CLC
ADVANCING DEMOCRACY THROUGH LAW

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Submitted electronically to sgordon@house.mi.gov and ofcsmcc@senate.michigan.gov.

The Honorable Lee Chatfield
Chair, Committee on Michigan Competitiveness
Michigan House of Representatives

The Honorable David B. Robertson
Chair, Committee on Elections and Government Reform
Michigan Senate

Re: SB 1176 and SB 1250

Dear Chairs Chatfield and Robertson and Members of the Committees:

The Campaign Legal Center ("CLC") respectfully urges you to support transparency and Michigan citizens' right to effective enforcement of the state's campaign finance and ethics laws by opposing SB 1176 and SB 1250. CLC further implores you to pause the rush to vote on these recently proposed bills to ensure that legislators and the public have an adequate opportunity to fully and carefully consider the proposals, to develop a complete legislative record, and to allow for any necessary amendments to be made before the bills are enacted.

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 has also provided guidance on campaign finance legislation and ballot initiatives. 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 have government officials act transparently and ethically, free from conflicts of interest. CLC is deeply concerned about recently proposed legislation, SB 1176 and SB 1250, which would ban Michigan officials from informing the public about the sources behind election-related spending, hamper the state's ability to identify and prevent conflicts of interest among government

officials, and could halt any effective enforcement of the state's campaign finance and ethics rules.

SB 1176, the "Personal Privacy Protection Act," contains sweeping language that is certain to undermine transparency and accountability in Michigan. By broadly restricting the ability of state and local agencies to require public disclosures by any section 501(c) nonprofit, the bill would mandate secrecy regarding the members, donors, and supporters of 29 different types of nonprofit corporations.[1] As currently drafted, the bill's mandatory concealment of nonprofit funders would not be limited to charities and religious groups organized under section 501(c)(3) of the Internal Revenue Code, but would extend to "social welfare" organizations, labor unions, and trade associations that engage in extensive amounts of political campaigning and lobbying activity. But transparency regarding the financing of those 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."[2] Justice Kennedy thus declared that the decision would establish a new federal regime "that pairs corporate campaign spending with effective disclosure."[3] And 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.'"[4] Nonprofit disclosure requirements also allow states to identify and prevent fraud and self-dealing, as other courts have recognized.[5]

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 spending, largely through the use of section 501(c)(4) "social welfare" organizations and section 501(c)(6) trade

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

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

[3] *Id.* at 370.

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

[5] *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'").

organizations, has been on the rise.[6] While other states have been working to close loopholes that have allowed for the increasing role of dark money in election campaigns, SB 1176 would codify those loopholes as enforceable law in Michigan.

Although it lacks a legislative record, 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.'"[7] It also ignores that such 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.[8]

CLC recognizes that the latest version of SB 1176 includes a new section 6, which provides that the bill's requirements "shall not affect" Michigan's campaign finance act. It may be that section 6 was intended to exempt existing campaign finance disclosure requirements from the disclosure ban otherwise mandated in SB 1176.[9] But the new provision's vague language appears to conflict 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 newly added section 6. The last-minute addition of section 6 thus introduces confusion about the scope of the proposed disclosure ban and underscores the danger of rushing such an important piece of legislation to a vote.[10]

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[6] *See* AUSTIN GRAHAM, CAMPAIGN LEGAL CENTER, TRANSPARENCY AND THE FIRST AMENDMENT: HOW DISCLOSURE LAWS ADVANCE THE CONSTITUTION'S PROMISE OF SELF-GOVERNMENT 8 (2018), https://campaignlegal.org/sites/default/files/2018-11/Transparency%20and%20the%20First%20Amendment_0.pdf.

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

[8] *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)).

[9] 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).

[10] CLC has similar concerns about the Senate's efforts to rush other recently proposed bills. SB 1238, SB 1239, and SB 1254 have been introduced following the passage of related ballot initiatives without any opportunity for public input, the development of a legislative record, or careful consideration of the proposals.

In addition to codifying a dark money loophole for nonprofit election spending, SB 1176 would make it easier for Michigan lawmakers to hide any 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 Michigan, and SB 1176 would make it easier, still. The bill, which would also ban disclosure of donations made by current or prospective government contractors, could also facilitate a rise of pay-to-play politics by shielding such arrangements from public scrutiny.

Finally, CLC is concerned about the proposal in SB 1250 to completely overhaul Michigan's campaign finance regime by supplanting the recently elected Secretary of State's authority over campaign finance enforcement with a new state commission. Although CLC does not object to the creation of an independent campaign finance commission in the abstract, it has serious concerns about the circumstances surrounding SB 1250, including Michigan voters' recent election of a new Secretary of State whose statutory jurisdiction currently includes campaign finance oversight, the lack of any record indicating the reasons for the change or why the proposed structure would be an improvement over Michigan's current system, and the fact that the new six-member agency proposed in SB 1250 appears to be modeled after the Federal Election Commission, which is notorious for its "dysfunction and deadlock."[12] Other states' campaign finance commissions that are similarly comprised of an equal number of Republicans and Democrats have faced substantial criticism for their ineffectiveness.[13]

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[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.

[12] *See, e.g.,* Ann M. Ravel, *Dysfunction and Deadlock and the Federal Election Commission*, N.Y. TIMES, Feb. 20, 2017, https://www.nytimes.com/2017/02/20/opinion/dysfunction-and-deadlock-at-the-federal-election-commission.html.

[13] *See, e.g.*, Jason Stein, *Wisconsin Ethics Commissioner Resigns in Disgust*, MILWAUKEE JOURNAL SENTINEL, Dec. 12, 2016, https://www.jsonline.com/story/news/politics/2016/12/12/wisconsin-ethics-commissioner-resigns-protest/95333182/; Casey Millburg, *R.I.P. Wisconsin G.A.B.*, CITIZENS FOR RESPONSIBILITY AND ETHICS IN WASHINGTON, Aug. 23, 2016, https://www.citizensforethics.org/rip-wisconsin-gab/.

CLC strongly urges you to consider the serious consequences of proceeding on these bills as they currently stand. The public and legislators are entitled to an adequate opportunity to fully and carefully consider the proposals, and any final legislation should be supported by a thoughtful and well-developed legislative record. In the absence of both, we urge you to oppose SB 1176 and SB 1250.

Respectfully submitted,

/s/

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/s/

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