THE CAMPAIGN LEGAL CENTER
1411 K Street NW, Suite 1400
Washington, DC 20005
tel: 202-736-2200 fax: 202-736-2222

May 5, 2017

By Electronic Mail (rburns-web@azcc.gov)

The Honorable Robert Burns
Arizona Corporation Commission
1200 W. Washington
Phoenix, AZ 85007

Re: March 23 Special Open Meeting, Commission Workshop, RU-00000A-17-0035

Dear Commissioner Burns:

Thank you for the opportunity to submit this written testimony and to testify at the March 23 workshop you convened to discuss the development of disclosure and conflict of interest rules for the Arizona Corporation Commission ("Commission"). On behalf of the Campaign Legal Center, I am submitting this written testimony in support of your effort to develop robust new transparency and disclosure rules for the Commission. This rulemaking proceeding is a prudent response to the significant amount of undisclosed political spending, or "dark money," flowing into Commission elections. The Commission is wise to carefully consider this issue and to develop rules that will ensure that the Commission acts in an open and transparent manner when making decisions that impact the everyday lives of all Arizona citizens.

Part I provides an overview of the Commission's functions and laws applicable to spending on Commission elections. Part II chronicles the development of campaign finance disclosure law, highlights the rise of undisclosed independent spending in elections, and describes different state efforts to address spending by outside groups.[1] Part III discusses other laws designed to make government more transparent and increase accountability.

Introduction

The Campaign Legal Center (CLC) is a nonprofit, nonpartisan organization that works to enact, implement and defend effective campaign finance, lobbying and ethics laws. Our work promotes

---

[1] In this document, the term "outside groups" generally refers to organizations that are not candidate committees, political parties, or political committees required to file regular campaign finance disclosure reports.

every voter's right to participate in our democracy, to know who is funding elections and to have a voice in our democratic process.

CLC has participated in every major Supreme Court campaign finance case since *McConnell v. FEC*[2] in 2003. A major part of CLC's litigation practice is the defense of disclosure laws—particularly those laws that shed light on the new universe of "independent" spending by corporations and other outside groups following *Citizens United v. FEC*.[3] Even as the current Supreme Court has viewed certain substantive campaign finance restrictions with skepticism, an eight-member majority of Justices has been steadfastly supportive of political disclosure. As a result, CLC has been able to defend disclosure laws challenged at the federal, state and local level. CLC was active as either an *amicus curiae* or counsel to a party in at least 20 such cases since 2015, including successfully representing the Delaware Attorney General in a constitutional challenge to the state's electioneering communications disclosure law. The majority of these cases concerned the constitutionality of various disclosure laws applicable to campaign expenditures by groups "independent" of candidates and political parties.

Additionally, CLC has assisted numerous state and municipal agencies— including the California Fair Political Practices Commission and the New Mexico Secretary of State's Office—in efforts to craft new campaign finance disclosure legislation and rules. In addition to submitting this testimony to the Commission, CLC is currently advising, or has advised in the last year, numerous states and localities on campaign finance, pay-to-play and disclosure reforms.

I. The critical role of the Arizona Corporation Commission requires that the Commission function in an open and transparent manner.

The Commission is an independent branch within Arizona's government tasked with, among other duties, regulating public service corporations. Arizona's constitution vests the Commission with legislative, executive and judicial functions in order for it to execute its supervision of utility companies and common carriers. Among its powers, the Commission is authorized to inspect and to investigate the operations of public service corporations; to issue certifications of incorporation; to set rates and charges for regulated entities; to make rules and regulations governing corporate activities; and to make decisions in contested matters as a tribunal.[4]

The principal basis for the state constitution's grant of multifaceted authority to the Commission, as elucidated by the Arizona Supreme Court, is to safeguard "the interest of the consumer."[5] To fulfill its role as a "uniquely protective" body, the five individual commissioners must act objectively, "with no member subject to influences other than the ascertaining of the truth and

---

[2] 540 U.S. 93 (2003).

[3] 558 U.S. 310 (2010).

[4] *See* ARIZ. CONST. art. 15.

[5] Arizona v. Tucson Gas, Elec. Light & Power Co., 138 P. 781, 786 (Ariz. 1914).

the facts."[6] Moreover, a driving factor in the Commission's formation was to check corporate influence over state government.

Arizona is one of only thirteen states that elects members of the government body responsible for regulating public service corporations.[7] In recent years, there has been a substantial amount of independent spending on Commission elections by outside groups.[8] However, Arizona law currently does not require these groups to disclose publicly whether they are funded by entities regulated by the Commission.

The campaign finance rules applicable to Commission elections are found in Chapter 6 of Title 16 of the Arizona Revised Statutes. Like other candidates for "statewide office,"[9] a Commission candidate must establish a candidate committee if he or she receives contributions or makes expenditures of at least $1,000.[10] Candidate committees must file regular reports disclosing their contributions and expenditures,[11] and they are subject to limits on the contributions they can receive from a single source.[12] Notably, Arizona law prohibits corporations, limited liability companies (LLCs) and labor unions from making contributions to candidate committees.[13]

Although they are prohibited from making contributions to candidates, corporations, LLCs, and unions are permitted to fund unlimited independent expenditures[14] expressly advocating the election or defeat of state candidates without qualifying as a political action committee (PAC) in

---

[6] *Id*. at 785-86.

[7] ARIZONA CORPORATION COMMISSION, BACKGROUND AND ORGANIZATION, http://www.azcc.gov/Divisions/Administration/about.asp.

[8] Ryan Randazzo, *FBI probing 'dark money' groups and APS. But what are they looking for?*, ARIZONA REPUBLIC, Aug. 16, 2016, http://www.azcentral.com/story/money/business/energy/2016/08/15/fbi-inquiry-into-utility-regulators-aps-2014-elections-continues/88772050/.

[9] "Statewide office' means the office of governor, secretary of state, state treasurer, attorney general, superintendent of public instruction, corporation commissioner or mine inspector." Ariz. Rev. Stat. § 16-901(49).

[10] Ariz. Rev. Stat. § 16-905.

[11] Ariz. Rev. Stat. §§ 16-926; 16-927.

[12] Ariz. Rev. Stat. §§ 16-912; 16-914; 16-915; 16-917.

[13] Ariz. Rev. Stat. §§ 16-916(A); 16-1022(A). Corporations may not make direct contributions to candidates, but they may sponsor a separate segregated fund political action committee, subject to particular requirements, and make contributions to candidates. Ariz. Rev. Stat. § 16-916(C).

[14] "'Independent expenditure' means an expenditure by a person, other than a candidate committee, that complies with both of the following: (a) Expressly advocates the election or defeat of a clearly identified candidate. (b) Is not made in cooperation or consultation with or at the request or suggestion of the candidate or candidate's agent." § 16-901(31).

Arizona.[15] Arizona law does require an "entity"[16] making independent expenditures over $1,000 in a reporting period to file a report with basic information about the expenditures.[17] However, an outside group's independent expenditure report does not have to disclose any information about the organization's donors or sources of funding.[18]

Consequently, a corporation, LLC, or other organization that does not want to be publicly identified as the source of funds for a political advertisement can completely avoid public disclosure under Arizona's laws. Rather than making the expenditures itself, an entity regulated by the Commission can simply transfer or donate money to an outside group for the purpose of making independent expenditures. The outside group then could spend the money to make independent expenditures supporting or opposing Commission candidates. While the outside group would have to file a report stating that it sponsored the ad, it would not have to disclose the underlying sources of the ad's funding. This type of undisclosed campaign spending, commonly called "dark money," has dramatically increased in recent federal and state elections as detailed below.[19]

II. History and development of campaign finance disclosure.

The disclosure of funds spent to influence elections is a cornerstone of campaign finance law. With origins in the reforms of the Progressive era, political disclosure laws serve as a mechanism to shine light on the real sources of money spent to influence our democratic processes. Historically, such laws have enjoyed bipartisan support as a means of combating corruption and informing the public about the financial interests behind candidates and elected officials.

Robust public disclosure of campaign spending prevents political corruption by assisting the public and enforcement agencies in monitoring the impact of that money on the behavior of elected officials. The creation of a public paper trail documenting significant campaign contributors and spenders deters elected officials from improperly rewarding their largest campaign supporters, and also helps regulators to detect illicit quid pro quo exchanges when they do occur.

Beyond preventing the corruption of elected leaders, disclosure provides key information to voters to help them evaluate the merits of candidates and messages within the political

---

[15] *See* Ariz. Rev. Stat. § 16-922(A) ("Any person may make independent expenditures."); *see also infra* Part I., B. To qualify as a PAC in Arizona, an entity must be organized "for the primary purpose of influencing the results of an election." Ariz. Rev. Stat. § 16-905(B).

[16] "'Entity' means a corporation, limited liability company, labor organization, partnership, trust, association, organization, joint venture, cooperative, unincorporated organization or association or other organized group that consists of more than one individual." Ariz. Rev. Stat. § 16-901(22).

[17] Ariz. Rev. Stat. § 16-926(H).

[18] *Id*.

[19] *See infra* Part I. B.

marketplace. Campaign finance disclosure can divulge much about a candidate's or group's position on policy issues and "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."[20] Further, disclosure offers some indication of the interests to which a candidate will be responsive if elected and "facilitates predictions of future performance in office."[21] Similarly, information gleaned through disclosure can help voters to assess the credibility and viewpoint of political advertisements through identification of the ad's sponsor and funding sources.

A. The United States Supreme Court has consistently upheld the constitutionality of campaign finance disclosure laws.

Concerns over political corruption prompted passage of the first disclosure laws in the U.S. at the close of the 19th century. Nearly every state had adopted some measure of campaign finance disclosure by the late 1920s.[22]

Congress enacted the first federal disclosure legislation, the Publicity of Political Contributions Act (Publicity Act), in 1910.[23] As amended in 1911, the Publicity Act required any organization that "spent more than $50 annually for the purpose of influencing congressional elections in more than one State" to disclose each contributor of over $100 and each expenditure over $10.[24]

The Federal Election Campaign Act of 1971 (FECA), as amended in 1974 and 1976, established much of the modern framework for disclosure that continues to govern federal election spending today. A key provision of FECA required a non-PAC group making independent expenditures over $100 "for the purpose of…influencing" federal elections to file a disclosure statement with the newly-created Federal Election Commission (FEC).[25] Additional disclosure components of FECA included requiring all federal candidates and committees to file quarterly reports; extending disclosure requirements to presidential candidates; increasing public accessibility of disclosure reports; and charging the FEC with responsibility for the receipt of campaign reports.[26]

In *Buckley v. Valeo*, the Supreme Court upheld the constitutionality of FECA's disclosure regime. The Court distinguished disclosure from contribution and expenditures limits by emphasizing that disclosure requirements "impose no ceiling on campaign-related activities."[27] The Court identified three important government interests directly advanced by disclosure. First,

[20] Human Life of Wash., Inc. v. Brumsickle, 624 F.3d 990, 1006 (9th Cir. 2010).

[21] *Id*.

[22] *Id*.

[23] *Id*. at 403.

[24] 36 Stat. 822, 823 (2010) (codified as amended at 2 U.S.C. §434 (1911)).

[25] Buckley v. Valeo, 424 U.S. 1, 63-64 (1976).

[26] *See* Federal Election Campaign Act of 1971, Pub. L. No. 92-225, 86 Stat. 3 (1972).

[27] Buckley v. Valeo, 424 U.S. at 64.

disclosure furnished information to the electorate "in order to aid the voters in evaluating those who seek federal office."[28] Second, disclosure prevented corruption and the appearance of corruption, "by exposing large contributions and expenditures to the light of publicity."[29] Finally, the Court noted that the recordkeeping mandated by disclosure helped to ensure enforcement of contribution limits and other regulation.[30]

While *Buckley* upheld FECA's independent expenditure disclosure provisions, the Court adopted a limiting construction. The Court expressed concern that the Act's specific definition of "expenditure" could capture issue advocacy unrelated to campaigns; therefore, the Court narrowed the application of independent expenditure disclosure to "communications that expressly advocate the election or defeat of a clearly identified candidate."[31] Express advocacy, the Court clarified, entailed so-called "magic words" of support or opposition "such as 'vote for,' 'elect' 'support,' 'cast your ballot for,' 'Smith for Congress,' 'vote against,' 'reject,' 'defeat.'"[32]

The decades following *Buckley* exposed deficiencies in FECA's disclosure rules as narrowly construed by the Court. Organizations could fund candidate-related advertisements but shirk disclosure under FECA so long as they avoided words of express advocacy. These organizations often had anodyne names, like "Citizens for Better Medicare," that fostered public perceptions they were grassroots organizations rather than shell groups bankrolled by special interests.

In 2002, Congress attempted to close shortcomings in FECA's coverage by enacting the Bipartisan Campaign Reform Act (BCRA).[33] Congress especially sought to eliminate sham "issue" advertisements that skirted coverage under FECA by avoiding "magic words" of express advocacy, yet still explicitly named and discussed federal candidates. To this end, BCRA imposed disclosure requirements on organizations sponsoring "electioneering communications"—defined as broadcast advertisements that (1) referenced specific candidates, (2) were aired shortly before an election, and (3) were targeted to the candidate's relevant electorate.[34]

The constitutionality of BCRA's electioneering communications disclosure provision was challenged shortly after the Act's passage. In *McConnell v. FEC*, the Supreme Court "rejected

---

[28] *Id*. at 66-67.

[29] *Id*. at 67.

[30] *Id*. at 67-68.

[31] *Id*. at 80.

[32] *Id*. at 44 n. 52.

[33] Pub. L. No. 107-155, 116 Stat. 81 (2002).

[34] *See* McConnell v. Fed. Election Comm'n, 540 U.S. 93, 194 (2003) ("The term 'electioneering communication' applies only (1) to a broadcast (2) clearly identifying a candidate for federal office, (3) aired within a specific time period and (4) targeted to an identified audience of at least 50,000 viewers or listeners."); *see also* 52 U.S.C. § 30104(f) (delineating reporting requirements for electioneering communications).

the notion that the First Amendment requires Congress to treat so-called issue advocacy differently from express advocacy." The Court explained that *Buckley*'s limiting construction of FECA's independent expenditure disclosure provision to cover only express advocacy communications "was the product of statutory interpretation rather than a constitutional command."[35] For the Court, the public's right to know the identity of the sources of candidate-related speech before an election outweighed the argument that an organization had a right to fund such speech anonymously:

> [The 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.[36]

The *McConnell* Court proceed to uphold BCRA's electioneering communication disclosure by an eight-to-one margin. The effectiveness of BCRA's disclosure mandates was handily demonstrated in the two election cycles following *McConnell*. An estimated 96.5% of outside money spent to influence federal elections during the 2004 election cycle was fully disclosed; for the 2006 cycle, an estimated 92.9% of outside spending on federal elections was completely disclosed.[37] Unfortunately, this high water mark was short-lived.

B. Although the Supreme Court's decision in *Citizens United v. FEC* endorsed disclosure, there has been a dramatic increase in the amount of dark money in elections at all levels of government.

In 2010, the Court again upheld BCRA's electioneering communication disclosure requirements by an eight-to-one margin in *Citizens United*. As in *McConnell*, the Court strongly endorsed the constitutionality of the disclosure law and extolled its capacity to "'insure that the voters are fully informed' about the person or group who is speaking" about a candidate in the run-up to an election.[38] The Court was satisfied that BCRA's disclosure provisions had a "substantial relation" to the government's "sufficiently important" interest in an informed electorate, even as applied to a video on-demand documentary and commercial advertisements promoting the film.

Although *Citizens United* reiterated the Court's support for comprehensive disclosure of independent campaign spending, the decision simultaneously opened a new channel for secret spending to influence federal and state elections. By invalidating the federal prohibition on

---

[35] *McConnell*, 540 U.S. at 103.

[36] *Id*. at 198 (quoting McConnell v. Fed. Election Comm'm, 251 F. Supp. 2d 176, 237 (2003)).

[37] Trevor Potter & Bryson B. Morgan, *The History of Undisclosed Spending in U.S. Elections & How 2012 Became the "Dark Money" Election*, 27 NOTRE DAME J.L. ETHICS & PUB. POL'Y 383, 442 (2013).

[38] Citizens United v. Fed. Election Comm'n, 558 U.S. 310, 369 (2010) (quoting Buckley v. Valeo, 424 U.S. 1, 76 (1976)).

corporate and union independent campaign spending, and implicitly nullifying equivalent state restrictions, *Citizens United* allowed corporate entities and other outside groups to use their general treasuries to fund advertisements expressly advocating the election or defeat of candidates. Consequently, independent spending on both federal and state elections surged, resulting in an exponential increase in "dark money"—i.e., funds spent by an organization that does not disclose the underlying source of its funding.

In the post-*Citizens United* universe, different methods are used by outside groups to avoid donor disclosure requirements. These groups, which are often organized as Section 501(c)(4) social welfare organizations under the federal tax code, typically do not qualify as PACs under federal or state law because they do not have the "major" or "primary" purpose of influencing elections.[39] Accordingly, the FEC and some states only require these groups to disclose donors who gave money specifically for funding candidate-related advertisements, if they are required to disclose at all.[40] Moreover, because these groups are legally "independent" from candidates and parties, there are no statutory limits on the contributions they can receive. Both for-profit corporations and wealthy individuals thus give huge donations to these outside groups with the expectation that the donated funds will go toward independent expenditures to influence elections.

Another common tactic employed by outside groups to thwart donor disclosure is through sophisticated organization-to-organization transfers. In these "daisy chain" schemes, a large donation originating from a for-profit corporation or wealthy individual will pass through multiple 501(c)(4) organizations before the funds are ultimately used for independent expenditures. While the ultimate spender may have to report the organization from which it directly received the funds, the spender typically has no legal obligation to trace the money back to its original source.

Data from recent elections readily demonstrates the marked escalation in dark money spending precipitated by *Citizens United*. During the 2012 federal election cycle, an estimated $308 million was spent by groups that do not publicly disclose their donors.[41] For the 2014 federal midterm elections, non-disclosing groups spent over $177 million.[42] In 2016, at least $182 million in dark money went into federal races (over $1 billion was channeled through more transparent "Super PACs").[43] As a point of reference, in 2006, the last election cycle in which

[39] *See, e.g.*, Ariz. Rev. Stat. § 16-905(B) (requiring an entity to register as a political action committee only if it has the "primary purpose of influencing the results of an election.").

[40] *See, e.g.*, 11 C.F.R. § 109.20(e) (limiting disclosure for federal independent expenditure reports to "each person who made a contribution in excess of $200 to the person filing the report, which contribution was made for the purpose of furthering the reported independent expenditure.").

[41] CTR. FOR RESPONSIVE POLITICS, *Outside Spending by Nondisclosing Groups, Cycle Totals, Excluding Party Committees*, https://www.opensecrets.org/outsidespending/nonprof_summ.php.

[42] *Id*.

[43] *Id*.

BCRA's disclosure provisions applied in full force, just over $5 million was spent by groups that do not disclose their donors publicly.[44]

Dark money can have an even greater impact on state and local elections due to the smaller scale of political races. In Arizona, undisclosed spending in state elections has mirrored the uptick at the federal level. As chronicled in a report by the Brennan Center for Justice, over $10.3 million in dark money was spent on Arizona elections in 2014.[45] That figure is 295 times greater than the $35,005 in dark money that was spent on state elections in 2006.[46] Chris Herstam, a lobbyist and former state legislator, remarked that "[Arizona] politics have changed dramatically since *Citizens United* as a direct result of dark money…In my 33 years in Arizona politics and government, dark money is the most corrupting influence I have seen…Without adequate disclosure laws, Arizonans do not know for sure who is purchasing their elected offices. And we, the citizens, don't have the proof to make it an issue and take a stand against it in any particular election…while dark money gets a lot of national publicity, it is having a monstrous effect in Arizona."[47]

C. Other states have addressed dark money by requiring outside groups to disclose their donors.

Since Arizona law does not require corporations and other outside groups funding independent expenditures to disclose any donor information, state elections are especially susceptible to dark money.[48] Other states, however, have addressed dark money with innovative and comprehensive disclosure requirements designed to reach independent spending by non-PAC groups.

Some states treat corporations and other entities as PACs for purposes of disclosure once they have engaged in significant independent spending, even if the organization does not have the primary purpose of influencing elections. In California, a "multipurpose organization"[49] that

---

[44] *Id*.

[45] CHISUN LEE, KATHERINE VALDE, BENJAMIN T. BRICKNER, & DOUGLAS KEITH, SECRET SPENDING IN THE STATES, BRENNAN CTR. FOR JUSTICE 7.

[46] *Id*.

[47] *Id*. at 10.

[48] *See* Ariz. Rev. Stat. § 926(H) ("An entity that makes independent expenditures or ballot measure expenditures in excess of one thousand dollars during a reporting period shall file an expenditure report with the filing officer for the applicable reporting period. Expenditure reports shall identify the candidate or ballot measure supported or opposed, office sought by the candidate, if any, election date, mode of advertising and first date of publication, display, delivery or broadcast of the advertisement.").

[49] "'[M]ultipurpose organization' means an organization described in Sections 501(c)(3) to 501(c)(10), inclusive, of the Internal Revenue Code[1] and that is exempt from taxation under Section 501(a) of the Internal Revenue Code, a federal or out-of-state political organization, a trade association, a professional association, a civic organization, a religious organization, a fraternal society, an educational institution, or any other association or

makes independent expenditures or contributions in excess of $50,000 within a 12 month period must register and report as a PAC for the remainder of the calendar year.[50] On its reports, the organization must disclose contributions that were solicited or otherwise earmarked for the purpose of making contributions or expenditures.[51] If these contributions do not match the total amount of campaign spending by the organization in the reporting period, then the organization must account for the balance by reporting donors who have given at least $1,000 within the calendar year using a "last in, first out" accounting method.[52]

Instead of imposing PAC status, some states require outside groups to file event-driven reports of independent expenditures when they spend above a threshold amount; such reports often must disclose information about the spending group's donors, even if the donors did not state explicitly that they were giving for political purposes.[53] Rhode Island requires event-driven reports whenever a group spends over $1,000 in a year on independent expenditures or electioneering communications.[54] If the group uses general treasury funds for its independent expenditures, it must disclose the identity of any donor who has given over $1,000 to the group within the election cycle.[55] This requirement applies even if the donor did not give to the organization for political purposes, unless the donor and the organization mutually agreed at the time of the donation that the money would not go toward campaign spending.[56] Alternatively, a group may establish a separate campaign-related account to make independent expenditures, in which case it is only required to disclose contributors to that account.[57]

A third system for disclosure of organization-to-organization transfers exists in Minnesota. Minnesota requires an "association," which is generally any non-PAC organization[58] that intends to make independent expenditures in excess of $1,500 in a calendar year to do so through an

---

group of persons acting in concert, that is operating for purposes other than making contributions or expenditures." Cal. Gov't Code § 84222(a).

[50] Cal. Gov't Code § 84222(c)(5).

[51] *Id*. § 84222(e)(1)(C).

[52] *Id*. § 84222(e)(2). "Last in, first out" accounting is a reverse chronological method in which the most recent contributions are reported first.

[53] Event-driven reporting is not ongoing, and, instead, mandates reports when an entity's campaign spending exceeds some monetary threshold. Arizona's current independent expenditure reporting statute is event-driven, but does not require donor disclosure.

[54] R.I. Gen. Laws § 17-25.3-1.

[55] *Id*.

[56] *Id*.

[57] *Id*.

[58] "Association" broadly means "a group of two or more persons, who are not all members of an immediate family, acting in concert." It includes both profit and nonprofit corporations. Minn. Stat. Ann. § 10A.01(6).

"independent expenditure fund."[59] An association's independent expenditure fund files reports on the same schedule as a PAC,[60] and the fund may accept unlimited contributions from the sponsoring association's general treasury.[61] Other associations also may make contributions without limit to another group's independent expenditure fund from their general treasury money.[62]

An association that has contributed over $5,000 in the aggregate to one or more independent expenditure funds during the calendar year, including to its own fund, must provide to the recipient fund a written statement disclosing the name, address and amount attributable to each person who donated more than $5,000 to the association that was used by the association to donate to the independent expenditure fund.[63] The contributing association must provide this disclosure statement to the independent expenditure fund prior to the date that the fund's next report is due with the Minnesota Campaign Finance and Public Disclosure Board.[64] The recipient independent expenditure fund then submits the contributing association's disclosure statement when filing its next report.[65] More simply stated, the law requires a contributing association to disclose its donors to the recipient independent expenditure fund, and the recipient fund in turn provides this information to the state.

III. The Commission's important place within Arizona government and its broad authority necessitate consideration of other reforms.

A. Courts have recognized unique corruption concerns raised by the campaign activity of highly-regulated industries.

In addition to robust transparency and disclosure rules, the Commission should enact reforms to address considerations unique to its governmental role. In the context of government contracting, courts have long recognized that a contractor's campaign contributions, or other forms of personal or campaign support, to officials with the authority to issue, modify or terminate its contracts raises heightened corruption and bias concerns. Indeed, Congress has prohibited federal contractors and prospective contractors from making political contributions to federal candidates since 1940. As stated in *FEC v. Weinsten*, "there is a greater likelihood that the public will perceive corrupt relationships between elected officials and corporations when those corporations have previously received Government contracts . . . ."[66] Thus, federal regulation of

[59] *Id*. § 10A.12(1a).

[60] *Id*. §§ 10A.14(1a); 10A.20.

[61] *Id*. § 10A.27(15)(a).

[62] *Id*.

[63] *Id*. § 10A.27(15)(b).

[64] *Id*.

[65] *Id*. § 10A.27(16).

[66] Fed. Election Comm'n v. Weinsten, 462 F. Supp. 243, 249 n.8 (S.D.N.Y. 1978).

government contractors' campaign-related spending has extended well beyond disclosure requirements.

A growing number of states and localities similarly have taken steps to restrict political contributions from government contractors. At least seventeen states have limits or prohibitions on campaign contributions from current and/ or prospective government contractors or licensees.[67] Various municipalities, including New York City and Los Angeles, have followed suit with their own "pay-to-play" restrictions.[68]

Two more states, Maryland and Rhode Island, have special political spending disclosure requirements for state contractors.[69] For instance, Maryland requires a governmental contractor with more than $200,000 in business with the state to file reports upon the awarding of a contract, and semiannual reports thereafter, disclosing all of its political contributions to candidates, political parties and PACs.[70] The disclosure obligation covers contributions from the contracting entity, its subsidiaries, its officers and directors, and any other individual whose contributions are attributable to the business entity.

Given the widespread problems presented by pay-to-play practices, courts have consistently approved restrictions on the campaign-related spending of entities doing business with the government. The federal contractor contribution ban has been upheld twice.[71] Most recently, the en banc D.C. Circuit unanimously upheld the federal prohibition on contractors contributing "directly or indirectly" to federal candidates, political parties or PACs.[72] The court recognized two interests underpinning the ban. First, the court acknowledged the contractor prohibition advanced an interest in preventing the actuality and appearance of corruption.[73] Second, the court noted the ban prevented "interference with merit-based public administration," since

---

[67] Cal. Gov't Code § 84308(d); Conn. Gen. Stat. § 9-612(f)(1)-(2); Haw. Rev. Stat. § 11-355; 30 Ill. Comp. Stat. 500/50-37; Ind. Code §§ 4-30-3-19.5 to -19.7; Ky. Rev. Stat. Ann. § 121.330; La. Rev. Stat. Ann. §§ 18:1505.2(L), 27:261(D); Mich. Comp. Laws § 432.207b; Neb. Rev. Stat. §§ 9-803, 49-1476.01; N.J. Stat. Ann. § 19:44A-20.13 to -20.14; N.M. Stat. Ann. § 13-1-191.1(E)-(F); Ohio Rev. Code § 3517.13(I) to (Z); 53 Pa. Cons. Stat. § 895.704-A(a); S.C. Code Ann. § 8-13-1342; Vt. Stat. Ann. tit. 32, § 109(B); Va. Code Ann. § 2.2-3104.01 (amended by Va. Acts 2013, Ch. 583 (eff. July 1, 2014)); W. Va. Code § 3-8-12(d).

[68] N.Y.C. Admin. Code §§ 3-702(18), 3-703(1-a) to (1-b); L.A., Cal., City Charter § 470(c)(12).

[69] *See* Md. Code, Elec. Law §§ 14-101 to 14-108 (amended by 2013 Md. Laws, Ch. 419 (eff. Jan. 1, 2015)); R.I. Gen. Laws §§ 17-27-2 to 17-27-5. Several of the states that restrict contractor campaign contributions also require contractors to file disclosure reports. *See, e.g.*, 25 Pa. Cons. Stat. § 3260a(a).

[70] Md. Code, Elec. Law §§ 14-101 to 14-108.

[71] *See* Wagner v. Fed. Election Comm'n, 793 F.3d 1 (D.C. Cir. 2015).

[72] *Id*.

[73] *Id*. at 3.

governmental “service should depend upon meritorious performance rather than political service.”[74]

Other federal circuits have upheld comparable state restrictions on government contractors. In *Green Party of Connecticut v. Garfield*, the Second Circuit upheld a Connecticut statute barring contributions from a state contractor, its “principals,” and the contractor’s or principals’ immediate family members.[75] The Court of Appeals found that Connecticut had a valid anti-corruption interest in its sweeping ban: “[T]he dangers of corruption associated with contractor contributions are so significant . . . that the General Assembly should be afforded leeway in its efforts to curb contractors’ influence on state lawmakers.”[76] In *Ognibene v. Parkes*, the Second Circuit again approved a broad pay-to-play law by upholding New York City’s regulation of contributions from entities “doing business” with the City.[77] This category was expansively defined to cover persons who had received or were seeking contracts, franchises, concessions, grants, pension fund investment contracts, economic development agreements and/ or land use actions with the city.[78]

Campaign-related spending by heavily-regulated industries, like energy utility corporations in Arizona, in support of their regulators prompts analogous concerns about corruption and bias. Many states have focused regulatory attention on the campaign-related activities of highly-regulated industries, such as casinos and liquor licensees, and state courts have routinely upheld contribution restrictions applicable to such businesses on the basis that their political spending poses a heightened risk of political corruption.[79]

B. The Commission’s judicial functions require the Commission to adhere to a higher standard of transparency.

The Supreme Court has made clear that both large campaign contributions and independent spending on campaign-related communications pose a particular threat to the appearance—and in some cases the reality—of judicial integrity. Equivalent concerns are implicated when a governmental body with adjudicatory functions, like the Commission, decides a matter affecting a person or entity that has previously expended funds to elect the officials comprising that body.

---

[74] *Id*. at 8-9.

[75] 616 F.3d 189, 202 (2d Cir. 2010).

[76] *Id*. at 203.

[77] 671 F.3d 174 (2d Cir. 2011).

[78] *Id*. at 179.

[79] *See, e.g.,* Casino Ass’n of La. v. State ex rel. Foster, 820 So.2d 494 (La. 2002) (upholding state law prohibiting any political contributions from officers, directors, and certain employees in the casino industry and their spouses); Soto v. New Jersey, 565 A.2d 1088 (N.J. 1989) (upholding prohibition on contributions from casino industry); Schiller Park Colonial Inn, Inc. v. Berz, 349 N.E.2d 61 (Ill. 1976) (upholding law prohibiting political contributions from any officer, associate, agent, representative, or employee of a liquor licensee).

In *Caperton v. A.T. Massey Coal Co., Inc*., the Supreme Court outlined the heightened concerns raised by campaign spending in the context of judicial elections.[80] *Caperton* centered on the campaign spending of Don Blankenship, chairman and CEO of A.T. Massey Coal, on behalf of Brent Benjamin, a candidate for the Supreme Court of Appeals of West Virginia (the highest court in the state).[81] While A.T. Massey was planning to appeal a $50 million jury verdict against the company with the Supreme Court of Appeals, Blankenship expended around $3 million in support of Benjamin's candidacy, including: a $1,000 direct campaign contribution, $2.5 million in donations to a political organization that made independent expenditures supporting Benjamin, and $500,000 for his own independent expenditures advocating Benjamin's election.[82] Blankenship's total campaign spending on Benjamin's behalf eclipsed the aggregate amount spent by all other Benjamin supporters in addition to the amount spent by Benjamin's own campaign committee. Benjamin proceeded to win the seat and, as justice, formed part of a 3-2 majority that ruled to overturn the verdict against A.T. Massey.[83]

Throughout the proceedings, Benjamin repeatedly refused to recuse himself despite assertions that Blankenship's prodigious campaign spending on his behalf created a constitutionally impermissible conflict of interest.[84] The U.S. Supreme Court granted cert to hear whether Benjamin should have recused himself as a matter of due process under the Fourteenth Amendment. While conceding that not all campaign contributions to judicial candidates create a risk of bias, the Court determined "there is a serious risk of actual bias—based on objective and reasonable perceptions—when a person with a personal stake in a particular case had a significant and disproportionate influence in placing the judge on the case by raising funds or directing the judge's election campaign."[85] Further, the Court noted that, in the interest of maintaining the appearance of judicial impartiality, "objective standards may also require recusal whether or not actual bias exists or can be proved."[86] In holding that Benjamin's failure to recuse violated the Due Process Clause, the Court explained that recusal is necessary when the degree of campaign spending is such that "'the probability of actual bias on the part of the judge or decisionmaker is too high to be constitutionally tolerable.'"[87]

There are clear parallels between the facts of *Caperton* and independent spending on Commission elections that may have been funded by regulated entities. To the extent the Commission operates as an adjudicatory body, preserving the actuality and appearance of its integrity and impartiality is a governmental interest of the highest order. *Caperton* makes clear that limits on direct contributions to public officials alone do not resolve concerns over judicial

[80] 556 U.S. 868 (2009).

[81] *Id*. at 872-76.

[82] *Id*.

[83] *Id*.

[84] *Id*.

[85] *Id*. at 884.

[86] *Id*. at 886.

[87] *Id*. at 872 (quoting Withrow v. Larkin, 421 U.S. 35, 47 (1975)).

integrity when there has been significant independent spending by persons or entities with a substantial interest in matters pending before the tribunal.

IV. Conclusion

The Campaign Legal Center hopes that the full Commission will recognize the crucial interests served by transparency. Meaningful disclosure of campaign spending fosters informed choices by the electorate and helps to preserve the integrity of government. In relation to a regulatory body like the Commission, which exercises authority over some of the state's most powerful corporations, the importance of complete disclosure of spending meant to influence members of the Commission is indisputable.

The Campaign Legal Center currently is developing model disclosure legislation that would address the type of independent spending that occurred in recent Commission elections. We would be happy to share that legislation with you when it is complete. Further, please contact us if there are any questions about the material covered in this testimony.

We appreciate the opportunity to submit this testimony.

Sincerely,

Tara Malloy
Deputy Executive Director