and I have supported disclosure. I have supported it in my academic writings. But it is a question of what should be disclosed and how much. The Supreme Court has not endorsed all disclosure. In many cases, in the 1970s, 1980s, 1990s, and 2000s, it has protected the right of citizens to engage in political activity anonymously, and nothing in Citizens United or McCutcheon overrules any of those decisions.

Senator KLOBUCHAR. Do you have concerns that once—you know, we do not know where this money is coming from because it is not

disclosed, that you could have foreign money come in when we do not know what the money is and——

Mr. SMITH. You can have foreign money come in anyway. People just would not have to—they would not report it. They would——

Senator KLOBUCHAR. Yeah, but if they have to report it——

Mr. SMITH. If they want to break the law, they will break the law.

Senator KLOBUCHAR [continuing]. You can add it up and see what it adds to. It would take another step if you made up where the money was from. This time you would at least be able to know where it was from.

Mr. SMITH. Right. Well, as I pointed out, it is about 4 percent of the money that is not itemized by donors that is in the system, and so I think we need to keep that in perspective. And I think the end result is I think that one could consider changes to disclosure rules, and there may be some things that we would want to do. But I think that this bill in particular has a lot of problems, again, as I pointed out, it brings up what we call "junk disclosure," double counting of funds, relating people to money that they did not give for purposes of advertising, misdirecting the public about who is giving, in fact, or who is not giving. And so I think that we need to be conscious of the fact that this is simply not a good bill on its own technical merits. But I think also as we design bills, we need to be conscious of the fact—and I think the data supports this pretty clearly—that excessive disclosure discourages honest, good political participation, and we need to be careful about that and sensitive to that reality. And it can be misused in the same way that anonymity can be misused when people intentionally say our goal is going to be to smear and attack people based on political activity they might be vaguely related to through some financial transaction.

Senator KLOBUCHAR. Okay. Ms. Gerken, do you want to respond?

Ms. GERKEN. Well, I want to agree with Professor Smith that the Supreme Court said what it said about disclosure when it robustly and emphatically affirmed the validity of disclosure rules. It did so against a background in which super PACs are regulated, political parties are regulated in the same way that 501(c)(4) organizations would be regulated going forward. They are the outlier. All that this bill does is pull 501(c)(4)s into the ambit of the kind of disclosure rules that we have had for a very long time without anyone worrying about the First Amendment or suppressing speech.

Senator KLOBUCHAR. I just think it so much weighs on the side of getting this disclosed, and this is just from my own—you know, I am not the constitutional expert that you two are. It is just based on my practical experience. I remember when I had a $100 contribution limit in local office. That is what we had in non-election years. So, like, six of my election—six of my years out of eight I had a $100 limit on contributions during the 8 years that I was county attorney. I would still get numerous contributions for $99 because then people knew that their name would not be out there. And, okay, maybe that is okay when you are dealing with $99, $100. But when you are dealing with the millions of dollars we are looking at here, I just do not think it is okay. It is a difference because of the impact that extra money can have. And the outsize im-

pact when you look at what individuals can give in an individual race, so you can get a max of, what, $5,000, a lot of the contributions I get are like $1,000, and then someone coming in with $25 million against you and then you cannot tell who those people are.

Ms. GERKEN. And, Senator, Professor Tokaji is not here to talk about his report, but it really provides compelling evidence that the numbers here are important, but what is more important is the way it is changing the political landscape. There are $310 million—there is complete agreement that at least that amount of money was not disclosed in 2012. But the way that it is changing how people run their campaigns and work with these shadow parties is quite astonishing. The parties are becoming more sophisticated. This is looking a lot more like what anyone in the world would call "coordination" except for a few lawyers. And so it is becoming an increasingly worrisome problem, and it is hard to imagine 2016 is going to be any better.

Senator KLOBUCHAR. Right. And the last thing I would say politically, as the Chairman, as someone who likes to get things done and try to find some common ground, I just think this money in these extreme forms from the outside is not going to foster that at all, because people are not—they are going to know something is going to hit them that will just outweigh all that money that normal people give you at $100 or $500 or $50 or $20, it will just be outweighed by some interest group who does not agree with you on one issue or that you have not toed the party line on one thing, either right or left, and that money is just going to come in and blow you out. And that is why I think that in the end not only is this bad for just the traditional idea that we should know who is giving money, I just think it is bad for our democracy in terms of getting things done.

So thank you very much.

Senator KING. Thank you, Senator.

Just a couple of follow-up questions. It occurs to me, Mr. Smith, that the reality—and this is a change that has happened almost overnight, really just in the last few years. Yes, there were 501(c)(4)s back along—but I would argue that the quantitative change equals a qualitative change. And what we have now is it is like the legends of the Trojan War where the Greeks and the Trojans fought each other, but the gods were fighting in the skies. We have parallel universes of campaigns, and it is getting to the point where the candidates themselves are the little guys, and the real fight is between the billionaires who are controlling it. And we have had for 100 years various kinds of controls that have come and gone, but it has all been because of scandals and the danger of corruption that people have recognized since Teddy Roosevelt. That has not gone away. Human nature has not changed. And it just seems to me that all we are talking about here—and you yourself have said we have got lots of disclosure, and I would agree that we do, except in this one area.

You have indicated you think it is only 4 percent, but you are counting, I think, as I carefully read your testimony, you are counting as disclosure when a group is listed, Americans for Greener Grass, as the contributor, that is disclosure. That is not disclosure.

Disclosure is knowing who gave the money to Americans for Greener Grass.

So I think you are—the 4-percent number, if it were true, we would not be wasting our time here. But the truth is there is a ton of money coming in, it is accelerating, and I think most of us have said, okay, the Court has said what they said, and those are the rules about campaign finance. But the only tool they have left us is disclosure. And it seems to me—and you talk about, well, you know, there could be harassment. I think Justice Scalia said it very well. This is part of civic engagement. And if a billionaire can spend millions of dollars attacking my record or my character, I at least ought to have the opportunity to know who it is. To me, it is just—again, go back to the New England town meeting. No one is allowed to speak in a Maine town meeting with a bag over their head. Who the speaker is, is part of the information, and that is the purest form of political speech in our country today.

Give me your thoughts. All we are talking about, I think Professor Gerken is right, we are talking about applying to the (c)(4)s and whatever the next iteration is the same rules that we have had for years where, if somebody contributes to my campaign, if it is 100 bucks, I have got to list their name, address, phone number, occupation, but then somebody can spend $20 million and have no idea who they are or where they are from.

Mr. SMITH. Right. No, I think those are all good points. Let me try to address those in some order that may not correspond to their importance or the order in which you raised them.

But, first, let us note that I think that the McCutcheon decision, if that is the concern, is actually a good decision in that, again, McCutcheon allows more money to flow directly into political campaigns.

Senator KING. I understand.

Mr. SMITH. Which is fully disclosed.

Senator KING. And that may actually diminish the pressure toward these un——

Mr. SMITH. Yes, I do not see it having a major effect, but I do see it having some effect there. And I think along with that, as I noted earlier in response to Senator Klobuchar, we have not raised contribution thresholds to anything close to what they would be even if adjusted for inflation. And in my view, they should be substantially higher than that inflation adjustment, and that would also, I think, relieve some of the pressure on office holders' fundraising and help to make them, again, more important in their own races, so to speak. This is a self-inflicted wound when I hear office holders complaining about this.

Now, you make a good point. You know, things change, right? And people change, and how things operate changes. And there is no doubt that is true. All I can say is that I do not think there is much evidence at all that these campaign finance—this web of regulation we have thrown at our political activity, mainly since 1974—before that the laws were pretty easily evaded, there were very few rules enforced. I do not think there is much evidence that it has helped. And if we look at States that are deregulated versus States that are highly regulated, there is little evidence that the latter group performs better in almost any measurement you

choose—educational attainment, personal income, unemployment, almost any measure of Government policy effectiveness you might want to come up with.

And in those old days, we always heard the same sort of stories—"It is just not like it used to be." You know, in the 1920s, the parties were complaining about the expense of getting radio into everybody's house. And in the 1850s, they were complaining about, "Ah, ever since Van Buren, we have to do all these pamphlets and so on." They have always been raising those kinds of issues.

But there are other ways in which society has changed. For example, it used to be if you wanted to see disclosure reports, somebody had to go down and manually look them up. Nowadays you can sit on the computer, pull up your neighbor's finances. There are sites that directly link giving to people's—to maps to people's homes. What is the purpose of that other than intimidation?

And we should be aware that there are increasingly groups out there—Media Matters is one; there are several others, one called "Accountable Americans," and so on—that are very open about wanting to harass and vilify people.

Now, Justice Scalia is being quoted all the time by people who never would quote Justice Scalia for anything else, right? Well, I think Justice Scalia is wrong here. I mean, if this is true, how did America survive until 1974? It is pretty hard to figure out. Why do we have the secret ballot, right?

So, again, the question is not, you know, do we oppose disclosure? No, we do not oppose disclosure. What we want to keep reminding ourselves is our purpose is to allow the people to keep tabs on the Government. It is not necessarily let the Government or let candidates keep tabs on the people. And while those often are intertwined in a way that cannot be separated, I think if we start with that premise in mind and we are sensitive to honest concerns about harassment, then I think we might have some room to devise more effective disclosure rules that would get at some of the issues that seem to spur interest in the DISCLOSE Act.

But what I am not seeing in this act and what I am not seeing in the public statements I have heard about—and I do not mean in this room today or anything; I mean generally when I hear it talked about in the press—is any sensitivity to those kinds of issues or to why some people might fear Government or unofficial retaliation and why those concerns are illegitimate. I think they are legitimate. The people give anonymously for all kinds of reasons. People give to hospitals anonymously, right? And I think we need to respect that. To have the Government compel people to disclose information on themselves is not something we normally do. It needs to be carefully done and with a strong rationale behind it.

Senator KING. I would not disagree that there are not issues in that regard, but it seems to me it is a balancing case, a balancing test of trying to weigh the public interest in knowing who is trying to influence their vote and also the corruption issue against the dangers of intimidation and this is—I tend to agree with Justice Scalia on this, although I do not agree with him on everything.

Mr. SMITH. And so that we can end on a point of agreement, I agree with your statement there up until the point of Justices. But I think obviously the devil is in the details.

Senator KING. Well, I want to thank both of you for your testimony, and I want to thank you for the thoughtfulness with which you have answered the questions and the work that you put into the testimony that you presented to this Committee. This is an important issue. It is one that is not going to go away, and I believe that it is going to continue to bedevil us for some time unless we can find some resolution.

So, again, I appreciate your joining us, and that is on my behalf and on behalf of the Committee. This concludes the second panel of today's hearing. Without objection, the hearing record will remain open for 5 business days for additional statements and post-hearing questions submitted in writing for our second panel of witnesses to answer.

I want to thank Senator Klobuchar and the other Senators who participated today, and there being no further business before the Committee this morning, this hearing is adjourned.

[Whereupon, at 12:11 p.m., the Committee was adjourned.]

APPENDIX MATERIAL SUBMITTED

Executive Summary of Testimony of Professor Daniel P. Tokaji

Robert M. Duncan/Jones Day Designated Professor of Law
The Ohio State University, Moritz College of Law

U.S. Senate Committee on Rules and Administration

"The DISCLOSE Act (S. 2516) and the Need for Expanded Public Disclosure of Funds Raised or Spent to Influence Federal Elections"

July 23, 2014

- This testimony addresses three points. First, it describes the goals and methodology of Professor Tokaji and Renata Strause's report *The New Soft Money* (2014). Second, it summarizes existing federal disclosure laws. Third, it discusses the report's key findings pertaining to disclosure.

- The explosion of outside money in federal election campaigns is one of the most important recent developments in American democracy. Since *Citizens United v. FEC* (2010), there has been a rapid increase in both the number of outside groups and the amounts they are spending.

- *The New Soft Money* investigates and analyzes the effects of outside money on congressional campaigns and governance by interviewing those in the best position to know: former members of and candidates for Congress – Republicans, Democrats, and Independents – as well as campaign staff, legislative staff, and political operatives.

- The rise of so-called "Dark Money," the ultimate sources of which are not disclosed, is associated with groups that claim to fall outside the Federal Election Campaign Act's definition of "political committee" and the Internal Revenue Code's definition of "political organizations."

- Across the political spectrum, the people we interviewed largely agree on how the increase in outside spending – much of it from undisclosed sources – has changed the political landscape.

- Lack of disclosure was a common complaint about the current federal campaign finance system, one that arose repeatedly in our interviews. Across the political spectrum, our interviewees generally believed that it is important for both campaigns and voters to have better information about the money spent on federal election campaigns.

- The ultimate value is *accountability* in the eyes of many whom we interviewed. Without adequate disclosure, accountability to the electorate is lacking. As the Supreme Court recently stated in *McCutcheon v. FEC* (2014): "With modern technology, disclosure now offers a particularly effective means of arming the voting public with information."

- Another concern expressed by interviewees is that the lack of disclosure opens the door to *corruption*, as the Supreme Court has recognized since *Buckley v. Valeo* (1976).

- Finally, *The New Soft Money* reveals considerable frustration with the *mechanics* of disclosure. Our interviews indicate the need for simplification and technological modernization, a rare point of bipartisan agreement in this deeply contested area of law.

Testimony of Professor Daniel P. Tokaji

Robert M. Duncan/Jones Day Designated Professor of Law
The Ohio State University, Moritz College of Law

U.S. Senate Committee on Rules and Administration

"The DISCLOSE Act (S. 2516) and the Need for Expanded Public Disclosure of Funds Raised or Spent to Influence Federal Elections"

July 23, 2014

Thank you for inviting me to appear before you today. My name is Daniel P. Tokaji, and I am the Robert M. Duncan/Jones Day Designated Professor of Law at The Ohio State University, Moritz College of Law. I am also a Senior Fellow with *Election Law @ Moritz*, a nonpartisan program devoted to providing accurate information, analysis, and commentary on election law and administration. This testimony is solely on my own behalf and does not necessarily represent the views of any entities with which I am affiliated.

My primary area of research and expertise is Election Law. I am co-author of the casebook *Election Law: Cases and Materials* (5th ed. 2012), author of the book *Election Law in a Nutshell* (2013), and former co-editor of *Election Law Journal*, the only peer-reviewed academic journal in the field. I have written numerous academic articles on various Election Law topics, including election administration, voting rights, and campaign finance. I am also the co-author, with Renata E.B. Strause, of *The New Soft Money: Outside Spending in Congressional Elections* (2014), published last month. A copy of that report is included with my written testimony.

I have been asked to describe the research contained in our *New Soft Money* report, particularly that which pertains to campaign finance disclosure. My testimony will address three points. First, it describes the goals and methodology of our report. Second, it briefly summarizes existing federal disclosure laws. Third, it discusses the key findings of our report pertaining to disclosure.

Goals and Methodology

The explosion of outside money in election campaigns is one of the most important recent developments in American democracy. Since the U.S. Supreme Court's decision in *Citizens United v. FEC* (2010), there has been a rapid proliferation in the number of outside groups – those that are not formally affiliated with candidates or parties – coupled with a dramatic increase in how much these groups are spending to influence federal elections.

While there has been considerable attention to raw numbers, there had been much less in-depth analysis of the impact that all this money is having, prior to the report by Ms. Strause and me. *The New Soft Money* investigates and analyzes the effects of outside money on congressional elections and governance, by speaking with those who are in the best position to know.

Over the last year, with the generous support of the Open Society Foundations, we conducted in-depth interviews with forty-three key political players. Among our interviewees were fifteen former members of or candidates for Congress – Republicans, Democrats, and Independents – as well as campaign staff, legislative staff, and political operatives. Our report also includes a detailed analysis of the changes in federal law over the years, and the current legal and political landscape as revealed in FEC proceedings, the congressional record, and publicly available reports. We aimed to get a clear-eyed, real world perspective on how this new world of increased spending affects elections and governance today.

Federal Disclosure Law

It is no secret that the law of campaign finance is extraordinarily complex. Chapter I of our report provides a primer on federal campaign finance laws, including the relevant statutes and regulations as well as key constitutional decisions. My testimony will focus exclusively on the law governing disclosure.

Under the Federal Election Campaign Act (FECA), some but not all of the money raised and spent to influence federal election campaigns is reported to the Federal Election Commission (FEC) and made public. Groups that are considered "political committees" under federal law, 4 U.S.C. § 431(4) are required to disclose their contributions received and disbursements made. These groups include candidates' campaigns, party committees, and other groups (commonly referred to as "political action committees" or "PACs") whose "major purpose" is to nominate or elect candidates for office.

The complexities of federal disclosure arise mainly with respect to individuals and groups that are *not* "political committees" under FECA. Those which spend more than $250 for express advocacy in a calendar year must disclose those expenditures, along with certain other information. 2 U.S.C. § 434(c). In addition, those making disbursements for "electioneering communications" aggregating over $10,000 in a calendar year must disclose those disbursements and certain other information. 2 U.S.C. § 434(f). An "electioneering communication" is defined to include broadcast, cable, or satellite communications referring to a clearly identified candidate for federal office, within 30 days of a primary or 60 days of a general election. 2 U.S.C. § 434(f)(3). This provision, enacted as a part of the Bipartisan Campaign Reform Act (BCRA), was designed to capture certain advertisements that, while not expressly advocating the election or defeat of a candidate, are intended to influence federal election campaigns.

In addition to FECA, Section 527 of the Internal Revenue Code imposes certain requirements on "political organizations," groups whose primary purpose is to influence elections or appointments at the federal, state, or local level. 26 U.S.C. § 527. This definition includes some groups that are not "political committees" under FECA. Section 527 political organizations are generally tax-exempt but are subject to taxation if they do not disclose their donors.

Many groups spending money in connection with federal elections today are not – or at least claim that they are not – covered by federal disclosure requirements. Prominent among them are various nonprofit organizations, typically organized under Section 501(c) of the Internal Revenue Code. So long as their major purpose is not to influence federal elections, they are not considered "political committees" under FECA; and so long as their primary purpose is not to influence elections or

appointments, they are not "political organizations" under Section 527. The rise of so-called "Dark Money," the ultimate sources of which are not disclosed, is associated with groups that claim to fall outside these definitions.

Findings on Disclosure

Perhaps the most striking feature of our interviews with former elected officials, candidates, campaign staff, and others – across the political spectrum – is the widespread agreement on how increased outside spending has changed the political landscape. To be sure, there is disagreement over whether these changes are desirable and what if anything should be done about them. But there is general agreement on what is actually happening on the ground.

Groups engaged in outside spending may be divided into two categories: those which disclose their donors and those which do not. Political committees – including so-called Super PACs, contributions to which are unlimited – are required to disclose their donors. But some of these organizations receive money from other groups, including nonprofits, that do not disclose their donors. Thus, the ultimate source of much of the money now being spent to influence federal election campaigns is undisclosed.

Inadequate disclosure was a common complaint about the current system, which arose repeatedly in our interviews.* Respondents across the political spectrum believe that it is important for both campaigns and voters to have better information about the money spent on federal election campaigns.

For many of those we interviewed, the ultimate value is *accountability*. Without adequate disclosure, accountability to the electorate is lacking. Because candidates are required to disclose contributions they receive, they and their donors are accountable in a way that many outside groups and their funders are not. While there is disagreement over what to do about this problem, there was widespread agreement among our interviewees that the lack of accountability arising from inadequate disclosure is a serious problem.

Another concern, expressed by some of our interviewees, is that the lack of disclosure opens the door to *corruption*. This is consistent with Supreme Court precedent, going back to *Buckley v. Valeo* (1976), which recognizes the prevention of both the appearance and reality of corruption as a justification for requiring disclosure of campaign-related contributions and expenditures.

Finally, we heard numerous complaints from our interviewees about the *mechanics* of disclosure. This system has been described as "byzantine" in prior testimony to this committee, and our interview subjects generally agreed.

Recent U.S. Supreme Court cases highlight the importance of having a well-functioning system of disclosure. As Chief Justice Roberts put it in his decision for the Supreme Court earlier this year in *McCutcheon v. FEC*: "With modern technology, disclosure now offers a particularly effective means of arming the voting public with information.... Because massive quantities of information can be accessed at the click of a mouse, disclosure is effective to a degree not possible at the time that *Buckley* or even

* Our main findings regarding disclosure appear at pp. 50-56 of *The New Soft Money*.

McConnell [2003] was decided." Yet our interviews reveal considerable frustration with how the disclosure system actually functions in practice, among those who are in the best position to know. They expressed the need for simplification and technological modernization of campaign finance disclosure. This is a rare point of bipartisan agreement in this deeply contested area of law.

Thank you for the opportunity to speak with you. I would be happy to answer any questions you have.

Professor Daniel P. Tokaji

Bio

Daniel P. Tokaji is the Robert M. Duncan/Jones Day Designated Professor of Law at The Ohio State University, Moritz College of Law, and a Senior Fellow with *Election Law @ Moritz*. Professor Tokaji is an authority on election law, including voting rights, election administration, and campaign finance. He is co-author of *Election Law: Cases and Materials* (5th ed. 2012) and *The New Soft Money: Outside Spending in Congressional Elections* (2014), the author of *Election Law in a Nutshell* (2013), and former co-editor of *Election Law Journal*.

Professor Tokaji's scholarship addresses questions of political equality, free speech, racial justice, and the role of the federal courts in American democracy. Among the publications in which his work has appeared are the *Michigan Law Review*, *Stanford Law & Policy Review*, and *Yale Law Journal*.

His published articles include "Responding to *Shelby County*: A Grand Election Bargain," 8 *Harvard Law & Policy Review* 71 (2014), "The Future of Election Reform: From Rules to Institutions," 28 *Yale Law & Policy Review* 125 (2009), "The New Vote Denial: Where Election Reform Meets the Voting Rights Act," 57 *South Carolina Law Review* 689 (2006), and "First Amendment Equal Protection: On Discretion, Inequality, and Participation," 101 *Michigan Law Review* 2409 (2003).

Professor Tokaji teaches a variety of courses at Ohio State, including Election Law, Legislation, First Amendment, Federal Courts, and a seminar on Money and Politics. He previously taught courses on Election Law and Federal Courts at Harvard Law School, while serving a Visiting Professor and Ralph Shikes Fellow.

In addition to his scholarship, Professor Tokaji has litigated many election law, free speech, and civil rights cases. He was lead counsel in a case that struck down an Ohio law requiring naturalized citizens to produce a certificate of naturalization when challenged at the polls. He was also counsel in cases that kept open the window for simultaneous registration and early voting in Ohio's 2008 general election, and that challenged punch-card voting systems in Ohio and California after the 2000 election. He successfully represented demonstrators at the 2000 Democratic National Convention.

A graduate of Harvard College and Yale Law School, Professor Tokaji clerked for the Honorable Stephen Reinhardt of the U.S. Court of Appeals for the Ninth Circuit. Before arriving at Ohio State, he was a staff attorney with the ACLU Foundation of Southern California and Chair of California Common Cause.

EXECUTIVE SUMMARY
Testimony of Professor Heather K. Gerken
J. Skelly Wright Professor of Law
Yale Law School
Submitted to the United States Senate Committee on Rules and Administration
July 18, 2014

Robust disclosure mechanisms are an essential foundation for any campaign finance system. In the United States, however, our disclosure rules are neither adequate nor effective. "Dark money" – money spent on campaigns by donors who are untraceable – flows freely through the system and grows in significance each election cycle. Hundreds of millions of dollars of independent spending occurred in 2012, with much of it untraceable. Experts expect that number to increase during the next two election cycles. The need for adequate disclosure mechanisms has become even more important as the Supreme Court dismantles much of our current campaign-finance system, leaving American politics even more vulnerable to money's hidden influence.

I will make three points in my testimony. First, disclosure rules have garnered considerable bipartisan support, and with good reason. Outside of Washington's tight circles, transparency measures enjoy a high level of support among policymakers, academics, and the American people. Unsurprisingly, they have been endorsed by political leaders on both sides of the aisle.

Second, transparency mandates stand on firmer constitutional footing than any other type of campaign-finance regulation. Even members of the Supreme Court who are deeply skeptical of campaign-finance regulations have offered full-throated endorsements of disclosure requirements.

Finally, there a variety of models for ensuring that disclosure requirements remain robust and efficacious over many election cycles. I offer a new proposal here, one that is aimed at the central problem in campaign finance law: keeping up with the ever-changing strategies donors have found to conceal their influence. Congress and the FEC have long struggled to keep up with the emergence of new, nontransparent organizations in each election cycle, facing a regulatory version of "whack-a-mole." This proposal avoids that problem by regulating the advertisement, not the organization. It's a universal disclosure rule that requires any advertisement funded directly or indirectly by an organization that does not disclose its donors to acknowledge that fact with a simple and truthful disclaimer: "This ad was paid for by 'X,' which does not disclose the identity of its donors." The fix is universal and flexible enough to accommodate changes in future election cycles and ensure that disclosure regulations keep pace with politics.

For all of these reasons, now is the right moment for Congress to pass new disclosure requirements. This is one of the rare instances when the need for change is significant, the time is ripe, and the American people are ready.

Testimony of Professor Heather K. Gerken
J. Skelly Wright Professor of Law
Yale Law School
Submitted to the United States Senate Committee on Rules and Administration
July 18, 2014

Robust disclosure mechanisms are an essential foundation for any campaign finance system. In the United States, however, our disclosure rules are neither adequate nor effective. "Dark money" – money spent on campaigns by donors who are untraceable – flows freely through the system and grows in significance each election cycle. Hundreds of millions of dollars of independent spending occurred in 2012, with much of it untraceable. Experts expect that number to increase during the next two election cycles. The need for adequate disclosure mechanisms has become even more important as the Supreme Court dismantles much of our current campaign-finance system, leaving American politics even more vulnerable to money's hidden influence. Moreover, outside of Washington's tight circles, transparency measures enjoy a high level of bipartisan support and impeccable constitutional credentials. The time to act is now.

I will make three points in my testimony. First, disclosure rules enjoy considerable bipartisan support, and with good reason. Second, transparency regulations stand on strong constitutional footing and have been endorsed even by members of the Supreme Court who are most skeptical of campaign-finance regulations. Finally, I will propose a new solution to the problem of dark money, one that helps solve the central problem in campaign finance law: keeping up with the ever-changing strategies donors have found to conceal their influence. Congress and the FEC have long struggled to keep up with the emergence of new, nontransparent organizations in each election cycle, facing a regulatory version of "whack-a-mole." Our proposal solves this problem by regulating the advertisement, not the organization. It's a universal disclosure rule that requires any advertisement funded directly or indirectly by an organization that does not disclose its donors to acknowledge that fact with a simple and truthful disclaimer: "This ad was paid for by 'X,' which does not disclose the identity of its donors."

A. Bipartisan Support for Disclosure Rules

Outside of the narrow confines of Washington's partisan politics, disclosure rules enjoy substantial bipartisan support, and with good reason. Disclosure sits at that sweet spot in policymaking, where democratic idealism and political realism meet. These rules provide the American people with the information they need to make informed decisions about the advertisements they watch and the politicians they support. It does so without placing restrictions on where and how donors spend their money, trusting the political marketplace – not top-down government regulation – to do the work.

As a result, transparency rules enjoy broad support among policymakers, academics, and the American people. Dating back more than a century, federal disclosure provisions have been termed "probably the most successful element of our campaign finance system" and "are the most widely adopted form of campaign finance regulation in democracies around the world."[1] Most academics view them as an essential feature of a well-functioning campaign-finance system. And poll after poll shows that Americans value transparency when it comes to funding elections.

As one of the 29 Commissioners on the Bipartisan Policy Center's Commission on Political Reform, I witnessed first-hand what happens when a politically savvy bipartisan group deliberates about the relationship between transparency and democracy. The Commission -- chaired by Senators Trent Lott, Olympia Snowe, and Tom Daschle, Secretary Dan Glickman, and Governor Dick Kempthorne – included academic, political, and community leaders. The Commission just issued a report making 65 recommendations for improving American democracy.

One of the Commission's most important recommendations concerned transparency. Recognizing that one of the central problems plaguing our election system is that Americans don't know who is funding our elections, the Commission recommended the disclosure of "all political contributions, including those made to outside or independent groups." The Commission did so *unanimously*. The Commissioners made this recommendation after a lively debate, and they were well aware that this policy debate – like most issues in election law -- is divisive in some circles. But every person on the Commission agreed on the importance of disclosure reform, including the many highly respected elected officials who had witnessed the damaging effects of dark money first-hand. It's worth keeping in mind that the Commission included individuals with wide range of political commitments and was led by political figures who are highly respected on both sides of the political aisle. And yet even in today's heated political environment, this bipartisan group came together to affirm that transparency measures are the type of common-sense reform that will make our democracy stronger.

It's not just my work on the Commission that has convinced me of the importance of robust disclosure rules. My academic work has focused on the emergence of what I call "shadow parties" – independent organizations (like 501(c)(4)'s and SuperPACs) that exist outside of the formal party structure, house party elites, carry out a great deal of campaign work, and closely cooperate with the campaigns even if they do not, as a legal matter, "coordinate" with them under the rules promulgated by the FEC.[2] These "shadow parties" are shifting the center of gravity away from the formal party apparatus into private, nontransparent organizations. That's because these "shadow parties" enjoy substantial advantages

[1] Richard Briffault, *Campaign Finance Disclosure 2.0*, 9 Elec. L. J. 273, 273 (2010).
[2] For a full analysis, see Heather K. Gerken, "The Real Problem with *Citizens United:* Campaign Finance, Dark Money, and Shadow Parties," *Marquette Lawyer* 10 (Summer 2014).

over the formal parties in terms of fundraising capacity. But many – specifically, the 501(c)(4)'s -- also offer donors another significant advantage: anonymity.

As my recent work makes clear, these shadow parties are reshaping the political landscape in ways that ought to concern us all. A new report issued by Ohio State's Moritz College of Law[3] provides compelling evidence of the problems associated with this new regime. Because one of its authors, Professor Tokaji, is testifying today, I'll leave it to him to provide you further details. I will just note for purposes of this hearing that many independent spending organizations will continue to enjoy an important structural advantage over the formal parties unless and until Congress passes a more robust disclosure regime.

B. Transparency's Solid Constitutional Foundations

Disclosure rules aren't just good policy; they also rest on the firmest of constitutional footings. Even as the Supreme Court has upended much of campaign-finance law, it has repeatedly affirmed the constitutionality of transparency measures.

It is well established that Congress has the power to ensure that election spending is transparent. See, e.g., Burroughs v. United States, 290 U.S. 435 (1934) (upholding congressional power to create disclosure rules for federal elections and take other steps to "preserve the departments and institutions of the general government from impairment."). While the First Amendment limits Congress's ability to regulate campaign finance generally, the Court has concluded that transparency rules *promote* First Amendment values:

> 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.

Citizens United v. Fed. Election Comm'n, 558 U.S. 310, 370-71 (2010).

The Court has reaffirmed this principle in a variety of settings, including a case involving the public disclosure of signatures in support of a referendum. "Public disclosure . . . promotes transparency and accountability in the electoral process to an extent other measures cannot," the Chief Justice wrote in that case. For that reason, public disclosure "is substantially related to the important interest of preserving the integrity of the electoral process." Doe v. Reed, 561 U.S. 186, 199 (2010).

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[3] Daniel P. Tokaji & Renata E.B. Strause, "The New Soft Money: Outside Spending in Congressional Elections" (2014).

If anything, the Court's controversial decision in *Citizens United* has strengthened the constitutional case for disclosure. Even as the Court struck down restrictions on independent expenditures, it offered a ringing endorsement of transparency rules. That portion of the opinion was joined by every Justice save one. Moreover, the Court's dramatic unwinding of the current campaign-finance regime has been premised on the assumption that Americans would have adequate information about the money spent on campaigns. Justice Kennedy, who penned *Citizens United*, assured us that disclosure rules were an important safeguard against independent spending's potentially damaging effects. Such transparency ensures that "shareholders can determine whether their corporation's political speech advances the corporation's interest," and "citizens can see whether elected officials are 'in the pocket' of so-called moneyed interests." Citizens United, 558 U.S. at 370.

That's why the Court in *Citizens United* explicitly rebuffed the parties' First Amendment challenge to disclosure rules, including those requiring rapid disclosure. As it noted, there were stronger First Amendment interests on the other side: "the public has an interest in knowing who is speaking about a candidate shortly before an election," Justice Kennedy wrote. Id. at 369. So, too, in *McConnell* the Court held that the government's interest in the timely disclosure of campaign expenditures was "unquestionably significant." McConnell v. Fed. Election Comm'n, 540 U.S. 93, 200 (2003). Congress can therefore regulate as long as there is a "'substantial relation' between the disclosure requirement and a 'sufficiently important governmental interest.'" Citizens United, 558 U.S. at 366-67 (quoting Buckley v. Valeo). A "sufficiently important governmental interest" includes "providing the electorate with information, deterring actual corruption and avoiding any appearance thereof, and gathering the data necessary to enforce more substantive electioneering restrictions." McConnell, 540 U.S. at 196; see also Citizens United v, 558 U.S. at 366-67.

Finally, note that there is robust support for transparency even among the Court's most conservative members. With the exception of Justice Thomas, the Justices who are the most skeptical of campaign-finance regulation have consistently voted to uphold transparency measures. They have even authored many of the touchstone opinions in this area. Justice Kennedy, for instance, penned *Citizens United,* and Chief Justice Roberts wrote for the Court in *Doe v. Reed.* So, too, one could not ask for a more full-throated endorsement of disclosure than that recently offered by Justice Scalia:

> Requiring people to stand up in public for their political acts fosters civic courage, without which democracy is doomed. For my part, I do not look forward to a society which . . . campaigns anonymously . . . and even exercises the direct democracy of initiative and referendum hidden from public scrutiny and protected from the accountability of criticism. This does not resemble the Home of the Brave.

Doe, 561 U.S. at 228 (Scalia, J., concurring in the judgment).

III. A New Path toward Transparency

Disclosure requirements are only effective if they are timely and accessible. Information must be disclosed before the election, and data dumps do little to promote transparency if they cannot be easily accessed and sorted. Moreover, as Richard Briffault has pointed out, there are limits to how much disclosure is useful. If too much information is disclosed, it becomes difficult for reporters and public interest groups to sort the wheat from the chaff.[4]

The core obstacle to transparency efforts is evasion. As we have seen in recent years, donors can hide behind shell organizations to shield their identity behind a vague but inspiring name. Donors can also evade disclosure rules by giving money to multipurpose organizations (those that engage in political and nonpolitical activities) without specifying whether the money is for political activities. Here the states have led the way in dealing with problems like these. Washington State, for instance, has prevented donors from using vaguely named fronts to shield their identity by requiring disclosure of the sponsor or the "top five contributors" of a political advertisement within the advertisement itself. Wash. Rev. Code § 42.17.320. Similarly, California has addressed efforts to evade disclosure rules by failing to earmark donations to multipurpose organizations. It has specified when a non-earmarked donation to such an organization will be deemed a form of political contribution for disclosure purposes. See California Gov't Code §84211; 2 CCR § 18215(b)(1).

Wade Gibson, Webb Lyons, and I have proposed another, novel solution to help solve the problem of evasion.[5] In our view, the core problem with disclosure efforts is what we term the regulatory game of "whack-a-mole." Whenever regulations make it hard for wealthy donors to fund politics through one outlet, donors find another outlet for their energies. Congress closed the "soft money" loophole for political parties, and money flowed into issue ads and 527s. 527s have now been displaced by SuperPACs and 501(c)(4)'s. The risk is that donors will always find new organizations to hide behind.

In order to avoid the "whack-a-mole" problem, our proposal regulates the ad, not the organization. Rather than trying to guess which organizations will emerge in the next campaign cycle, we offer a simple fix: Any advertisement funded directly or indirectly by an organization that does not disclose its donors must acknowledge that fact with a simple and truthful disclaimer: "This ad was paid for by 'X,' which

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[4] Briffault, *supra* note 1.

[5] See Heather Gerken, Wade Gibson & Webb Lyons, "Rerouting the flow of 'dark money' into political campaigns," *Washington Post* (Apr. 3, 2014); see also Heather K. Gerken, "Nondisclosure Disclosure: Giving Lawmakers an Excuse to Avoid the Hard Questions," electionlawblog.org (Apr. 8, 2014). What follows draws heavily upon those two pieces.

does not disclose the identity of its donors." This "nondisclosure disclosure" would thus require all organizations that do not publicly identify their donors to acknowledge that fact. It provides voters with a helpful shorthand while giving donors an important choice: put their money into transparent organizations (like political parties or SuperPACs), or fund groups that keep their donors hidden but risk running ads that may not persuade cynical voters.

Unlike most of the proposals on the table, ours would apply not just to all of the entities we currently worry about – social welfare groups *and* labor unions *and* the chambers of commerce *and* private individuals – but future organizations built to funnel dark money into the system. The fix is universal and flexible enough to accommodate changes in future election cycles. Congress and the FEC have always had trouble keeping up with those changes. Because our proposal offers universal disclosure, it guarantees that disclosure regulations will keep pace with politics.

Another core benefit of our proposal is that it doesn't place an unfair burden on voters. Voters could presumably try to trace all the organizations and shell organizations behind any given ad, but it would require them to know a great deal about election law (even corporate law), and it's very hard to do. Rather than ask voters to do so every time a 30-second ad flashes across the screen, voters should be told the simple fact of the matter: Some ads are funded anonymously. There's no reason voters shouldn't be able to sort between ads funded transparently and ads funded anonymously. In that respect, our proposal is little different from the "stand by your ad" requirement. That requirement demands that the connection between the ad and a candidate is identified. Ours demands that the connection between the ad and an anonymous donor is identified.

Finally, rather than attempt to sail against political headwinds, our proposal works with rather than against political incentives. It harnesses politics to fix politics. We are under no illusions that donors are going to stop seeking anonymous outlets for funding. But our proposal should reduce the value of those anonymous outlets by giving voters a reason to be skeptical of ads they put out. Donors will thus be forced to choose. They can fund organizations that disclose their donors, like the political parties or SuperPACs. Or they can fund groups that keep donors' identities hidden, knowing their ads will lose some of their oomph in the eyes of cynical voters. Political incentives will push money into transparent organizations rather than away from them. Money and political influence will be easier to trace. That's not a full remedy for our ailing system, but it's the type of reform that makes bigger and better reform possible.

Conclusion

Now is the right moment for Congress to pass new disclosure requirements. A disclosure regime is one of the basic building blocks of a healthy campaign finance system, and ours is sorely in disrepair. Transparency mandates stand on firmer constitutional footing than any other type of campaign-finance regulation, and they

enjoy substantial bipartisan support. Moreover, there a variety of models for ensuring that disclosure requirements remain robust and efficacious over many election cycles. This is one of the rare examples of reform for which the need is significant, the time is ripe, and the American people are ready.

Biographical Information

Heather K. Gerken is the J. Skelly Wright Professor of Law at Yale Law School. Professor Gerken specializes in election law and constitutional law. She has published in the *Harvard Law Review*, the *Yale Law Journal*, the *Stanford Law Review*, *Political Theory*, and *Political Science Quarterly*. Her most recent scholarship explores questions of election reform, federalism, diversity, and dissent. Her work has been featured in *The Atlantic*'s "Ideas of the Year" section and the Ideas Section of the *Boston Globe* and has been the subject of a festschrift and a symposium. Professor Gerken clerked for Judge Stephen Reinhardt of the 9th Circuit and Justice David Souter of the United States Supreme Court. After practicing for several years, she joined the Harvard faculty in September 2000 and was awarded tenure in 2005. In 2006, she joined the Yale faculty. She has won teaching awards at both Yale and Harvard, has been named one of the nation's "twenty-six best law teachers" in a book published by the Harvard University Press, and has won a Green Bag award for legal writing. Professor Gerken served as a senior legal adviser to the Obama for America campaign in 2008 and 2012. Her proposal for creating a "Democracy Index" was incorporated into separate bills by then-Senator Hillary Clinton, then-Senator Barack Obama, and Congressman Israel and turned into reality by the Pew Trusts, which created the nation's first Election Performance Index in February 2013.

Summary of Testimony of Bradley A. Smith
Chairman, Center for Competitive Politics and
Visiting Judge John T. Copenhaver, Jr. Chair of Law, West Virginia University

The current federal disclosure regime is the most extensive in U.S. history. Data from the Federal Election Commission and the Center for Responsive Politics show that groups who do not disclose information on individual donors accounted for just over 4 percent of spending in the 2012 elections. Any policy produces diminishing marginal returns and rising costs as it aims for 100 percent achievement of its goal, and compulsory disclosure appears to have reached that point of diminished returns.

If enacted, S. 2516, the "DISCLOSE Act of 2014," will discourage both small and large donors from contributing, expose them to the risk of harassment, burden volunteer-run campaigns, and ultimately produce "junk disclosure" data that is not only not useful to voters, but in many cases misleading. Placed in the context of existing disclosure requirements, which are already thorough and over inclusive, this bill is a regulatory overreach that will do mostly harm and little good to public knowledge and trust in government.

S. 2516 suffers from several flaws. These include:

1) The bill would force nonprofits to radically alter their fundraising and public advocacy efforts.
2) The bill's new definition of "functional equivalent of express advocacy" is vague and raises constitutional concerns.
3) The bill is a solution in search of a problem. Current law already requires disclosure of all spending on independent expenditures and electioneering communications and all contributions to further such communications.
4) The bill's rule regarding covered transfers is likely unenforceable and will be a compliance nightmare for many nonprofits.

Ironically, this bill comes at a time when there is growing recognition that our existing disclosure requirements are regulatory overkill, and increasingly unhelpful. Excessive disclosure may actually be fueling the money chase, even as it discourages some donors from giving.

Ultimately, the purpose of disclosure is to allow citizens to monitor government, not to allow government to monitor citizens. The IRS Harassment Scandal and subsequent proposed rulemaking governing the permissible activities of 501(c)(4) social welfare organizations illustrates how partisan pressure for disclosure can decrease, rather than increase, public confidence in government. Tinkering with the First Amendment and the speech rights of American citizens to score political points in an election year is an idea fraught with peril.

Testimony of

Bradley A. Smith
Chairman, Center for Competitive Politics, Alexandria, Virginia
Visiting Judge John T. Copenhaver, Jr. Chair of Law, West Virginia University

Before the Committee on Rules and Administration
United States Senate
July 23, 2014

Mr. Chairman and members of the Committee, thank you for the opportunity to present my view at this hearing on, "The DISCLOSE Act (S. 2516) and the Need for Expanded Public Disclosure of Funds Raised and Spent to Influence Federal Elections."

The Committee has expressed some interest in using this hearing to explore new disclosure requirements for spending on politics and public affairs through the DISCLOSE Act, ostensibly due to recent Supreme Court decisions, including the Court's ruling striking down the federal aggregate limit on overall political contributions in *McCutcheon v. FEC*. With that in mind, it is worth noting that the *McCutcheon* ruling is disclosure's friend. By freeing donors to contribute more aggregate funds directly to candidates and party committees, one likely effect of *McCutcheon* will be to encourage donors to give directly to those candidates and party committees, where their contributions are subject to the most rigorous compulsory disclosure rules, rather than to organizations that may have fewer disclosure requirements. So, *McCutcheon* is good for disclosure advocates.

Compulsory disclosure seeks to improve politics through transparency, but poorly designed or excessive disclosure requirements can damage politics by discouraging small and large donors from contributing, exposing them to the risk of harassment, burdening volunteer-run campaigns, and producing "junk disclosure" data that is not only not useful to voters, but in many cases misleading. To truly improve transparency, disclosure requirements should be narrowly tailored to avoid these common pitfalls and constitutional controversies.

The bill being considered today is not narrowly tailored. While the stated goal of the DISCLOSE Act is to increase disclosure of spending to elect or defeat candidates, this radical bill would chill speech, force nonprofits to fundamentally alter their fundraising and public advocacy efforts, and implement several vague and unenforceable requirements on citizen groups attempting to speak out on issues of public importance. Placed in the context of existing disclosure requirements, this bill is a clear overreach that will do mostly harm and little good to public knowledge and trust in government.

The alleged disclosure "problem" itself, as I will outline below, is routinely overstated. Data from the Federal Election Commission and the Center for Responsive Politics show that *just over four percent* of political expenditures in 2012 were financed by groups that did not itemize their donors. And in all cases, the name of the group making the expenditures was disclosed (at least if they were operating legally under already existing disclosure rules).

Legislation regulating the discussion of public affairs should be grounded in a realistic understanding of what the law actually is; it must be based on a realistic assessment of the effects it has in practice; and it must take into account the actual costs, as well as alleged benefits, of added compulsory disclosure. Discussion of disclosure should eschew loaded terms like "dark money," that to do little to enlighten and much to obscure those costs and benefits.

The Scope of the Issue

Information about political donors, it is believed, can help guard against officeholders becoming too compliant with the wishes of large spenders, and provide information that might be valuable to voters in deciding for whom to vote and how to evaluate political messages.

In the wake of this year's Supreme Court decision in *McCutcheon*, those who wish to further regulate political speech have renewed calls for even more mandatory disclosure, continuing a pattern established after the decisions of the United States Supreme Court in *Citizens United v. Federal Election Commission*,[1] and of the United States Court of Appeals in *SpeechNow.org v. Federal Election Commission*.[2]

The claim by those demanding more regulation has been that the public lacks information on the sources of vast amounts of political independent spending. This concern, while serious if true, has been artificially ramped up by many mistaken comments in the media about "secret" contributions to campaigns, as well as a widely held, but mistaken belief that under *Citizens United,* corporations and unions may now contribute directly to candidate campaigns. (Both types of entities are prohibited from contributing directly to candidates under federal law; states may choose to ban such contributions for state candidates and several have done so). In particular, there have been concerns that nonprofit organizations formed under Section 501(c)(4) of the Internal Revenue Code have been engaging in extensive political campaigns using what critics have rather unhelpfully dubbed "dark money."

Politically-related spending by 501(c)(4) organizations is not new, and long predates the decision in *Citizens United.* Express advocacy in favor of or against candidates was allowed for certain types of 501(c)(4) organizations even before *Citizens United,* as a result of the Supreme Court's 1986 ruling in *Federal Election Commission v. Massachusetts Citizens For Life ("MCFL").*[3] That decision allowed qualified nonprofit corporations to conduct express advocacy through independent expenditures. These groups were significant and growing before the

[1] 558 U.S. 310 (2010) (allowing corporations and unions to make independent expenditures in political campaigns from general treasury funds).
[2] 599 F.3d 686 (en banc, 2010) (allowing independent expenditures to be made from pooled funds not subject to PAC contribution limits).
[3] 479 U.S. 238 (1986).

Citizens United decision and included groups such as the League of Conservation Voters and NARAL Pro-Choice America.

In addition, even groups that did not qualify for the exemption pursuant to *MCFL* could and did run hard-hitting issue campaigns against candidates. For example, in 2000, the NAACP Voter Action Fund, a nonprofit social welfare group organized under Section 501(c)(4) of the tax code, ran the following ad:

> *Renee Mullins (voice over):* I'm Renee Mullins, James Byrd's daughter. On June 7, 1998 in Texas my father was killed. He was beaten, chained, and then dragged miles to his death, all because he was black. So when Governor George W. Bush refused to support hate-crime legislation, it was like my father was killed all over again. Call Governor George W. Bush and tell him to support hate-crime legislation. We won't be dragged away from our future.

This thirty-second TV spot, featuring graphic reenactment footage, began running on October 25, 2000, just a few days before the 2000 presidential election.[4]

This ad was perfectly legal to run at any time prior to 2003, with no donor disclosure, and remained legal to run under current disclosure laws more than 30 days before a primary or 60 days before a general election between 2003 and 2007. It probably also could have been run, with no donor disclosure, at any time after the Supreme Court's 2007 decision in *Wisconsin Right to Life v. Federal Election Commission*.[5] In short, political spending by 501(c) organizations is nothing new, and those organizations have never been required to disclose the names of their donors and members unless donors gave specifically to support a particular independent expenditure.

It should also be noted that neither the *Citizens United* nor *SpeechNow.org* decisions struck down any disclosure laws; nor has Congress or the FEC loosened any disclosure rules in place at the time those two decisions were issued in the spring of 2010. There has been no change in the laws governing disclosure of political spenders and contributors.

Despite heavy media focus in 2012 on so-called "dark money," "secret money," and "undisclosed spending," in fact, the United States currently mandates more disclosure of political spending and contributions than any time in its history. Candidates, political parties, PACs, and Super PACs disclose all of their donors beyond the most *de minimis* amounts. This disclosure includes the name of the group, individual, or other entity that is contributing, the date on which it occurred, and the amount given, and recipients are also required to seek information and report on donors' occupation and employment.[6] These entities also report all of their expenditures.

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[4] Bradley A. Smith, "Disclosure in a Post-*Citizens United* Real World," 6 St. Thomas J. L. & Pol'y 257 (2012). Draft available at: http://www.ncsl.org/documents/summit/summit2013/online-resources/2013_smith_disclosure.pdf (March 26, 2013).
[5] 551 U.S. 449 (2007).
[6] *See* 2 U.S.C. § 434(b) and (c).

Current federal law also requires reporting of all independent expenditures over $250, and of all "electioneering communications" (as defined in 2 U.S.C. § 434(f)) over $10,000, by any individual, corporation, union, or organization. Like individuals, for-profit corporations, and unions, 501(c)(4) organizations, such as the National Rifle Association and the Sierra Club, must disclose their independent expenditures, electioneering communications, and the individual information on donors who give money earmarked for political activity. All of this information is freely available on the FEC's website.

Current law also requires disclosure of the spender on all campaign advertising itself. All broadcast political ads (like, in fact, all broadcast ads, political or not) must include, within the ad, the identity of the person or organization paying for the ad. Finally, organizations operating under § 527 of the tax code, but not required to file with the FEC or state campaign finance regulators, must disclose their donors to the IRS, where they are made public.

Given this extensive disclosure regime, which is more extensive than that existing in the U.S. at any time prior to 2003, and more extensive than that in most democracies, it is a misnomer to speak of "undisclosed spending." Rather, more accurately, some ads are run with less information about the spender, and contributors to the spender, than some might think desirable. Recognizing the reality of this extensive disclosure regime, rather than railing about the meaningless slogan "dark money," is the first step to understanding the nature of the issue and possible legislative action.

The FEC reports that approximately $7.3 billion was spent on federal races in 2012. Approximately $2 billion, or less than 30 percent, was spent by "outside groups" (that is, citizens and organizations other than candidate campaign committees and national political parties).[7] According to figures from the Center for Responsive Politics, approximately $311 million was spent by organizations that did not provide itemized disclosure of their donors.[8] That is just under 4.3 percent of the total. $311 million sounds like a lot of money – four percent of total spending on federal races doesn't sound like much money at all.

Moreover, that four percent tends to overstate the issue because many of the largest 501(c) spenders are well-known public groups. Only 28 organizations that did not publicly disclose all of their donors spent more than $1 million on all independent expenditures in 2012. Most of these were well-known entities, including the U.S. Chamber of Commerce, the Humane Society, the League of Conservation Voters, NARAL Pro-Choice America, the National Association of Realtors, the National Federation of Independent Business, the National Rifle Association, and Planned Parenthood. Several of these groups also spent substantial funds on issue ads or express advocacy under the *MCFL* exemption, or on candidate-related issue ads, even before *Citizens United*, suggesting that the growth in "undisclosed" spending is even less than many who favor more regulation lead the public to believe.

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[7] Jake Harper, "Total 2012 election spending: $7 Billion." Sunlight Foundation. Retrieved on July 18, 2014. Available at: http://sunlightfoundation.com/blog/2013/01/31/total-2012-election-spending-7-billion/ (January 31, 2013); Jonathan Salant, 2012 Elections Cost Will Hit $7 Billion, FEC Chair Weintraub Says." *Bloomberg*. Retrieved on July 18, 2014. Available at: http://go.bloomberg.com/political-capital/2013-01-31/fec-head-weintraub-says-2012-elections-cost-will-hit-7-billion/ (January 31, 2013).

[8] "Outside Spending by Disclosure, Excluding Party Committees," Center for Responsive Politics. Retrieved on July 18, 2014. Available at: http://www.opensecrets.org/outsidespending/disclosure.php.

Even many spenders that are not historically well-known organizations on this list are quite familiar to anyone who remotely follows the news, such as Crossroads GPS and Americans for Prosperity. Indeed, many of these organizations' funders are well-known, even as the organizations themselves do not formally disclose their names. Does anyone on this Committee not know that Tom Steyer provided substantial funding to NextGen Climate Action, a 501(c)(4)? If not, a Google search of the organization's name will provide that information in a matter of seconds.[9]

Furthermore, data from the Center for Responsive Politics shows that the percentage of independent spending by organizations that do not disclose their donors appears to have declined substantially (by approximately 25 percent) in 2012 from 2010. This is not surprising. Because 501(c) organizations may not have political activity as their primary purpose, they must conduct their activities to stay within the IRS guidelines to maintain their exempt status. In effect, then, a donor whose main objective is political activity faces the effective equivalent of a 50 percent or higher tax on his or her political donations by giving to a 501(c) organization rather than to a "Super PAC," which fully discloses its donors. This is because the group must primarily spend its funds on programs other than political activity, as defined in Section 527 of the tax code. As a result of this inefficiency, it is doubtful that spending by 501(c) organizations will increase substantially as a percentage of independent or total spending. Furthermore, if the group does not conduct its activities in a manner consistent with IRS regulations, it could possibly be reclassified as a Section 527 organization by the Agency and be forced to publically disclose its donors on nearly the same schedule as a political committee, except that the reports are on IRS Form 8872 and listed on the IRS's website.

Lastly, it bears repeating that, contrary to claims by many, the Supreme Court's ruling in *Citizens United* did not change the prohibition on political activity by non-resident aliens and foreign corporations. Specifically, according to 2 U.S.C. § 441(e), any "partnership, association, corporation, organization, or other combination of persons organized under the laws of, or having its principal place of business in, a foreign country" is prohibited from contributing in elections. Indeed, despite the President's expressed fear that the decision would allow "foreign corporations"[10] to make expenditures in elections, not only did *Citizens United* specifically not address that longstanding prohibition, but the Supreme Court has summarily reaffirmed that ban since.[11]

In summary, candidates, parties, PACs, and Super PACs already disclose all of their donors. Other groups that spend in elections – primarily 501(c)(4) social welfare organizations, 501(c)(5) labor unions, and 501(c)(6) trade associations – disclose their spending and the names of donors who have contributed specifically for that spending, but not the names of other members and donors. Spending that falls into this latter category is a very small fraction of total

[9] Nicholas Confessore, "Financier Plans Big Ad Campaign on Climate Change," *The New York Times*. Retrieved on July 18, 2014. Available at: http://www.nytimes.com/2014/02/18/us/politics/financier-plans-big-ad-campaign-on-environment.html?_r=0 (February 17, 2014).

[10] President Barack Obama, "Remarks by the President in State of the Union Address," The White House, Office of the Press Secretary. Retrieved on July 18, 2014. Available at: http://www.whitehouse.gov/the-press-office/remarks-president-state-union-address (January 27, 2010).

[11] *See Bluman v. Federal Election Commission*, 132 S. Ct. 1087 (2012).

political spending (just over four percent), is not new, and declined as a percentage of total spending in 2012. In considering legislation that expands or retracts disclosure requirements, members of Congress should first understand the extent of the current federal disclosure regime. Viewed through this lens, the rhetoric of "secret money" in American politics is far overblown.

Policy Issues with Disclosure

Given that non-itemized donor expenditures are such a small part of the whole, why not require disclosure of that four percent of spending? The answer is that disclosure does impose costs, and efforts to squeeze the final four percent of non-itemized expenditures may simply mislead the public.

Any public policy finds its costs increasing and its benefits decreasing as it aims for 100 percent achievement of its goal. To take one example, some increase in spending on police, prisons, and courts is likely to reduce crime, but eliminating all crime – with police on every corner and prisons stuffed with petty offenders – is not worth the cost.

Studies have confirmed that the costs of mandated disclosure disproportionately harm grassroots organizations and campaigns run by volunteers.[12] Complying with disclosure laws often requires expensive legal counsel, an accountant, and other record-keeping staff. Ordinary citizens volunteering for a candidate or issue campaign may unknowingly violate the law if disclosure requirements are overbroad or overly complex. Equally worrisome, powerful political interests may seek to use disclosure requirements to raise the cost of doing business for their grassroots competition. One study of the costs of various state disclosure regulations concluded that "regulation of grassroots political activity puts ordinary citizens at risk of legal entrapment, leaves disfavored groups open to abuse from partisan regulators and robs unpopular speakers of the protective benefits of anonymous speech."[13]

In addition to the logistical challenges faced by organizations, increased disclosure requirements often create "junk disclosure" that misleads the public by associating contributions with communications they have no link to or, as is often the case, knowledge of. When individuals donate to a political committee or political party, they know the funds will be used to support or oppose candidates. The same is not at all true of donors to 501(c) membership organizations, unions, and trade associations. As a result, if a group decides to make political expenditures as a small part of the organization's multiple activities, many of its donors could potentially be made public, regardless of whether their donations were earmarked for a political expenditure. People give to membership organizations and trade associations not because they agree with everything the organization does, or particular political positions it takes, but because on balance they think it provides a voice for their views or otherwise advances their interests with benefits or public education. To publicly identify contributing individuals with expenditures of which they had no advance knowledge and may even oppose is both unfair to members and donors, and misleads the public. It is "junk disclosure" – disclosure that serves little purpose

[12] *See e.g.* Jeffrey Milyo, Ph. D., "Mowing Down the Grassroots: How Grassroots Lobbying Disclosure Suppresses Political Participation," Institute for Justice. Retrieved on July 18, 2014. Available at: http://www.campaignfreedom.org/doclib/20100419_Milyo2010GrassrootsLobbying.pdf (April 2010).
[13] *Ibid.*, p. 24.

other than to provide a basis for official or private harassment, and that may actually misinform the public.

There are also serious practical problems. As I have recently explained in the St. Thomas University Journal of Law & Policy:

> Disclosure of general financial donors to groups sounds easier in theory than it is in practice. Consider this scenario: Acme Industries makes a $100,000 dues payment to the National Business Chamber ("NBC") in December of an election year, say 2014, and then again in 2015. NBC, in order to encourage political activity by local and state chambers of commerce, agrees to match what the State Chamber of Commerce raises for election activity in the 2016 elections. State Chamber raises $350,000 specifically for political activity over several months, and the National Chamber matches it by sending a check to State Chamber in March 2016. In June of 2016, State Chamber transfers $1 million – the $350,000 it raised specifically for political activity, the $350,000 from the NBC, and another $300,000 from general dues – to the Committee for a Better State ("CBS"), a 501(c)(4) organization that the State Chamber uses for its political activity. CBS reserves $200,000 for its own direct spending, and then transfers $800,000 to the State Jobs Alliance, a coalition formed to promote pro-business issues and candidates, which raises and spends $3 million in the state, about two-thirds for advertising on a ballot initiative. When NBC, the State Chamber, CBS, and the State Jobs Alliance file their spending reports, what donors are to be disclosed, and for how much?
>
> What should be immediately obvious to any observer is that the question of "disclosure" is not so easy. Is Acme Industries responsible for spending by NBC, CBS, or the State Chamber? Is there some point at which Acme becomes cut off from political spending made by entities to which it neither directly gave money nor directed money, over which it has no control, and which is made eighteen months or more after Acme's initial payment to NBC?... By the time we reach Acme Industries, is the information useful – or even truthful? Would it be truthful to say that Acme Industries is "responsible" or "endorses" messages on a state ballot initiative made by the State Jobs Alliance far down the road?[14]

This Russian Nesting Doll problem, named after the small Russian dolls of decreasing size, placed one inside the other, exemplifies the serious issues with attempts to require disclosure of general members and donors to 501(c) membership organizations. Disclosure requirements like those that would be instituted by the DISCLOSE Act will result in "junk" disclosure that serves to misinform the public, a result that is antithetical to the rationale underlying disclosure laws.

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[14] Bradley A. Smith, "Disclosure in a Post-*Citizens United* Real World," 6 St. Thomas J. L. & Pol'y 257 (2012). Draft available at: http://www.ncsl.org/documents/summit/summit2013/online-resources/2013_smith_disclosure.pdf (March 26, 2013).

Ironically, this bill comes at a time when there is growing recognition that our existing disclosure rules are overkill, and increasingly unhelpful. Excessive disclosure may actually be fueling the money chase,[15] even as it discourages some donors from giving.

Finally, the IRS Harassment Scandal and subsequent proposed rulemaking governing the permissible activities of 501(c)(4) organizations[16] illustrates the dangers of calls for increased disclosure.

This concern over so-called "dark money" and push for increased disclosure requirements comes at a time when Americans' confidence in government has been rocked by information that the IRS systematically targeted groups based on their political beliefs. A number of Senators specifically urged the IRS to investigate conservative nonprofit groups.[17] Such pressure on the Agency appears to have been a major factor in creating the current IRS scandal, which will have longstanding repercussions for the Agency's reputation and the voluntary compliance of citizens with the tax system.

These demands of the IRS by members of Congress are reminiscent of the provisions contained in this DISCLOSE Act, by mandating the disclosure of donations not related to the election or defeat of political candidates. The DISCLOSE Act is sometimes said to be necessary to restore public trust in government. In fact, the partisanship, and apparent quest for partisan advantage behind the bill, make it as likely that the bill will decrease confidence in the fairness and integrity of Congress. This bill is about politics and silence as much as "disclosure." As the lead Senate sponsor said when the first iteration of the bill was introduced in 2010, "the deterrent effect [on citizens' speaking out] should not be underestimated."[18] Not surprisingly, it appears to many that the ultimate aim of this bill is to force trade associations and nonprofits to publicly list all their members along with their dues and contributions, so that such lists can be used by

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[15] Lindsay Mark Lewis, "The Easiest Fix for Dark Money: Disclose Less Often," *The Atlantic*. Retrieved on July 18, 2014. Available at: http://www.theatlantic.com/politics/archive/2014/07/easiest-Fix-for-Dark-Money-Disclose-Less-Often/374500/ (July 16, 2014).

[16] "Proposed IRS Rules on 501(c)(4) Social Welfare Groups," Center for Competitive Politics. Retrieved on July 18, 2014. Available at: http://www.campaignfreedom.org/irs/ (2014).

[17] On October 11, 2010, Senator Durbin wrote the IRS, asking the Agency to "quickly examine the tax status of Crossroads GPS and other (c)(4) organizations that are directing millions of dollars into political advertising." (U.S. Senator Richard J. Durbin, "DURBIN URGES IRS TO INVESTIGATE SPENDING BY CROSSROADS GPS," Office of Senator Richard J. Durbin. Retrieved on July 18, 2014. Available at: http://www.durbin.senate.gov/public/index.cfm/pressreleases?ID=833d8f1e-bbdb-4a5b-93ec-706f0cb9cb99 (October 12, 2010).) Several months later, on February 16, 2012, Senators Schumer and Udall (NM), along with Senators Bennet, Franken, Merkley, Shaheen, and Whitehouse wrote the IRS, asking the Agency to investigate tax-exempt organizations' political activities. In an accompanying press release by Senator Bennet, he opined that "operations such as Mr. [Karl] Rove's [Crossroads GPS] should not be allowed to masquerade as charities." (U.S. Senator Michael Bennet, "Senators Call for IRS Investigations into Potential Abuse of Tax-Exempt Status by Groups Engaged in Campaign Activity," Office of Senator Michael F. Bennet. Retrieved on July 18, 2014. Available at: http://www.bennet.senate.gov/newsroom/press/release/senators-call-for-irs-investigations-into-potential-abuse-of-tax-exempt-status-by-groups-engaged-in-campaign-activity (February 16, 2012).) Nearly two years later, on February 13, 2014, echoing the prior calls of Democratic Senators before the IRS scandal revelations in May 2013, Senator Pryor publicly prodded the IRS to regulate 501(c)(4) organizations more aggressively: "That whole 501(c)(3), 501(c)(4) [issue], those are IRS numbers. It is inherently an internal revenue matter. There are two things you don't want in political money, in the fundraising world and expenditure world. You don't want secret money, and you don't want unlimited money, and that's what we have now." (Alexander Bolton, "Vulnerable Dems want IRS to step up," *The Hill*. Retrieved on July 18, 2014. Available at: http://thehill.com/homenews/senate/198298-vulnerable-dems-want-irs-to-step-up (February 13, 2014)).

[18] Jess Bravin and Brody Mullins, "New Rules Proposed On Campaign Donors," *The Wall Street Journal*. Retrieved on July 18, 2014. Available at: http://online.wsj.com/article/SB10001424052748703382904575059941933737002.html (February 12, 2010).

competing groups to poach members and, more ominously, to gin up boycotts and threats to the individuals and corporate members of the groups – indeed, this has already occurred. Further in the background lies the thinly veiled threat of official government retaliation.

Constitutional Issues with Disclosure

The purpose of disclosure is to allow citizens to monitor government, not to allow government to monitor citizens. Of course, this distinction can dissolve in practice. For example, if we demand public disclosure of who gave money to a public official, in order to monitor that official, we will necessarily give the government the tools to monitor us. But as a first principle for thinking about what type of disclosure is proper, this distinction provides a good starting point for analyzing the costs and benefits of compulsory disclosure.

Indeed, the Supreme Court has recognized the careful balance between allowing citizens the tools to monitor the government and balancing that consideration with the realization this publicly available personal information can be used by individuals and organizations to threaten and intimidate those that they disagree with.

This evidence is seen particularly in the Court's decision in *NAACP v. Alabama*, in which the Court recognized that the government may not compel disclosure of a private organization's general membership or donor list.[19] In recognizing the sanctity of anonymous free speech and association, the Court asserted that "it is hardly a novel perception that compelled disclosure of affiliation with groups engaged in advocacy may constitute as effective a restraint on freedom of association as [other] forms of governmental action."[20]

Much as the Supreme Court sought to protect those citizens who financially supported the cause of civil rights from retribution, donors and members of groups supporting unpopular candidates and causes still need protection today. Events in the state of California over the past few years lend credence to this phenomenon. Many supporters of California's Proposition 8 faced harassment from opposing activists, simply because these donors' information was made publicly available through government-mandated disclosure. Indeed, in Justice Thomas' opinion in *Citizens United*, he dissented in part, noting harassment issues stemming from the disclosure of political information. In his dissent, Justice Thomas made specific reference to the experience of Proposition 8 supporters: "Some opponents of Proposition 8 compiled this [disclosure] information and created Web sites with maps showing the locations of homes or businesses of Proposition 8 supporters. Many supporters (or their customers) suffered property damage, or threats of physical violence or death, as a result."[21] Similarly, it is hardly impossible to imagine a scenario in 2014 in which donors to controversial candidates and causes that make independent expenditures – for or against another same-sex marriage initiative; for or against abortion rights; or even persons associated with others who have been publicly vilified, such as the Koch family, Sheldon Adelson, or George Soros, might be subjected to similar threats.

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[19] 357 U.S. 449 (1958).
[20] *Id.* at 462.
[21] *Citizens United*, 130 S. Ct. 876, 980-981 (Thomas, J., concurring in part and dissenting in part).

Indeed, very recently, Mozilla CEO Brendan Eich was ousted from his position due to a pressure campaign orchestrated by those who support same-sex marriage over a $1,000 donation by Eich to the campaign for California Proposition 8 in 2008. As Eich's longtime business partner and defender of the need for his resignation, Mozilla Executive Chairwoman Mitchell Baker, noted when discovering that he gave money to the Proposition 8 campaign: "I never saw any kind of behavior or attitude from him that was not in line with Mozilla's values of inclusiveness."[22] In other words, Eich was forced out not for his actions, but for his opinions. As one legal news site pointed out, "Brendan Eich's situation shows how donor disclosure laws can lead to reprisals that may change the legal analysis. Eich didn't purposefully publicize his views on Prop 8. California law required the disclosure of his identity as a contributor – donating the princely sum of $1,000."[23] Ultimately, Eich was forced to resign.[24]

Worse still, as the Eich example shows, little can be done once individual contributor information – a donor's full name, street address, occupation, and employer – is made public under government compulsion. It can immediately be used by non-governmental entities and individuals to harass, threaten, or financially harm a speaker or contributor to an unpopular cause. This problem is best addressed by limiting the opportunities for harassment by crafting reporting thresholds that capture just those donors who are truly contributing large sums to *political candidates,* and those who give to organizations whose *major purpose* is political advocacy – and not to organizations engaging in issue advocacy about a particular issue relevant to the voters, especially when that advocacy is but a part of the organization's overall mission.

The 1995 decision in the case *McIntyre v. Ohio Elections Commission,* in which the U.S. Supreme Court upheld the claim of a right to anonymously publish and distribute pamphlets opposing a school tax that was on the ballot, further illustrates how disclosure can impact First Amendment freedoms.[25] Justice John Paul Stevens, writing for the majority in *McIntyre*, noted that "Anonymity is a shield from the tyranny of the majority.... It thus exemplifies the purpose behind the Bill of Rights, and of the First Amendment in particular."[26]

Justice Stevens went on to explain, for the Court majority, several of the many benefits to free speech from anonymity:

> "Anonymous pamphlets, leaflets, brochures and even books have played an important role in the progress of mankind." *Talley v. California*, 362 U.S., at 64. Great works of literature have frequently been produced by authors writing under assumed names. [footnote omitted] Despite readers' curiosity and the public's interest in identifying the creator of a work of art, an author generally is free to decide whether or not to disclose his or her true identity. The decision in favor of anonymity may be motivated by

[22] Conor Friedersdorf, "Mozilla's Gay-Marriage Litmus Test Violates Liberal Values," *The Atlantic*. Retrieved on July 18, 2014. Available at: http://www.theatlantic.com/politics/archive/2014/04/mozillas-gay-marriage-litmus-test-violates-liberal-values/360156/ (April 4, 2014).
[23] Tamara Tabo, "Cupid's Arrow Strikes Eich: OkCupid, Mozilla's CEO, And Campaign Finance Laws," *Above The Law*. Retrieved on July 18, 2014. Available at: http://abovethelaw.com/2014/04/cupids-arrow-strikes-eich-okcupid-mozillas-ceo-and-campaign-finance-laws/ (April 3, 2014).
[24] *Id.*
[25] 514 U.S. 334 (1995).
[26] *Id.* at 357.

> fear of economic or official retaliation, by concern about social ostracism, or merely by a desire to preserve as much of one's privacy as possible. Whatever the motivation may be, at least in the field of literary endeavor, the interest in having anonymous works enter the marketplace of ideas unquestionably outweighs any public interest in requiring disclosure as a condition of entry. [footnote omitted] Accordingly, an author's decision to remain anonymous, like other decisions concerning omissions or additions to the content of a publication, is an aspect of the freedom of speech protected by the First Amendment.[27]
>
> The freedom to publish anonymously extends beyond the literary realm. In *Talley*, the Court held that the First Amendment protects the distribution of unsigned handbills urging readers to boycott certain Los Angeles merchants who were allegedly engaging in discriminatory employment practices. 362 U.S. 60. Writing for the Court, Justice Black noted that "[p]ersecuted groups and sects from time to time throughout history have been able to criticize oppressive practices and laws either anonymously or not at all." *Id.*, at 64. Justice Black recalled England's abusive press licensing laws and seditious libel prosecutions, and he reminded us that even the arguments favoring the ratification of the Constitution advanced in the Federalist Papers were published under fictitious names. *Id.*, at 64-65. On occasion, quite apart from any threat of persecution, an advocate may believe her ideas will be more persuasive if her readers are unaware of her identity. Anonymity thereby provides a way for a writer who may be personally unpopular to ensure that readers will not prejudge her message simply because they do not like its proponent. Thus, even in the field of political rhetoric, where "the identity of the speaker is an important component of many attempts to persuade," *City of Ladue v. Gilleo*, 512 U.S. 43, 56 (1994) (footnote omitted), the most effective advocates have sometimes opted for anonymity. The specific holding in Talley related to advocacy of an economic boycott, but the Court's reasoning embraced a respected tradition of anonymity in the advocacy of political causes. [footnote omitted] This tradition is perhaps best exemplified by the secret ballot, the hard-won right to vote one's conscience without fear of retaliation.[28]

Ultimately, the Court has made clear that this concern over harassment exists, whether the threats or intimidation come from the government or from private citizens,[29] who receive their information because of the forced disclosure. In short, mandatory disclosure of political activity should require a strong justification and must be carefully tailored to address issues of public corruption and to provide information of particular importance to voters.

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[27] *Id.* at 341-342.
[28] *Id.* at 342-343.
[29] *Brown v. Socialist Workers' '74 Campaign Comm.*, 458 U.S. 87 (1982).

Almost two decades after *NAACP v. Alabama*, in the landmark Supreme Court case, *Buckley v. Valeo*, the Court ruled that disclosure must be related to express advocacy or controlled by a candidate, party, or political committee, narrowly defined. The Court held that donor or membership disclosure can be compelled "only… [for] organizations that are under the control of a candidate or the major purpose of which is the nomination or election of a candidate," or "funds used for communications that expressly advocate the election or defeat of a clearly identified candidate."[30] Footnote 52 of the ruling defined "expressly advocate" to mean "communications containing express words of advocacy of election or defeat, such as 'vote for,' 'elect,' 'support,' 'cast your ballot for,' 'Smith for Congress,' 'vote against,' 'defeat,' 'reject.'"[31]

In *Buckley*, the Court struck down disclosure for issue speech because the standard that triggered disclosure requirements was unclear or overbroad. Vague laws are unconstitutional if they provide insufficient notice of what is regulated and what is not. If the law does not make clear what speech is allowed and what speech is not, speakers will curtail their speech more than they otherwise would to avoid violating the law. The security of free speech breaks down when citizens are left to guess how regulations apply. The *Buckley* Court put this danger into context:

> "No speaker, in such circumstances, safely could assume that anything he might say upon the general subject would not be understood by some as an invitation. In short, the supposedly clear-cut distinction between discussion, laudation, general advocacy, and solicitation puts the speaker in these circumstances wholly at the mercy of the varied understanding of his hearers and consequently of whatever inference may be drawn as to his intent and meaning. … Such a distinction offers no security for free discussion. In these conditions it blankets with uncertainty whatever may be said. It compels the speaker to hedge and trim."[32]

In striking much of the disclosure requirements in the Federal Election Campaign Act, the *Buckley* Court ruled that "compelled disclosure, in itself, can seriously infringe on privacy of association and belief guaranteed by the First Amendment … significant encroachments on First Amendment rights of the sort that compelled disclosure imposes cannot be justified by a mere showing of some legitimate governmental interest."[33] As a result, disclosure laws are subject to "exacting scrutiny."

Advocates for greater regulation of political speech often cite the Supreme Court's *Citizens United* decision as an endorsement of expansive disclosure regimes, but that contention is not supported by the actual opinion or holding. The *Citizens United* Court upheld the disclosure of an electioneering communication report, which discloses only the *entity making the expenditure*, the purpose of the expenditure, and the names of contributors giving over $1,000 *for the purpose of furthering the expenditure*.[34] "For the purpose of furthering the expenditure" has been interpreted by the Federal Election Commission to mean contributions earmarked for particular communications, an interpretation recently supported by the U.S. Court of Appeals for

[30] *Buckley v. Valeo*, 424 U.S. 1, 79-80 (1976).
[31] *Id.* at 44 n. 52.
[32] *Id.* at 43 (quoting *Thomas v. Collins*, 323 U.S. 516, 535 (1945)).
[33] *Id.* at 64.
[34] 2 U.S.C. § 434 (2013); *Citizens United v. Federal Election Commission*, 130 S. Ct. 876, 913-914 (2010).

the D.C. Circuit in a case involving analogous electioneering communication reporting requirements.[35] *Citizens United* did not endorse the general disclosure of members and donors to groups that did not qualify as political parties, and that did not have the objectively determined primary purpose of supporting or defeating candidates, unless the donations were affirmatively earmarked for that purpose.

In contrast, broader disclosure regimes have been treated with skepticism by the Court. Importantly, the *Citizens United* Court specifically held that the limited disclosure of an electioneering communication report is a "less restrictive alternative to more comprehensive regulations of speech," such as broader disclosure requirements.[36] The *Citizens United* Court specifically invoked *Massachusetts Citizens for Life v. FEC* (*MCFL*), where both the plurality and the concurrence were troubled by the burdens placed upon nonprofit corporations by certain disclosure requirements.[37] The plurality was concerned with the detailed record keeping, reporting schedules, and limitations on solicitation of funds to only "members" rather than the general public.[38] Likewise, in her concurrent opinion, Justice O'Connor was concerned with the "organizational restraints" imposed by disclosure requirements, including "a more formalized organizational form" and a significant loss of funding availability.[39]

The Court has recognized that the burdens of disclosure may be used to discourage speech in an unconstitutional manner, by forcing organizations to change their organizational structure, spend significant amounts on compliance with regulations, or opt out of making political contributions or independent expenditures altogether due to the burdens imposed by such laws. *MCFL* noted that these sorts of "incentives" serve to "necessarily produce a result which the State [can]...not command directly. It only result[s] in a deterrence of speech which the Constitution ma[de] free."[40]

Four Key Flaws in the DISCLOSE Act of 2014

1) *The bill would force nonprofits to radically alter their fundraising and public advocacy efforts.*

Current law defines a so-called "electioneering communication" as a broadcast ad that mentions the name of a candidate within 60 days prior to a general election or 30 days before a primary. The bill would significantly expand that definition. The new time period would be from January 1 to the Election Day of each election year for congressional candidates.

Therefore, if this bill became law, the following ad by the imaginary group American Action for the Environment (AAFE) would be considered an electioneering communication subject to burdensome restrictions, if aired on January 2 of an even numbered year in the district of a hypothetical congressman, John Doe, who is running for re-election and facing a September primary:

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[35] *Ctr. for Individual Freedom v. Van Hollen*, 694 F.3d 108 (D.C. Cir. 2012).
[36] *Citizens United*, 130 S. Ct. at 915 (contrasting independent expenditure reports with the burdens discussed in *MCFL*).
[37] *Massachusetts Citizens for Life* (MCFL) *v. Federal Election Commission*, 479 U.S. 238 (1986).
[38] *MCFL*, 479 U.S. at 253 (plurality opinion).
[39] *Id.* at 266 (O'Connor, J. concurring).
[40] *MCFL*, 479 U.S. at 256 (plurality opinion).

> [Pelosi]: Hi. I'm Nancy Pelosi, lifelong Democrat, and former Speaker of the House.
> [Gingrich]: And, I'm Newt Gingrich, lifelong Republican, and I used to be Speaker too.
> [Pelosi]: We don't always see eye-to-eye, do we, Newt?
> [Gingrich]: No, but we do agree that our country must take action to address climate change.
> [Pelosi]: We need cleaner forms of energy, and we need them fast.
> [Gingrich]: If enough of us demand action from our leaders, we can spark the innovation we need.
> On screen: Call Congressman John Doe and urge him to vote for H.R. 10000. 202-224-3121
> Paid for by American Action for the Environment.

There is scant justification for forcing any additional disclosure on such an ad by this hypothetical group. Yet, S. 2516 would do just that.

AAFE would face several bad choices in funding such an ad. It might have to disclose its donors to the public, as required by this bill, some of whom might be individuals who work for utilities or coal industries. Those donors might have supported the group's clean water efforts in response to an appeal for funds on that specific basis, but had not thought to earmark their checks.

Under this bill, AAFE would report these donors to the Federal Election Commission (FEC), where they would be publicly listed, and may find it difficult to keep their jobs. Worse yet, a donor may not even agree with the ad, but could be listed as a donor because he or she gave to the group for entirely non-political reasons.

Under the Act, AAFE could set up a special bank account and deposit into it only funds from donors who want to support ads that might run in even-numbered years. But that would massively complicate their fundraising efforts, which are already difficult in this economy.

On this issue, the Supreme Court has previously ruled in *Citizens United v. FEC* that the existence of an alternative way of engaging in speech – in that case PACs – did not save a prohibition on the use of general-treasury funds to pay for political advertisements.

A near certain result of this new mandate would be that AAFE and other organizations would witness a dramatic increase in their fundraising costs, their donations would decline, or some combination of the two would occur. Alternatively, many groups would avoid lobbying ads during even numbered years, when many important bills become law.

And what of their donors? The Act's segregated funds provisions require donors to choose between their rights under *NAACP v. Alabama*, the seminal case that allows advocacy groups to shield their membership lists, and their rights under *Citizens United*. Under this law,

they cannot exercise both by keeping membership payments and donations private while still contributing to a group's general fund.

Similarly, donors – many of whom are unfamiliar with campaign finance laws – would have to affirmatively request that their funds not be used on campaign activity in order to remain anonymous. Current law mandating disclosure only when funds are given to further independent expenditures or electioneering communications is sufficient to provide transparency. As written, current law also avoids the misleading possibility that contributors to a group, whether the NRA or the Sierra Club, who do not specifically earmark their contributions, may be associated with advertisements they had no part in developing, and with which they may disagree.

2) *The new definition of the "functional equivalent of express advocacy" is vague.*

Despite claiming to be a "pure disclosure" proposal, S. 2516 adds a new and indecipherable definition to a core element of campaign finance law. The bill would expand the standard for express advocacy where the law defines independent expenditures if an ad:

> "Expressly advocates the election or defeat of a clearly identified candidate, or is the functional equivalent of express advocacy because, when taken as a whole, it can be interpreted by a reasonable person only as advocating the election or defeat of a candidate, taking into account whether the communication involved mentions a candidacy, a political party, or a challenger to a candidate, or takes a position on a candidate's character, qualifications, or fitness for office."

Similar definitions for regulating speech have repeatedly been struck down by federal courts as unconstitutionally vague. Doubtless, one could show 50 ad scripts to a randomly-selected group of U.S. Senators and Representatives, and its members would disagree as to which are issue advocacy and which are "the functional equivalent of express advocacy." If individuals who have gone through federal elections cannot agree, how can grassroots organizers, many of whom may be new to politics, be sure of how regulators will evaluate the content of their ad? How is a group to know, in advance, that it has not run afoul of this vague provision? Ultimately, this definition is nothing more than an invitation to burdensome and costly investigations and litigation by federal officials.

The provision is also harmful because the Federal Election Campaign Act uses "expenditures" to define which organizations become forced to register with the FEC as Political Action Committees. Were such a broad definition upheld by a court and actually applied, it would instantly convert large numbers of nonprofit organizations into PACs. This would include numerous organizations that never specifically advocated for the election or defeat of candidates for office, and would run directly counter to *Buckley.*

3) *The Act is a solution in search of a problem. Current law already requires disclosure of all spending on independent expenditures and electioneering communications and all contributions to further such communications.*

2 U.S.C. 434(c) requires that groups report independent expenditures greater than $250.

Current law already provides for disclosure of independent expenditures. This includes the name of the group, individual, or other entity that is doing the spending, the date on which it occurred, the amount spent, the candidate who benefits from the independent expenditure, the purpose of the expenditure, and a statement certifying the expenditure was made without coordination between the party authorizing the communication and the candidate to whom it promotes. This existing regulation requires that the expenditure reporting follow the money – both who gives and who receives. For example, in the 2010 Massachusetts Senate race, TeaPartyExpress.org spent hundreds of thousands of dollars on independent expenditures. However, its political action committee, called Our Country Deserves Better PAC, was the source of the funds. A simple search of the FEC website shows that both of these names are listed on the filing papers, along with the names of any person who donated money that furthered the production of the communication.

Reporting also follows where the money in independent spending goes. A separate tab on the FEC report shows the disbursements by the group – to whom each payment was made and for what purpose.

2 U.S.C. 434(f) requires groups to report "electioneering communications" when they exceed $10,000.

Current law also requires reporting of "electioneering communications." This mandates the disclosure of the identity of the person making the disbursement, any person sharing or exercising direction or control over the activities of such person, the custodian of the books and accounts of the person making the disbursement, the principal place of business of the person making the disbursement (if not an individual), each amount exceeding $200 that is disbursed, the person to whom the expenditure was made, and the election to which the communication pertains. Contributions made by individuals that exceed $1,000 are disclosed and accompanied by the individual's name and address.

As with independent expenditures, the reporting of electioneering communications also tracks the money. Looking again at the Massachusetts Senate race in January 2010, a quick search of the FEC database shows that the ambiguous-sounding group "Citizens for Strength and Security" spent $265,876.96 for a communication on January 13, 2010. While the name of the group may not reveal much, the list of donors who funded the electioneering communication do. The eight donations listed came from two labor unions: the Service Employees International Union and Communications Workers of America. Concerns that corporations like Exxon Mobil could set up "shadow groups" to funnel money for political advertisements are unfounded. That spending would be tracked just as the disbursements by Citizens for Strength and Security were.

Existing law requires other disclosures as well.

In addition to the above reporting requirements, existing law requires that any organization organized under Section 527 of the tax code must also disclose donors who contribute more than $200 in the calendar year with the IRS. In turn, that information is publicly

listed. Moreover, any group whose "major purpose" is the funding of express advocacy expenditures – whether organized under Section 527 or some other provision – would also become a PAC, subject to additional, ongoing reporting to the FEC, including the names of all donors of more than $200 to the group. Finally, all independent expenditures and electioneering communications already must include "disclaimers" clearly stating who is paying for the ad.

4) *The rule regarding covered transfers is likely unenforceable and will be a nightmare for many nonprofits.*

The bill requires any entity transferring $10,000 or more in funds to a "covered organization" to disclose its donors if a donor knew or "had reason to know" that the "covered organization" – a definition that includes corporations, labor unions, trade associations, 527s, and nonprofit 501(c)(4) organizations – would make expenditures or electioneering communications of $50,000 or more in the coming two years, or had made such expenditures in the prior two years.

The look-back requirement is bad enough; a donor may not know of those expenditures by another, unrelated organization, and has no safe-harbor even if it inquires of the receiving organization and receives an innocent but incorrect answer. The look-forward requirement, however, is worse. If the donating organization does not "designate[], request[], or suggest[]" that the donation be used for "campaign-related disbursements," and does not make the donation in request to a "solicitation or other request" for "campaign-related disbursements," and does not "engage[] in discussions ... regarding ... campaign-related disbursements" – all separate liability triggers – how is it supposed to know that the organization will spend $50,000 on "campaign-related disbursements"?

The provision seems designed to trip up the unwary and provide a means for post-hoc investigations of unsuspecting organizations.

* * *

Considering that just over 4 percent of election spending in 2012 came from groups who do not itemize their individual donors and members, members of this Committee must think carefully about whether it is worth it to expand our already intrusive disclosure requirements even further. Doing so will impose significant costs with dubious public benefit and disproportionately harm those who can afford it least. The proposed bill suffers from many practical flaws – from provisions that are vague to ones that are likely unenforceable. Much of the "disclosure" that the ironically-named DISCLOSE Act would produce is junk that would not accurately reflect the sources of support for candidates and causes, and would not improve transparency or public knowledge.

Notably, at the same time as we discuss this bill to discourage political speech, some members of this body are also pushing for a vaguely worded constitutional amendment that appears to grant unlimited and frightening powers to Congress to regulate speech if lawmakers

can assert any connection to an election.[41] S.J. Res. 19 would revoke nearly four decades of campaign finance jurisprudence from the Supreme Court and greatly reduce the quantity (and likely quality) of debate in this country. If adopted, this constitutional amendment would help entrench those in Congress by insulating incumbent politicians from criticism and granting members of Congress unprecedented power to regulate the speech of those they serve.

Whether with the DISCLOSE Act, or a constitutional amendment, Congress does more damage to the public's trust in government by meddling with political speech and association rights in the waning months before the 2014 midterm elections than it would by permitting an insignificant portion of otherwise disclosed election spending to remain unitemized by donor. Tinkering with the First Amendment and the speech rights of American citizens to score political points in an election year is an idea fraught with peril.

Thank you.

[41] Zac Morgan, "Amending the First Amendment: The Udall Proposal is Poorly Drafted, Intellectually Unserious, and Extremely Dangerous to Free Speech," Center for Competitive Politics. Retrieved on July 18, 2014. Available at: http://www.campaignfreedom.org/wp-content/uploads/2014/05/2014-05-29_Text-Analysis_US_Senate_SJ-Res-19_Amending-The-First-Amendment-The-Udall-Proposal-Is-Poorly-Drafted-Intellectually-Unserious-And-Extremely-Dangerous-To-Free-Speech.pdf (May 29, 2014).

Bradley A. Smith
Chairman, Center for Competitive Politics, Alexandria, Virginia
Visiting Judge John T. Copenhaver, Jr. Chair of Law
West Virginia University College of Law
101 Law Center Drive | P.O. Box 6130 | Morgantown, WV 26505
(304) 293-6789
bsmith@campaignfreedom.org

Bradley A. Smith holds the Judge John T. Copenhaver, Jr. Visiting Endowed Chair of Law at the West Virginia University College of Law and is the Josiah H. Blackmore II/Shirley M. Nault Professor of Law at Capital University Law School in Columbus, Ohio. In addition to his professorship, he is an attorney for Steptoe & Johnson PLLC, where he practices in the areas of Political Law and Government Relations from the firm's Columbus office, and the Founder and Chairman of the Center for Competitive Politics in Alexandria, Virginia.

Professor Smith served on the Federal Election Commission (FEC) from 2000 through 2005, including as the Commission's Vice-Chairman in 2003 and Chairman during the presidential election year of 2004. During his tenure, *The Wall Street Journal* dubbed Smith "the only honest man in this bordello."

Professor Smith's writings have appeared in such academic journals as the *Yale Law Journal*, *Georgetown Law Journal*, and *Pennsylvania Law Review*, and in popular publications such as the *Wall Street Journal*, *New York Times*, *Washington Post*, and *National Review*. His 2001 book, "Unfree Speech: The Folly of Campaign Finance Reform," (Princeton University Press) was praised by columnist George Will as "the year's most important book on governance." He is also the co-author of a leading casebook in the field of voting rights and election law.

In 2010, Professor Smith was awarded the Bradley Prize by the Bradley Foundation of Milwaukee, Wisconsin, as an "innovative thinker" whose work has "strengthened American democratic capitalism and the institutions, principles, and values that sustain and nurture it."

His work was cited in the majority opinion in *Citizens United v. FEC*, and he was co-counsel in *SpeechNow.org*, the case that gave constitutional protection to "Super PACs."

He is Chairman of the Board of the 1851 Center for Constitutional Law, a member of the Board of Trustees of the Buckeye Institute for Public Policy Studies, and a member of the Editorial Board of the Election Law Journal, the Board of Advisors of the Harvard Journal of Law & Public Policy, the Executive Committee of the Election Law and Free Speech Practice Group of the Federalist Society, and the Board of Advisors of the Institute for Politics at the University of Minnesota.

Professor Smith is a *cum laude* graduate of both Kalamazoo College and Harvard Law School.

WASHINGTON
LEGISLATIVE OFFICE

July 22, 2014

The Honorable Charles E. Schumer
Senate Committee on Rules and Administration
305 Russell Senate Office Building
Washington, DC 20510

The Honorable Pat Roberts
Senate Committee on Rules and Administration
305 Russell Senate Office Building
Washington, DC 20510

AMERICAN CIVIL
LIBERTIES UNION
WASHINGTON
LEGISLATIVE OFFICE
915 15TH STREET, NW, 6TH FL
WASHINGTON, DC 20005
T 202.544.1681
F 202.546.0738
WWW.ACLU.ORG

LAURA W. MURPHY
DIRECTOR

NATIONAL OFFICE
125 BROAD STREET, 18TH FL.
NEW YORK, NY 10004-2400
T 212.549.2500

OFFICERS AND DIRECTORS
SUSAN N. HERMAN
PRESIDENT

ANTHONY D. ROMERO
EXECUTIVE DIRECTOR

ROBERT REMAR
TREASURER

Re: ACLU Opposes S. 2516 – The Democracy is Strengthened by Casting Light on Spending in Elections ("DISCLOSE") Act

Dear Senator:

In advance of tomorrow's hearing on S. 2516, the Democracy Is Strengthened by Casting Light on Spending in Elections ("DISCLOSE") Act, we write in opposition to the measure.[1]

It is clear that the sponsors of the DISCLOSE Act seek the laudable goal of fair and participatory federal elections, one that we emphatically share. To that end, we support numerous measures that promote an informed and engaged electorate, including comprehensive public financing like the program proposed in the Fair Elections Now Act,[2] enforcement of laws against straw donations and effective coordination restrictions to prevent campaign or candidate control of outside spending.

We also believe the electorate has a legitimate interest in knowing the source of significant support for a candidate – one of the reasons we are concerned

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[1] S. 2516, 113th Cong. (2014). S. 2516 is identical, save updating to reflect the reintroduction, to S. 3369, 112th Cong. (2012), the previously introduced version of the DISCLOSE Act. The ACLU opposed S. 3369 and other past iterations of the bill. *See* Letter from Laura W. Murphy et al., Director, Am. Civil Liberties Union Washington Legislative Office, to Senate (July 16, 2012), *available at* http://bit.ly/1p2LhO4; Letter from Laura W. Murphy & Michael Macleod-Ball, Am. Civil Liberties Union Washington Legislative Office to Senate on S. 3628, 111th Cong. (July 23, 2010), *available at* http://bit.ly/1nbAeoF; Letter from Laura W. Murphy & Michael Macleod-Ball, Am. Civil Liberties Union Washington Legislative Office to the House of Representatives on H.R. 5175, 111th Cong. (June 17, 2010), *available at* http://bit.ly/1k8xYjn.

[2] H.R. 269/S. 2023, 113th Cong. (2014).

about the abuse of coordination rules. For groups, however, engaged in advocacy around political issues, even in proximity to elections or primaries, we fear that overbroad disclosure requirements will chill the exercise of rights of expression and association. We agree that transparency in our elections serves to protect the integrity of those elections. Nevertheless, caution must be the watchword when any legislation has the potential to restrict or chill political speech, entitled to the highest level of constitutional protection under the First Amendment.[3]

Because campaign finance restrictions like the DISCLOSE Act have the potential to chill political speech, they must be drafted to minimize any burden on free expression. We fear that the DISCLOSE Act as currently written may strike the wrong balance, and could act to suppress a sizeable amount of issue advocacy by groups—including wholly non-partisan groups like the ACLU—that serves to inform the electorate and improve electoral outcomes without expressing support or opposition for particular candidates.

The DISCLOSE Act extends beyond regulating "Super PACs" or 501(c)(4) organizations engaged in direct partisan political advocacy using secret donations.[4] The DISCLOSE Act, as written, would abrogate the anonymous speech rights of donors to non-partisan groups advocating on controversial issues of the day and not advocating for or against candidates for office.

We offer comments on two areas of concern.

1. **The DISCLOSE Act Would Extend the Period During Which Special Reporting Rules for Pure, Non-Partisan Issue Advocacy Apply**

The DISCLOSE Act expands the period of time during which issue advocates—those taking no position in support of or in opposition to a political candidate—must disclose their donors if they wish to publish issue ads.[5]

The act would expand the "electioneering communications" period—currently the 30 days before a primary and the 60 days before a general election—quite significantly. For communications that refer to a candidate for the House or Senate, the period would begin on January 1 of the election year and end on the election, and would encompass the entire period

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[3] *R.A.V. v. City of St. Paul*, 505 U.S. 377, 422 (1992) ("Our First Amendment decisions have created a rough hierarchy in the constitutional protection of speech. Core political speech occupies the highest, most protected position . . . .") (Stephens, J., concurring).

[4] For more on the ongoing controversy over § 501(c)(4) tax exempt social welfare groups, please see the ACLU's comments to the Internal Revenue Service urging it to withdraw its proposed rules governing the definition of political intervention under the relevant regulations, too much of which will jeopardize a group's (c)(4) status. Letter from Laura W. Murphy & Gabe Rottman, Am. Civil Liberties Union Washington Legislative Office, to the Hon. John A. Koskinen on Guidance for Tax-Exempt Social Welfare Organizations on Candidate-Related Political Activities, 78 Fed. Reg. 71,535 (proposed on Nov. 29, 2013) (Feb. 4, 2014), *available at* http://bit.ly/MoPWh4.

[5] S. 2516 § (2)(a)(2).

following the announcement of a special election up to the special election. In concrete terms, the period for communications referring to a member of the House or Senate would extend for a full 10 months before a typical November election, whereas the relevant period under current law is limited to two months.

As a result, the special reporting rules would apply to communications about all members of the House of Representatives and one-third of senators for effectively the entire second session of each Congress. During this period of time—nearly half of every Congress for House members—any advocacy organization wishing to run an ad that even mentions a candidate's name would have to publicly disclose personally identifying information about some of its donors.

Such organizations would face two unsatisfactory choices: protect the privacy of their donors by refraining from issue advocacy or give up the privacy of their donors and place at risk the opportunity for additional donations by those supporters. Either way, this bill would have a chilling effect on political speech about pending legislation for more than 40% of each Congress.

For communications mentioning a presidential or vice presidential candidate, the period would extend from 120 days before the primary or caucus in an individual state.

To take the 2012 election as an illustration, under current law the electioneering communications disclosure period in Iowa—the first state in the Republican presidential nominating process—started on December 4, 2011, 30 days prior to the caucus on January 3, 2012. Were the DISCLOSE Act to have been law during the 2012 election season, that disclosure period for presidential candidates would have extended all the way back to September 5, 2011, *and* would have continue unabated until the election.

Accordingly, pure non-partisan issue advertising that happens to mention a presidential or vice-presidential candidate—including ads commenting, for instance, on a candidate's record on Obamacare, gun control, or the wars in the Iraq and Afghanistan, and even if they assiduously avoid expressing support for or opposition to the candidate—would be subject to the heightened disclosure rules in most states for significantly more than a year before a general presidential election.

For similar ads mentioning other candidates, the special rules period would begin on January 1 of the election year.

These concerns are further heightened when one of the candidates is the incumbent president running for reelection. The result of the extended period is a chilling effect on public criticism of the *sitting* president or vice president, including truly non-partisan criticism on specific policy issues, during more than a fourth of a president's first term. But whether it's the president or a member of Congress, citizens of this country must retain the right to band together and urge an officeholder to take a position on an issue of public importance. This bill, by its very terms, makes it more likely that some citizens will choose to remain silent.

We reiterate our concurrence with the laudable goals of this legislation. At the very least, however, new disclosure rules must distinguish clearly between express advocacy for or against

a candidate for office and commentary on political issues. This legislation fails to draw that bright line, and will therefore chill advocacy at all points on the political spectrum.

2. The DISCLOSE Act Fails To Protect the Anonymous Speech Rights of Donors Who Have No Intention of Making a Gift for Political Communication Purposes.

The DISCLOSE Act would require disclosure in two circumstances. A "covered organization"[6] that spends more than $10,000 in a cycle on "campaign-related disbursements,"[7] and does not maintain a separate segregated account for such disbursements, would have to disclose the identity, specific payments and aggregate amount donated of any person giving more than $10,000 to the entity during the cycle.[8] Any entity that maintains a separate segregated account for such disbursements would only have to do the same for those individuals donating specifically to that account in an amount greater than $10,000.[9]

Even with a $10,000 trigger, the present exceptions in the DISCLOSE Act may still leave the door open to disclosure when a donor had no intention that a gift be used for political purposes.[10] It is both impractical and unfair to hold contributors responsible for every advertisement that an organization publishes, and even donors who give more than $10,000 may be small relative to the size of the covered organization's donor base as a whole.

Any effort to increase voter awareness of an organization's funding must respect the freedom of private association that the Supreme Court recognized in *NAACP v. Alabama.*[11] In that case, the Supreme Court sternly rebuked government-mandated membership disclosure regimes as thinly veiled attempts to intimidate activist organizations by instilling fear of retaliation among members of the activist group.

The disclosure provisions are likely to do one of two things, particularly when an organization is engaged in advocacy on controversial issues with which typical donors or members might not want to be associated publicly.

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[6] That is, virtually any politically active entity save organizations that are exempt from taxation under § 501(c)(3) of the Internal Revenue Code. S. 2516 § (2)(b)(1) (proposed new 2 U.S.C. § 441k(e)).

[7] Defined in S. 2516 § (2)(b)(1) (proposed new 2 U.S.C. § 441k(d)) to include independent expenditures and electioneering communications.

[8] S. 2516 § (2)(b)(1) (proposed new 2 U.S.C. § 441k(a)(2)(F)). We do note and appreciate the raised threshold for disclosure.

[9] S. 2516 § (2)(b)(1) (proposed new 2 U.S.C. § 441k(a)(2)(E)).

[10] S. 2516 § (2)(b)(1) (proposed new 2 U.S.C. § (a)(3)(B)). The donor would have to specifically prohibit, in writing, use of the funds for any covered payment, and the covered organization would have to agree and then segregate the funds.

[11] 357 U.S. 449, 460 (1958).

First, the organization might refrain from engaging in public communications that would subject its donors to disclosure, in which case the organization's speech will have been curtailed. Alternatively, donors sensitive to public disclosure may refrain from giving to the organization (or may cap disclosure just below the trigger threshold), in which case the organization's ability to engage in speech will have been curtailed. And in both cases, those whose names are disclosed would be subject to personal, political or commercial impacts.

3. Conclusion

The ACLU welcomes reforms that improve our democratic elections by providing for a properly informed electorate. Some elements of the DISCLOSE Act move in that direction. Unfortunately, the most promising proposal in past disclosure reform is missing in S. 3369. The provision offering candidates the television advertising rates equal to the lowest amount charged for the same amount of time in the previous 180 days is the type of solution that would increase speech, rather than stifling speech about elections and issues of public importance.[12]

Our Constitution embraces public discussion of matters that are important to our nation's future, and it respects the right of individuals to support those conversations without being exposed to unnecessary risk of harassment or embarrassment. Only reforms that promote speech will bring positive change to our elections, and overbroad disclosure requirements do the opposite.

Please contact Legislative Counsel/Policy Advisor Gabe Rottman if you should have any questions or comments at 202-675-2325 or grottman@dcaclu.org.

Sincerely,

Laura W. Murphy
Director, Washington Legislative Office

Michael W. Macleod-Ball
Chief of Staff/First Amendment Counsel

Gabriel Rottman
Legislative Counsel/Policy Advisor

[12] *See, e.g.*, DISCLOSE Act, S. 3295, 111th Cong. § 401 (2010).

CHAMBER OF COMMERCE
OF THE
UNITED STATES OF AMERICA

R. BRUCE JOSTEN
EXECUTIVE VICE PRESIDENT
GOVERNMENT AFFAIRS

1615 H STREET, N.W.
WASHINGTON, D.C. 20062-2000
202/463-5310

July 23, 2014

The Honorable Charles E. Schumer
Chairman
Committee on Rules & Administration
United States Senate
Washington, DC 20510

The Honorable Pat Roberts
Ranking Member
Committee on Rules & Administration
United States Senate
Washington, DC 20510

To Chairman Schumer and Ranking Member Roberts:

The U.S. Chamber of Commerce, the world's largest business federation representing the interests of more than three million businesses of all sizes, sectors, and regions, as well as state and local chambers and industry associations, and dedicated to promoting, protecting, and defending America's free enterprise system, strongly opposes the "Democracy Is Strengthened by Casting Light On Spending in Elections Act of 2014" or the "DISCLOSE Act of 2014," S. 2516. The Senate should reject this legislation because it would violate critically important First Amendment free speech protections.

S. 2516, like previous iterations from the 111th and 112th Congresses, is designed to effectively exempt labor unions from its reach while chilling the political speech of the business community and others engaged in the political process. In the Chamber's view, DISCLOSE 2014 is blatantly political and ultimately unconstitutional legislation that detracts from much more significant efforts to solve challenges confronting America.

Political speech by corporations is protected by the First Amendment. The Supreme Court recognized that right not only in its *Citizens United v. Federal Elections Commission* decision, but also in several earlier decisions. In addition, First Amendment rights are at their height when the speaker is addressing matters of public policy, politics, and governance. As the Court has emphasized, the First Amendment "'has its fullest and most urgent application' to speech uttered during a campaign for political office." *Eu v. San Francisco County Democratic Central Comm.*, 489 U.S. 214, 223 (1989). Furthermore, the Supreme Court repeatedly has recognized that voluntary associations are vital participants in the public debate and that government attempts to curb participation in associations in order to stifle their voice in the public debate violate the First Amendment.

The bill's manifest purpose is to impose exceptional burdens on the speech of corporations and business interests based on their identity as corporations and their presumed hostility to the political objectives of the bill's supporters. As the Supreme Court held in *Citizens United*, "the First Amendment generally prohibits the suppression of political speech based on the speaker's identity." *Citizens United v. FEC*, 558 U.S. 310, 350 (2010). The crafting of the bill and many of the statements of DISCLOSE 2014's sponsors and supporters show that the true purpose of the legislation is to squelch the constitutionally protected speech of

the business community and their trade associations – a clearly impermissible intent. For example, in the press release trumpeting the introduction of S. 2516, the sponsors of the legislation acknowledged that the legislation is aimed primarily at *corporate speech*. Similar arguments and statements have been made by other supporters of the legislation, both in and out of Congress.

While the bill purports to be even-handed in its treatment of labor unions, corporations, and business associations, the reality is far different, and the bill would place significantly more burdens on businesses. There are two significant provisions that protect both local unions and large "international" unions from the legislation's required disclosure.

First, DISCLOSE 2014 would require an organization that engages in political conduct to disclose payments to it that exceed $10,000 in a two-year election cycle, which means that local union chapters would not have to disclose the payments of individual union members to the union, even if those funds will be used for political purposes.

Second, the bill exempts from its disclosure requirements transfers from affiliates that do not exceed $50,000 for a two-year election cycle. Therefore, an international union would not have to disclose the transfers made to it by many of its smaller local chapters. The result is that unions would not be greatly impacted by the legislation, while business associations (which almost by definition do not have a ground-up fundraising funneling structure built on the mandatory dues of millions of members) would be subject to the bill's provisions. It is also likely that many business associations' corporate members might provide more than $10,000 over a two-year period to the business association. This would trigger the bill's disclosure provisions – a situation not paralleled in the union world. Similarly, most business associations do not have a vast network of local affiliates from which they can draw up to $50,000 in exempted transfers.

Furthermore, DISCLOSE 2014 is designed to unconstitutionally encourage retaliation against certain speakers who have unpopular or unfavorable political views by requiring groups to disclose the names and addresses of their donors. The First Amendment does not permit the government to require membership disclosure under such circumstances. *See Doe v. Reed*, 561 U.S. 186 (2010) and *NAACP v. Alabama ex rel. Patterson*, 357 U.S. 449 (1958). Numerous statements by supporters of DISCLOSE 2014 (both in and out of Congress) have made it abundantly clear that they are seeking disclosure as a means to accomplish just that sort of impermissible retaliation against speakers with whom they disagree.

The clear purpose of S. 2516 is to upend irretrievably core First Amendment political speech protections. These rights are too important to the foundation of American democracy to be infringed. Accordingly, the Chamber strongly urges you to oppose S. 2516 and to vote against the legislation as well as any effort to bring it to the Senate floor.

Sincerely,

R. Bruce Josten

COMMON CAUSE

United States Senate Committee on Rules & Administration

Statement for the Record at the Hearing:

"The DISCLOSE Act (S. 2516) and the Need for Expanded Public Disclosure of Funds Raised and Spent to Influence Federal Elections"

Miles Rapoport
President
Common Cause

July 23, 2014

Common Cause is a national nonpartisan advocacy organization founded in 1970 by John Gardner as a vehicle for ordinary citizens to make their voices heard in the political process. Mr. Chairman, on behalf of our 400,000 members and supporters, we appreciate the opportunity to submit this statement for the record.

Common Cause works at the federal, state and local level to advocate for full transparency and disclosure in our elections, including the money spent to influence the outcome of campaigns.

The Money, The Donors, The Secrecy.

The 2014 elections are on pace to shatter all records to become the most expensive midterms in American history. Already, candidates for the House of Representatives and Senate have raised more than $1 billion.[1] Outside spending has topped $125 million, which is more than three times the spending of outside groups at this point in the last midterm election cycle in 2010.[2] Spending by independent expenditure-only committees ("Super PACs") in the 2014 cycle has surpassed the total amount that Super PACs spent during the entire 2010 midterms.[3] This spending comes on the heels of the 2012 presidential election cycle, which was our nation's first federal election cycle to cost more than $6 billion, an amount that does not even count the billions spent in state races.

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[1] Center for Responsive Politics, 2014 Election Overview, http://www.opensecrets.org/overview/ (last accessed July 22, 2014).

[2] Center for Responsive Politics, Outside Spending by Cycle Thru July 22nd of Election Year, http://www.opensecrets.org/outsidespending/index.php?type=A (last accessed July 22, 2014); Andrew Mayersohn, "2014 Outside Spending Hits the $100 Million Mark," CENTER FOR RESPONSIVE POLITICS, May 30, 2014, http://www.opensecrets.org/news/2014/05/2014-outside-spending-hits-the-100-million-mark/ (last accessed July 22, 2014).

[3] *Compare* Center for Responsive Politics, 2014 Outside Spending, by Super PAC, http://www.opensecrets.org/outsidespending/summ.php?cycle=2014&chrt=V&disp=O&type=S *with* Center for Responsive Politics, 2010 Outside Spending, by Super PAC, http://www.opensecrets.org/outsidespending/summ.php?cycle=2010&chrt=V&disp=O&type=S (last accessed July 22, 2014).

The money fueling these 2014 midterms comes from an extraordinarily small and unrepresentative segment of the population. A little over one-tenth of 1% is delivering 64% – over one billion dollars – of the total contributions to federal candidates, PACs and political parties.[4]

A significant amount of the outside spending comes from sources under no obligation to disclose their donors, corporate or otherwise. Thirty percent of the outside money in 2012 – over $310 million – came from undisclosed sources.[5] So far in the current midterm cycle-to-date, over 27% of total outside spending (more than $35 million) has come from dark money groups.[6] One group in particular, the Koch brothers' Americans for Prosperity, plans to spend more than $125 million on an "aggressive ground, air and data operation" which "would be unprecedented for a private political group in a midterm, and would likely rival even the spending of the Republican and Democratic parties' congressional campaign arms."[7] Unlike the political parties' campaign arms, however, Americans for Prosperity is under no legal obligation to disclose the donors funding its "aggressive" campaign to influence voters in any of its targeted races.

Money from Undisclosed Sources Flows Through Multiple Entities, Including Super PACs.

While there has been significant and much-needed attention in recent years to the steep rise in the political spending of 501(c)(4) social welfare organizations, some of the secret money is flowing through Super PACs. Unlike 501(c)(4)s, Super PACs are required to disclose their donors to the Federal Election Commission. However, the names of the "donors" can mean little to nothing, depending on the source. For example, a donor may be the name of a shell corporation or other faceless entity. This does do not shed any light on the actual source of the money.

The number of candidate-specific Super PACs has dramatically increased during this election cycle – and with it, the opportunity for more secret money.[8] For example, the Center for Public Integrity reported earlier this month that two social welfare nonprofit organizations are responsible for donating almost all of the money – over $2 million – to a Super PAC backing the winner of yesterday's U.S. Senate Republican primary in Georgia.[9] Those two nonprofit

[4] Center for Responsive Politics, Donor Demographics, http://www.opensecrets.org/overview/donordemographics.php (last accessed July 22, 2014).
[5] Center for Responsive Politics, Outside Spending by Disclosure Excluding Party Committees, http://www.opensecrets.org/outsidespending/disclosure.php?range=tot (last accessed July 22, 2014).
[6] Center for Responsive Politics, Outside Spending by Disclosure Excluding Party Committees Cycle to Date, http://www.opensecrets.org/outsidespending/disclosure.php?range=ytd (last accessed July 22, 2014).
[7] Kenneth P. Vogel, "Koch Brothers' Americans for Prosperity Plans $125 million Spending Spree," POLITICO, May 9, 2014, http://www.politico.com/story/2014/05/koch-brothers-americans-for-prosperity-2014-elections-106520.html.
[8] Matea Gold & Tom Hamburger, "Must-have Accessory for House Candidates in 2014: The Personalized Super PAC," WASHINGTON POST, July 18, 2014, http://www.washingtonpost.com/politics/one-candidate-super-pac-now-a-must-have-to-count-especially-in-lesser-house-races/2014/07/17/aaa2fcd6-0dcd-11e4-8c9a-923ecc0c7d23_story.html.
[9] Michael Beckel, "Is This Super PAC Subverting Disclosure Rules?," CENTER FOR PUBLIC INTEGRITY, July 11, 2014, http://www.publicintegrity.org/2014/07/11/15061/super-pac-subverting-disclosure-rules.

organizations are under no obligation to disclose the source of the money that they funneled to the Super PAC.

At least 64 of these candidate-specific Super PACs exist so far in this election cycle – more than the 42 that were active in the 2012 federal election and the 21 from 2010.[10] Candidate-specific Super PACs are little more than an extension of a candidate's principle campaign committee, with the added ability to take unlimited contributions from individuals and corporations – including corporations and social welfare nonprofits that do not disclose their donors.

Although Super PACs are prohibited by law from coordinating with candidates because the coordination would constitute an unlawful contribution, the difference between a candidate-specific Super PAC and a principle campaign committee is becoming a distinction without a difference. During the 2012 presidential election, former Speaker of the House Newt Gingrich made a disturbing yet frank assessment for why his campaign failed. Although he said that running for President is not "a rich man's game," he continued that "[i]t's certainly a game which requires you to have access to a lot of money. We couldn't have matched Romney's Super PAC, but in the end, he had I think sixteen billionaires and we had one, and it made it tough."[11] The billionaire that Mr. Gingrich mentions that he "had" is Las Vegas casino magnate Sheldon Adelson, who spent at least $98 million in the 2012 election cycle, including more than $20 million to a Super PAC backing Mr. Gingrich.[12]

Secret money is also awash in state level campaigns. During the 2012 election, for example, California Common Cause filed a complaint with California's Fair Political Practices Commission (FPPC) after an unknown Arizona nonprofit contributed $11 million to a political action committee active in two ballot proposition campaigns in California.[13] Earlier this year, this Rules Committee heard testimony from former FPPC Chair (and current FEC Commissioner) Ann Ravel about the case. The FPPC investigated and eventually uncovered $15 million from two out-of-state nonprofits that sought to evade California's disclosure regulations.[14] Ultimately, the entities were levied a record $1 million fine for laundering the money to evade disclosure.[15]

As Congress and the Federal Election Commission remain gridlocked, some states have acted to advance transparency in a post-*Citizens United* state and local election landscape. Common Cause chapters led fights to pass and Governors have signed comprehensive DISCLOSE-like

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[10] *Id.*

[11] Jonathan Karl et al., *Newt Gingrich's Advice for Mitt Romney: Sharpen Your Animal Instincts*, ABC NEWS/YAHOO! NEWS, June 19, 2012, http://news.yahoo.com/blogs/power-players/newt-gingrich-advice-mitt-romney-sharpen-animal-instincts-105728293.html (last accessed July 22, 2014) (emphasis added).

[12] Theodoric Meyer, "How Much Did Sheldon Adelson Really Spend on Campaign 2012?," PROPUBLICA, Dec. 20, 2012, http://www.propublica.org/article/how-much-did-sheldon-adelson-really-spend-on-campaign-2012.

[13] Chris Megerian, "Identity of Donors to Conservative Group Sought," LOS ANGELES TIMES, Oct. 19, 2012, http://articles.latimes.com/2012/oct/19/local/la-me-election-money-20121020.

[14] *Dollars and Sense: How Undisclosed Money and Post-*McCutcheon *Campaign Finance Will Affect the 2014 Election and Beyond: Hearing Before the United States Senate Committee on Rules and Administration* 113th Cong. 1 (2014) (Testimony of Ann M. Ravel, Former Chair, California Fair Political Practices Commission).

[15] *Id.*

legislation in California and Rhode Island. A strong Common Cause-supported disclosure bill is being debated this very week in the Massachusetts statehouse.

Congress Should Pass the DISCLOSE Act.

Common Cause strongly supports the DISCLOSE Act (S. 2516). The DISCLOSE Act already enjoys majority support in the United States Senate and should pass as soon as possible. This is common sense legislation in keeping with our core American values of transparency and accountability in a robust and participatory democracy.

Disclosure serves several purposes in campaigns. First, it protects a voter's right to know who is trying to influence their decision on Election Day. Voters are able to evaluate the merits of an appeal for their vote if they know who is speaking to them. Second, disclosure curbs corruption and its appearance, including the specter of undue influence over public policy. Third, disclosure is critical to the enforcement of our campaign finance laws. The DISCLOSE Act is carefully crafted to further all of these purposes.

The DISCLOSE Act would apply uniformly to organizations across the political spectrum. There are no special exemptions or carve-outs for organizations depending on the size of their membership or their political stances. Ultimately, it will require the disclosure of major donors to those entities – donors contributing and spending $10,000 or more to influence elections.

The DISCLOSE Act Comports with the Constitution.

The DISCLOSE Act is also consistent with the Supreme Court's disclosure jurisprudence. In a portion of *Citizens United* that had the support of eight members of the Court, Justice Kennedy wrote that "disclosure ... enables the electorate to make informed decisions and give proper weight to different speakers and messages."[16] The same eight justices agreed that disclosure allows "[s]hareholders [to] determine whether their corporation's political speech advances the corporation's interest in making profits, and citizens can see whether elected officials are 'in the pocket' of so-called moneyed interests."[17]

In *McCutcheon v. FEC*, the Chief Justice wrote that "[d]isclosure requirements are in part justified based on a governmental interest in providing the electorate with information about the sources of election-related spending."[18] He further opined that "[t]oday, given the Internet, disclosure offers much more robust protections against corruption. ... Because massive quantities of information can be accessed at the click of a mouse, disclosure is effective to a degree not possible at the time *Buckley*, or even *McConnell*, was decided."[19]

Unfortunately, reality belies the latter pronouncement about the availability of campaign finance disclosure "at the click of a mouse." There is no adequate disclosure system in place to fully shine a light on the hundreds of millions of dollars flooding our elections in the form of

[16] *Citizens United v. FEC*, 558 U.S. 310, 371 (2010).
[17] *Id.* at 370.
[18] *McCutcheon v. FEC*, 134 S. Ct. 1434, 1459 (2014) (internal quotations omitted).
[19] *Id.* at 1460.

independent expenditures. The DISLCOSE Act, coupled with the Real Time Transparency Act (S. 2207) and the Senate Campaign Disclosure Parity Act (S. 375), would create a regime more in keeping with the transparency the Court assumed was already in place when it opened up our elections to unlimited corporate and special interest money.

Conclusion.

Congress must act to restore transparency in our elections after the sea change in our campaign finance laws after *Citizens United*. Americans of every political stripe agree that campaign spending ought to be transparent and disclosed.

Citizens are working at various levels of government to make this a reality. For example, at the Securities and Exchange Commission, investors, shareholders, academics and others have filed nearly 900,000 comments in support of a rulemaking petition that would require publicly traded companies to disclose their political spending to shareholders. The Internal Revenue Service is examining reforms to its rules that would end abuse of our tax laws to hide campaign spending. These efforts are squarely within these agencies' authority.

Ultimately, though, the DISCLOSE Act is a critical component of shining a light on the money in our campaigns. It will protect Americans' right to know who is seeking to influence their vote on Election Day and who is attempting to influence their elected officials afterwards.

We urge its swift approval.

Thank you for the opportunity to submit this statement for the record.

June 24, 2014

Senator Whitehouse Re-introduces DISCLOSE Act with 49 Cosponsors, Reform Groups Urge Congress to Enact Bill to Close Gaping Disclosure Loopholes Used to Hide Donors from Voters

Our organizations strongly support the DISCLOSE Act of 2014 introduced today by Senator Whitehouse (D-RI) with 49 cosponosrs.

Our organizations include Americans for Campaign Reform, the Brennan Center for Justice, the Campaign Legal Center, Citizens for Responsibility and Ethics in Washington, Common Cause, Democracy 21, Demos, the League of Women Voters, People For the American Way, Public Citizen and Sunlight Foundation.

The legislation would ensure that voters know the identity of donors who have been secretly financing campaign expenditures in federal elections. Voters have a fundamental right to know this information.

Donors funneled more than $300 million in secret contributions into the 2012 national elections.

National polls have shown that citizens overwhelmingly favor disclosure by outside groups of the donors financing their campaign expenditures. The basic right of citizens to know whose money is being spent to influence their votes has long been recognized by Congress in enacting campaign finance disclosure laws and by the Supreme Court in upholding these laws.

The Supreme Court in the *Citizens United* case, by an overwhelming 8 to 1 vote, upheld the constitutionality of and need for disclosure requirements for outside groups making expenditures to influence federal elections. The Court stated:

> 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.

Notwithstanding the Supreme Court's overwhelming support for disclosure by outside spending groups, flawed FEC regulations and the impact of the *Citizens United* decision have resulted in massive amounts of secret contributions being spent in federal elections. The DISCLOSE Act would close the gaping disclosure loopholes that have allowed this to happen.

The DISCLOSE Act is effective, fair and constitutional. There are no legitimate policy or constitutional grounds on which to oppose and kill this legislation.

If Senators have specific problems with provisions of the Act, they should negotiate with the bill's sponsors, not stonewall the legislation and continue to keep citizens in the dark about the sources of huge amounts being spent to influence their votes.

Our organizations strongly urge the Senate to pass the DISCLOSE Act.

Statement for the Hearing Record
regarding the July 23, 2014
United States Senate Committee on Rules and Administration

Theda Skocpol
Director of the Scholars Strategy Network
Submitted July 24, 2014

On July 23, 2014, the Senate Committee on Rules and Administration held a hearing entitled "The DISCLOSE ACT (S. 2516) and the Need for Expanded Public Disclosure of Funds Raised and Spent to Influence Federal Elections." During the hearing, Ranking Member Pat Roberts engaged in an exchange with hearing witness Heather Gerken, the J. Skelly Wright Professor of Law at the Yale Law School regarding her membership in the Scholars Strategy Network.

Professor Gerken admirably answered the Ranking Member's questions and accurately described the Scholars Strategy Network. As the organization's national director, I would like to further respond to the concerns the Ranking Member expressed during the hearing by providing the following facts.

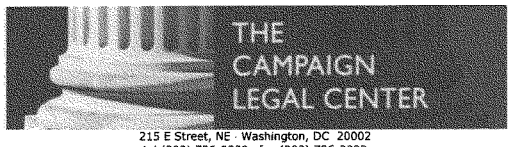
Contrary to the Ranking Member's suggestion, the Scholars Strategy Network is *not* funded by the Democracy Alliance or any other political organization. Our straightforward nonpartisan and nonprofit purpose is to enable our scholar members to share their research with citizen's groups, journalists, and policymakers and their staffs. Our members have worked with groups and policymakers of many persuasions.

As spelled out in the following Mission Statement reproduced from our website [www.scholarsstrategynetwork.org/page/what-scholars-strategy-network], the Scholars Strategy Network as such does not take political positions or endorse any party or candidate:

The Scholars Strategy Network seeks to improve public policy and strengthen democracy by organizing scholars working in America's colleges and universities, and connecting scholars and their research to policymakers, citizens associations, and the media.

SSN members spell out the implications of their research in ways that are broadly accessible. They engage in consultations with policymakers in Washington DC and state capitals. They make regular contributions to the media and share findings and ideas with journalists and bloggers. Many SSN scholars also work with advocates and civic organizations to address pressing public challenges at the national, state, and local levels.

SSN members believe that university scholars should share their work with fellow citizens – and they endeavor to further good public policymaking and responsive democratic government. Beyond these shared values, members hold a variety of views – and SSN as a whole does not endorse any political party, candidate, or specific policy position. Each SSN scholar takes individual responsibility for signed contributions and choices about civic engagement.



215 E Street, NE · Washington, DC 20002
tel (202) 736-2200 · fax (202) 736-2222
www.campaignlegalcenter.org

July 23, 2014

The Honorable Charles E. Schumer
Chairman
Senate Committee on Rules & Administration
305 Russell Senate Office Building
Washington, DC 20510

The Honorable Pat Roberts
Ranking Member
Senate Committee on Rules & Administration
305 Russell Senate Office Building
Washington, DC 20510

Re: The DISCLOSE Act (S.2516) and the Need for Expanded Public Disclosure of Funds Raised and Spent to Influence Federal Elections

Dear Chairman Schumer, Ranking Member Roberts and Members of the Senate Committee on Rules and Administration:

These remarks are submitted on behalf of the Campaign Legal Center regarding the July 23, 2014 hearing on the Democracy Is Strengthened by Casting Light on Spending in Elections Act (DISCLOSE Act), S.2516. Now that a revised DISCLOSE Act has once again been introduced, we applaud the Committee for acting quickly to hold a hearing on this important bill. Given the current lack of disclosure of the sources of funds used by outside spenders in political campaigns, we urge the Committee to support and expedite passage of the DISCLOSE Act in order to ensure voters have full information as to the sources of funding that influence federal elections.

The DISCLOSE Act is of particular urgency due to the mushrooming of outside spending in elections combined with the Federal Election Commission's (FEC) ongoing efforts to narrow the coverage of the disclosure rules. The FEC's disclosure regulations—which are clearly contrary to the legislative intent of Congress—and the Commission's failure to enforce the law as intended have largely created this problem. The good news is that this is a problem that can be fixed legislatively, and in fact was addressed by Congress when it passed the Bipartisan Campaign Reform Act (BCRA) in 2002. The "electioneering communications" disclosure provision of BCRA, which the Supreme Court upheld and is still on the books, says that any "person," including corporations and labor unions, that spends more than $10,000 on TV and radio ads mentioning candidates in close proximity to elections must file a report with the FEC disclosing the names and addresses of all contributors who contributed $1,000 or more to the person making the ad buy.

The FEC's initial regulation implementing this disclosure requirement tracked the language of the statute. However, the Commission promulgated a revised, and significantly narrowed, regulation in 2007 after the Supreme Court's decision in *FEC v. Wisconsin Right to Life* (*WRTL*), a case that had nothing to do with disclosure. In its 2007 rule, the FEC provided that a corporation, including a 501(c)(4) social welfare corporation, that spends more than $10,000 on electioneering communication no longer has to disclose the names of all contributors who contributed $1,000 or more but, instead, need only disclose the names of contributors who specifically designated their contributions for the purpose of furthering electioneering communications. Not surprisingly, in the wake of the FEC's 2007 gutting of the electioneering communication donor disclosure requirement, there has been a sharp drop in the disclosure of donors to groups spending money on electioneering communication. Donors simply refrain from specifically designating their contributions for electioneering communications and, as a result, they remain anonymous to the voting public.

To date, the FEC has gotten away with this blatant override of Congressional intent to require donor disclosure for electioneering communications. The lack of disclosure of the true funders of outside spending deprives citizens of critical information regarding who is trying to influence their vote. The Supreme Court has consistently upheld the constitutionality of campaign finance disclosure provisions, supporting Congressional efforts to provide voters with timely and comprehensive information regarding the sources of funding of election spending. The vast amount of money from anonymous sources channeled through various organizations that is being spent in our elections is contrary to the high value the Supreme Court has placed on disclosure within our democratic system of government. Beginning with the Court's foundational campaign finance decision, *Buckley v. Valeo*, the Court has recognized the value of disclosing the sources of campaign spending:

> First, disclosure provides the electorate with information as to where political campaign money comes from and how it is spent by the candidate in order to aid the voters in evaluating those who seek federal office. It allows voters to place each candidate in the political spectrum more precisely than is often possible solely on the basis of party labels and campaign speeches. The sources of a candidate's financial support also alert the voter to the interests to which a candidate is most likely to be responsive and thus facilitate predictions of future performance in office.

Buckley, 424 U.S. 1, 66-67 (1976) (internal citations and quotation marks omitted).

In 2003, when the Court upheld BCRA's electioneering communications disclosure requirements, it dismissed attacks on the disclosure requirements and again emphasized the fundamental value of disclosure to the democratic process:

> Curiously, Plaintiffs want to preserve the ability to run these advertisements while hiding behind dubious and misleading names like: 'The Coalition–Americans Working for Real Change' (funded by business organizations opposed to organized labor), 'Citizens for Better Medicare' (funded by the pharmaceutical industry), 'Republicans for Clean Air' (funded by brothers Charles and Sam

> Wyly). Given these tactics, Plaintiffs never satisfactorily answer the question of how 'uninhibited, robust, and wide-open' speech can occur when organizations hide themselves from the scrutiny of the voting public. Plaintiffs' argument for striking down BCRA's disclosure provisions does not reinforce the precious First Amendment values that Plaintiffs argue are trampled by BCRA, but ignores the competing First Amendment interests of individual citizens seeking to make informed choices in the political marketplace.

McConnell v. FEC, 540 U.S. 93, 196-97 (2003) (quoting the district court's decision, *McConnell v. FEC*, 251 F. Supp. 2d 176, 237 (D.D.C. 2003)) (internal citations omitted).

The magnitude of money from undisclosed sources has rapidly increased since the Supreme Court's problematic 2010 ruling in *Citizens United v. FEC*. Although the *Citizens United* decision opened the door for corporations and labor unions to spend money to influence elections, the Supreme Court upheld challenged disclosure provisions 8-1 and wrote strongly in favor of disclosure and the Court's expectation that the funders of outside spending would be disclosed:

> With the advent of the Internet, prompt disclosure of expenditures can provide shareholders and citizens with the information needed to hold corporations and elected officials accountable for their positions and supporters. Shareholders can determine whether their corporations political speech advances the corporations interest in making profits, and citizens can see whether elected officials are 'in the pocket' of so-called moneyed interests. 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.

Citizens United, 558 U.S. 310, 371 (2010). The lack of disclosure in the current system is contrary to the Court's assumption in *Citizens United* that the real sources of funding of outside spending in elections would be publicly disclosed. In this year's *McCutcheon v. FEC* decision, the Court again extolled the importance of disclosure and noted the utility of modern technology in facilitating public access to donor information:

> [D]isclosure of contributions minimizes the potential for abuse of the campaign finance system. Disclosure requirements are in part justified based on a governmental interest in providing the electorate with information about the sources of election related spending. . . . With modern technology, disclosure now offers a particularly effective means of arming the voting public with information. . . . Because massive quantities of information can be accessed at the click of a mouse, disclosure is effective to a degree not possible at the time *Buckley*, or even *McConnell*, was decided.

McCutcheon, 134 S. Ct. 1434, 1459-60 (2014) (internal citations omitted). How can shareholders determine whether election related spending advances the interest of a corporation, or the electorate obtain information about the sources of election related spending, when that spending is funneled through outside groups that do not disclose the source of the funds they are using to influence elections?

The technology currently exists to provide voters with real time information about the true sources of outside spending. However, the reality is that voters simply cannot access this important information. Expenditures on political ads paid for by outside groups that did not disclose the source of the money used for election activity quadrupled between 2008 and 2012, increasing from $69 million to more than $310 million (Figure I). Simultaneously, the portion of outside spending accompanied by full donor disclosure decreased from 65 percent of spending to 41 percent (Figure II).*

Figure I. Outside Spending by Groups Not Disclosing Donors

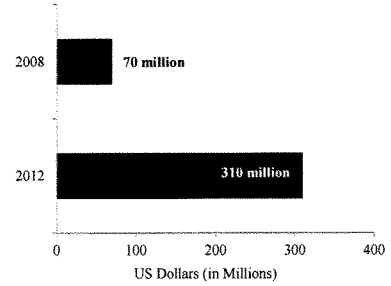
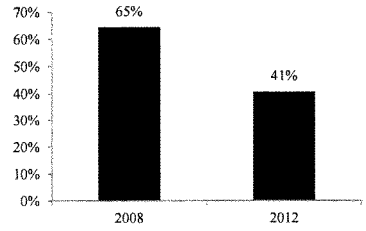


Figure II. Outside Spending Accompanied by Full Donor Disclosure



The DISCLOSE Act addresses this troubling lack of donor disclosure on several fronts. Under the Act, covered organizations (including corporations, all 501(c) organizations except 501(c)(3)s, labor organizations and 527 organizations) spending an aggregate amount of $10,000 or more in an election cycle must disclosure such expenditures to the FEC within 24 hours of spending in excess of the $10,000 threshold. This disclosure filing must identify all sources of

* Numbers courtesy of the Center for Responsive Politics, *available at* http://www.opensecrets.org/outsidespending/disclosure.php.

donations that exceed $10,000. Currently groups paying for political ads may claim that their "major purpose" is something other than participating in federal elections, and therefore not register or report with the FEC as political committees or with the IRS as 527 organizations. Instead, they file as 501(c)(4)s, 501(c)(6)s or other non-profit legal entities. Because they are permitted to keep secret the names of their large donors when they publicly release their tax returns filed with the IRS, and because they claim that they received no funds designated for political advertisements, they do not report their donors to the FEC either.

The Act also expands the amount of time covering electioneering communications. The electioneering communication disclosure provisions will apply to any broadcast, cable, or satellite communication that clearly refers to a House or Senate candidate and airs during the period beginning on January 1 of an election year through the general election. Likewise, the electioneering communication disclosure provisions will apply to such communications that clearly refer to a Presidential or Vice Presidential candidate and air during the period beginning 120 days before the first primary election, caucus, or preference election through the general election. Under current law, "electioneering communication" is defined to include only advertisements aired within 30 days of a primary election and 60 days of a general election. Expanding the periods covered by the electioneering communication disclosure requirements will capture more information about the funders of political ads during the long campaign season.

Most critically, the Act requires the disclosure of transfers by covered organizations to other persons or organizations when those funds are intended to be used to make campaign-related disbursements. This provision prevents the laundering of money through shell organizations for the purpose of keeping campaign-related spending anonymous. This goes to the heart of the current problem of vast sums of outside spending in our elections using funds from undisclosed donors. Currently, organizations that are required to disclose their contributors, such as Super PACs, may accept funds from organizations that are not required to disclose their donors, such as 501(c)(4) organizations. This has essentially made disclosure optional. Donors who want to keep their political contributions anonymous may simply give their money to a 501(c)(4) that then funnels the money to a Super PAC. The Super PAC must disclose the contribution from the (c)(4), but does not have to disclose the original source of the funds. The DISCLOSE Act will shed light on these shadowy transactions by requiring the (c)(4) to disclose its donors who gave $10,000 or more—allowing the public to understand the original source of funding of campaign advertising. The Act will provide voters with critical information about who is funding communications supporting or opposing candidates.

The disclosure requirements for outside spending are woefully inadequate and do not provide voters with information they need to make informed decisions about federal candidates. It is time to bring the statutes governing campaign finance disclosure in line with the Supreme Court's repeated emphasis on the importance of disclosure in our system of government. It is time to utilize modern technology and the powerful disclosure tools it provides to give voters timely and meaningful information about the sources of funding in our elections. We urge the Committee to report out this legislation expeditiously and to oppose any efforts to significantly weaken the bill. Disclosure should be the cornerstone of our campaign finance system. We hope

the Committee will take this opportunity to begin the process of restoring this important foundation.

Sincerely,

Trevor Potter
President & General Counsel

J. Gerald Hebert
Executive Director & Director of Litigation