CLC
ADVANCING DEMOCRACY THROUGH LAW

December 20, 2018

The Honorable Richard D. Snyder
Executive Office of Governor Snyder
P.O. Box 30013
Lansing, MI 48909

Re: Opposition to SB 1176

Dear Governor Snyder,

The Campaign Legal Center ("CLC") respectfully urges you to veto SB 1176. The bill was rushed through the legislature in a manner that precluded development of a complete legislative record and deprived the public and legislators from carefully considering the consequences of its provisions. If it becomes law, SB 1176 will severely undermine governmental transparency and integrity in Michigan, an outcome directly contrary to Michigan residents' desire for greater transparency and accountability in the political process.[1]

CLC is a nonpartisan, nonprofit organization that works to implement and defend effective campaign finance, lobbying, and ethics laws. Since the organization's founding in 2002, CLC has participated in every major U.S. Supreme Court campaign finance case as well as numerous other federal and state court campaign finance cases. CLC also has provided guidance on campaign finance legislation and ballot initiatives in states and cities around the country. Our work promotes every voter's right to participate in the democratic process and to know the true sources of money spent to influence elections, as well as the public's right to transparent and ethical government.

[1] According to statewide polling conducted by the Center for Michigan in 2016, Michigan residents identified "greater transparency and financial/donor reporting requirements" as the policy reform most likely to improve their trust in Michigan's campaign finance system. CTR. FOR MICH., FRACTURED TRUST: LOST FAITH IN STATE GOVERNMENT, AND HOW TO RESTORE IT 6, Mar. 2017, https://www.bridgemi.com/sites/default/files/fractured_trust.pdf. *See also* Paul Egan, *Bill to heighten secrecy of 'dark money' political donors sent to Snyder*, DETROIT FREE PRESS (Dec. 18, 2018), https://www.freep.com/story/news/politics/2018/12/18/michigan-political-donors/2347965002/.

SB 1176 is certain to undermine transparency and accountability in Michigan government. By broadly restricting the ability of state and local agencies to require public disclosures by any section 501(c) nonprofit, the bill mandates secrecy regarding the members, donors, and supporters of 29 different types of nonprofit corporations.[2] This mandatory concealment of nonprofit funders is not limited to charities and religious groups organized under section 501(c)(3) of the Internal Revenue Code, but extends to section 501(c)(4) "social welfare" organizations, section 501(c)(5) labor unions, and section 501(c)(6) trade associations, all of which engage in extensive amounts of political campaigning and lobbying activity. Transparency regarding the financing of these nonprofits' activities is crucial to a functioning democracy.

Indeed, even when the United States Supreme Court opened the door to unlimited corporate spending on federal elections in its 2010 *Citizens United* decision, a key aspect of that decision was the Justices' nearly unanimous agreement that such spending should be publicly disclosed, because "providing the electorate with information" about the sources of election-related spending helps citizens "make informed choices in the political marketplace."[3] Justice Kennedy thus declared that the *Citizens United* decision would establish a new federal regime "that pairs corporate campaign spending with effective disclosure."[4] In affirming the First Amendment values underlying public disclosure of electoral spending, the Supreme Court recognized the public's right to receive information regarding "'those who for hire attempt to influence legislation or who collect or spend funds for that purpose.'"[5] Further, nonprofit disclosure requirements allow state authorities to identify and prevent fraud and self-dealing, as courts have recognized.[6]

In the years since *Citizens United* was decided, courts around the country have upheld federal and state disclosure laws in recognition that political transparency *advances* First Amendment principles by facilitating citizens' informed participation in the electoral process. At the same time, undisclosed election spending, largely through the use of section 501(c)(4) "social welfare" organizations and section 501(c)(6) trade organizations, has been on the rise.[7] While other states have been

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[2] I.R.S. Publication 557 (revised Jan. 2018), https://www.irs.gov/pub/irs-pdf/p557.pdf.

[3] *Citizens United v. FEC*, 558 U.S. 310, 367 (2010).

[4] *Id.* at 370.

[5] *Id.* at 369 (quoting *United States v. Harriss*, 347 U.S. 612, 625 (1954)).

[6] *See, e.g.*, *Citizens United v. Schneiderman*, 882 F.3d 374, 382 (2d Cir. 2018) (upholding New York nonprofit disclosure law, which advanced the state's important interest in "ensuring organizations that receive special tax treatment do not abuse that privilege" and in preventing such organizations "from using donations for purposes other than those they represent to their donors and the public"); *Americans for Prosperity v. Becerra*, 903 F.3d 1000, 1009 (9th Cir. 2018) (upholding California disclosure law, which enabled the state to "'determine whether a charity is actually engaged in a charitable purpose, or is instead violating California law by engaging in self-dealing, improper loans, or other unfair business practices'").

[7] *See* AUSTIN GRAHAM, CAMPAIGN LEGAL CENTER, TRANSPARENCY AND THE FIRST AMENDMENT: HOW DISCLOSURE LAWS ADVANCE THE CONSTITUTION'S PROMISE OF SELF-GOVERNMENT 8 (2018),

working to close loopholes that have allowed for the increasing role of dark money in election campaigns, SB 1176 codifies those loopholes as enforceable law in Michigan.

SB 1176's title suggests it is intended to provide generalized "personal privacy protection." But the pursuit of that objective through a far-reaching ban on nonprofit disclosure infringes the "'First Amendment interests of individual citizens seeking to make informed choice in the political marketplace.'"[8] It also ignores that statutory privacy protection is unnecessary, because courts have long recognized that exemptions from disclosure rules are available where there is an *actual*, demonstrated probability that an organization's members will face threats, harassment, or reprisals as a result of their public identification.[9]

CLC recognizes that section 6 of SB 1176 provides that the bill's requirements "shall not affect" the Michigan Campaign Finance Act. It may be that section 6 was meant to exempt existing campaign finance reporting requirements from the disclosure ban otherwise mandated in SB 1176.[10] But section 6's vague language conflicts with the explicit secrecy mandated in section 3(1) of the bill, which applies "[n]otwithstanding any law to the contrary" and does not exclude or otherwise reference the campaign finance exception in section 6. At most, section 6 introduces confusion about the scope of the nonprofit disclosure ban and underscores the danger of enacting such a broad piece of legislation.

In addition to codifying a dark money loophole for nonprofit spending in elections, SB 1176 will make it easier for Michigan lawmakers to hide conflicts of interest, including through donations to their affiliated nonprofits. Michigan has been recognized as one of the least transparent states in the country, and it is one of only two states with no financial disclosure requirements for public officials.[11] This lack of transparency already makes it easy for conflicts of interests to go undetected in

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https://campaignlegal.org/sites/default/files/2018-11/Transparency%20and%20the%20First%20Amendment_0.pdf.

[8] *McConnell v. FEC*, 540 U.S. 93, 197 (2003).

[9] *See, e.g.*, *Citizens United v. FEC*, 558 U.S. at 367 (recognizing that as-applied challenges to disclosure rules are available where a group can show a "'reasonable probability' that disclosure of its contributors' names 'will subject them to threats, harassment, ore reprisals from either Government officials or private parties'") (quoting *McConnell*, 540 U.S. at 231; *Buckley v. Valeo*, 424 U.S. 1, 74 (1976) (per curiam)).

[10] For example, under the Michigan Campaign Finance Act, a nonprofit corporation or labor organization that makes an "independent expenditure" in excess of $100 in a calendar year must file a report of the expenditure that includes, among other information, "the name, address, occupation, employer, and principal place of business of each person that contributed $100.01 or more to the expenditure." Mich. Comp. Laws Ann. § 169.251(1). And last year, the Michigan Legislature approved amendments that clarify reporting requirements for "independent expenditure committees" and non-committee groups making independent expenditures in state and local elections. Mich. Pub. Act No. 119 of 2017 (SB 335).

[11] *See* Kristian Hernández, *Michigan lawmakers go public with their finances in effort to boost state integrity*, CENTER FOR PUBLIC INTEGRITY, July 12, 2018, https://www.publicintegrity.org/2018/07/09/21942/michigan-state-integrity.

Michigan, and SB 1176 will make it easier, still. Additionally, the bill bans disclosure of donations made by current or prospective government contractors, which could facilitate a rise of pay-to-play politics by shielding these arrangements from public scrutiny.

The people of Michigan want transparency and accountability. SB 1176 will undermine both and is contrary to core principles of our democracy. CLC respectfully urges you to veto the bill.

Respectfully submitted,

/s/

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/s/

Austin Graham
Legal Counsel