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Dear Senator :

You recently received a letter from the Chamber of Commerce expressing opposition to S. 2219, the DISCLOSE 2012 Act, which is expected to be considered soon by the Senate Rules Committee. The letter claims that the effort to increase transparency in elections in the aftermath of the ground-shifting Supreme Court decision in *Citizens United v. Federal Election Commission* (FEC) is, at its base, partisan.

The Campaign Legal Center, a non-partisan, nonprofit organization, strongly urges you to carefully consider the unsettling and potentially dangerous consequences of the approach advocated by the Chamber. While the 112th Congress is struggling with a sharp partisan divide, the Legal Center believes it is imperative for Republicans and Democrats alike to work toward a legislative response to the new types of spending triggered by the *Citizens United* decision. We stand ready to provide you with non-partisan assistance in the effort to ensure that Americans have the information they need to be informed and engaged voters.

We are especially troubled by several erroneous and misleading legal attacks by the Chamber against improved disclosure. In this letter, we seek to set the record straight—without partisan bias—as to why our nation's campaign finance disclosure system needs to be updated following *Citizens United* and why such efforts are directly in line with Supreme Court precedent. In addition, we urge you to see the Chamber's contention that the bill favors unions over business corporations as the smoke screen it is, and to reject this argument.

I. Background on the 2012 Elections and Outside Spending

Recent developments in the electoral arena demonstrate why Congress needs to act to improve disclosure. Spending by outside groups in the 2012 elections has already topped the $130 million mark, according to the Center for Responsive Politics. In the recent Republican presidential primaries, more than $90 million dollars was spent by supposedly "independent groups"—many of which were closely allied with specific candidates.

Even more troubling, while spending by so-called Super PACs, or "independent expenditure-only committees," is being reported to the Federal Election Commission (FEC), the donors funding the expenditures of so-called "Section 501(c) groups" are not being reported. These groups include such entities as Crossroads GPS, the Chamber of Commerce and Priorities USA.

According to a recent report of the Wesleyan Media Project, ten groups have already exceeded the million-dollar mark for the general election, and seven of the ten are nonprofits that do not disclose

their donors. They together spent $30 million. Many more millions will be dispensed to influence the outcome of the elections over the next five months, much on television advertising, and neither the candidates nor the public will have accurate information about the sources of such money.

In congressional races, outside groups are taking advantage of their new rights under *Citizens United* to spend unlimited amounts from unlimited sources. In the recent Senate primary for Indiana, both candidates, Senator Richard Lugar and the victorious Indiana State Treasurer Richard Mourdock, were outspent by outside groups who poured in more than $4 million to sway the outcome of the race. House races have also already seen heavy investment by outside groups: in the California District 31 race, for instance, $1.3 million has already been spent by independent groups.

II. Why Improved Disclosure Is Needed Following the *Citizens United* Decision

Citizens United struck down the restrictions on corporate and union spending to influence federal elections, but it did not invalidate any disclosure requirements applicable to such spending; instead, eight Justices strongly endorsed the electioneering communications disclosure requirements that were also at issue in the case. The Supreme Court's support for transparency notwithstanding, corporations and unions have clear incentives to avoid disclosure and accountability, and federal tax and campaign finance laws unfortunately have accommodated this preference. The two techniques now frequently employed to evade disclosure are: (1) use of a Section 501(c) group to engage in independent campaign-related spending; and (2) use of a Section 501(c) group or business corporation as an intermediary to contribute to a federal political committee.

Following *Citizens United*, almost half of all the independent spending in federal elections has been conducted by groups organized under Section 501(c) of the Internal Revenue Code, such as Section 501(c)(4) (social welfare groups) and Section 501(c)(6) (trade associations). Federal tax law allows these groups to spend unlimited amounts on campaign advertisements for candidates, provided that candidate-related advocacy is not the organization's "primary activity," but does not require the groups to publicly disclose their donors. As a result, instead of spending directly on election ads, corporations and unions often choose to route their political money through 501(c) groups to maintain their anonymity.

Further, the Federal Election Campaign Act (FECA) has not proven to be much more effective at ensuring disclosure of the donors to 501(c) groups. FECA's "independent expenditure" donor reporting requirements require the disclosure only of those donors who *specifically designate* their donations for election ads. Similarly, the FEC's rule implementing FECA's "electioneering communication" donor disclosure requirement applies the same "specifically designated" test (though the FEC's rule is currently under legal challenge and has been invalidated by a federal district court). Corporate and other donors to 501(c) organizations simply refrain from earmarking contributions for election ads and, by doing so, entirely avoid the FECA disclosure requirements. The result of this subterfuge is that the percentage of federal campaign-related spending by groups that do not disclose their donors rose from 1 percent in the 2006 mid-term elections to 47 percent in the 2010 mid-term elections following *Citizens United*.

In addition to the proliferation of election-related 501(c) groups, the *Citizens United* decision also led to Super PACs—even though the decision never mentioned them, and there is no evidence the Justices ever conceived of such a development. The Supreme Court's finding in *Citizens United* that independent expenditures pose no threat of actual or apparent corruption led to a subsequent decision by the D.C. Circuit Court of Appeals, *SpeechNow v. FEC*, which held that contributions to groups

making only independent expenditures could not be constitutionally limited. This was the genesis of the "independent expenditure-only committee," or "Super PAC," which is bound neither by the federal contribution amount limits, nor by the federal law restriction on corporation and union contributions.

Under federal law, political action committees, such as Super PACs, must regularly report all contributions of over $200—corporate or otherwise. Disclosure, however, is not the same as complete transparency. The current campaign finance disclosure law requires only that political committees disclose their immediate sources of funding—not that those funders in turn disclose their own donors.

Because political committee reporting requirements thus penetrate only "one level" of contributions, the true interests funding Super PACs often remain opaque. What about contributions to Super PACs from shell corporations? Or from 501(c)(4) or 501(c)(6) organizations that do not themselves publicly disclose the sources of their funds? For example, if a Super PAC discloses that it received contributions from "Anonymous Corp." and "Americans Who Love America," it has fulfilled its current statutory requirements. However, that disclosure does not reveal anything about the sources of Anonymous Corp.'s and Americans Who Love America's money, nor their political interests or purposes.

Further, there have already been reports of deliberate efforts to use shell corporations to hide the true sources of Super PAC contributions. Last year, for example, the Super PAC Restore Our Future reported its receipt of three $1 million contributions of questionable legality from mysterious corporate donors—W Spann LLC, F8 LLC and Eli Publishing, L.C. These corporations had no discernible business activities and, therefore, appear to have been used specifically for the purpose of hiding the true donors' identities.

These attempts at evading disclosure notwithstanding, neither the IRS (apparently averse to dealing with politically controversial issues), nor the FEC has shown any inclination to wade into these turbulent waters. Moreover, the FEC is persistently trapped in partisan deadlock; in many cases, it is not merely inadequate in responding to such evasions, but is wholly unable to act.

III. Errors of Legal Reasoning in the Chamber's Letter

A. The Chamber's Allegations of "Chill" Do Not Render the Bill Unconstitutional.

The Chamber's letter argues that S. 2219 "infringes constitutional rights" because disclosure has a "chilling" effect on speech and will "facilitate retaliation." This argument is faulty in at least two respects. It fails to acknowledge the crucial First Amendment interests on the other side of the constitutional ledger supporting disclosure, as well as the position of the Supreme Court, which has consistently upheld electoral disclosure laws against First Amendment challenge. Further, although the Chamber argues that the bill will facilitate retaliation, it offers no more than speculation about this threat, and makes no allegations specific to its members or the Chamber itself.

First, the Chamber ignores the important First Amendment speech interests advanced by disclosure; they are so vital, in fact, that the Supreme Court regularly upholds disclosure laws against similar challenges. In 2010 alone, the high Court twice upheld challenged disclosure requirements by 8-1 votes in *Citizens United* and *Doe v. Reed*.

The Court's decisions in *Doe* and *Citizens United* reiterated that, in general, disclosure imposes only modest burdens on individual speech—burdens that are readily outweighed by the important speech interests advanced by disclosure. As Justice Scalia stated in his opinion in *Doe*:

> 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.

Similarly, the *Citizens United* decision emphasized:

> 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.

The Supreme Court and the voting public have long recognized that disclosure advances key First Amendment values, both enabling the electorate to make informed political choices and arming citizens with the information they need to hold political actors accountable. These interests are a venerable and indispensable part of our First Amendment tradition.

Second, the Chamber opposes the bill on grounds that it will trigger "unconstitutional reprisals" against corporate speakers, but it omits the fact that the Supreme Court has already fashioned a remedy for potential harassment due to political disclosure. In *Buckley v. Valeo*, the Court held that a specific group could request an "as-applied" exemption to a campaign disclosure law if it presented evidence showing "a reasonable probability that the compelled disclosure of [its] contributors' names will subject them to threats, harassment, or reprisals from either Government officials or private parties." But the Court did not question the general constitutionality of disclosure on these grounds, nor fashion a blanket exemption from disclosure as the Chamber proposes here.

Furthermore, the Court requires evidence of harassment or reprisals before it granted even an group-specific, "as applied" exemption to disclosure. Vague, unproven, and generalized allegations of potential "retaliation" like those offered by the Chamber do not suffice. Only if a group can demonstrate a legitimate fear of "reprisals" from campaign finance disclosure is an exemption warranted. For example, several years after *Buckley*, the Supreme Court recognized that the Ohio Socialist Workers Party (SWP) was entitled to such an exemption. But the SWP had introduced proof of specific incidents of private and government actions toward the SWP and its members within the four years preceding the case, including FBI surveillance of both the national party and the Ohio SWP, police harassment of a party candidate, threatening phone calls and hate mail, the destruction of SWP members' property and the firing of shots at an SWP office. The Supreme Court has thus set a high evidentiary bar for such an exemption, and the Chamber's wholly speculative allegations of possible harassment fall far below it.

The inadequacy of the Chamber's case is brought into further relief by its citation of a 1958 case, *NAACP v. Alabama*, to bolster its argument. There is really no comparison between the facts of *NAACP* and the current position of the Chamber. That case concerned the compelled disclosure of the names and addresses of Alabama NAACP members, where there was ample evidence that disclosure would subject members to severe and even violent reprisals. But it is plainly absurd to compare civil

rights activists in 1950s Alabama to modern-day corporations and unions seeking to hide their campaign activities from public scrutiny. The Chamber is hardly a small or oppressed group. And the "harm" it alleges is not serious physical danger, but rather public criticism and possible consumer boycotts – neither of which are "harassment," and both of which represent protected first amendment activity.

It is thus clear that when the Chamber claims that S. 2219 will have a "chilling" effect on its speech, it is really arguing that disclosure itself discourages people from engaging in protected speech to such an extent that *any* disclosure requirement is unconstitutional. This position, however, is unsustainable, and contrary to all relevant Supreme Court precedent on the subject.

B. The Provisions Relating to Transfers Do Not "Favor" Unions or Render the Bill Underinclusive.

The Chamber also criticizes S. 2219 for its "high" reporting thresholds. It points to the provision requiring an organization engaged in political advocacy to disclose only those donors that contribute more than $10,000 in a two-year election cycle. It further cites a provision that exempts from certain disclosure requirements transfers from affiliates that do not exceed $50,000 for a two-year election cycle.

In criticizing these provisions, the Chamber appears to want a disclosure threshold that is low enough to capture union donors and to put individual union members' names on the public record. It is not clear what public policy interest is served by this approach, however. Union money is union money: knowing the names of typical dues-paying members will not often provide any additional insight into a union's political interests or biases. Moreover, unions are already subject to public reporting obligations under federal labor regulations. Unions are required to file annual reports (LM-2) with the Office of Labor-Management Standards disclosing any political or legislative disbursements of $5,000 or more.[1] These include disbursements for communications with Members, get-out-the-vote and voter education campaigns, expenses related to administering a PAC, and disbursements to Section 527 political organizations.

Further, as a general matter, disclosing the names of very small donors is unlikely to provide much useful information about any groups making campaign expenditures: this is why almost every campaign finance law includes a threshold before disclosure obligations commence. Indeed, if campaign finance laws do not set a reasonable threshold for reporting, they may be subject to constitutional challenge for not being sufficiently tailored to the government's informational interest in disclosure. Disclosure laws in Washington, California, Maine and Vermont are all currently being challenged under this theory. While Congress has considerable discretion in establishing such reporting thresholds—and a wide range of dollar amounts may be reasonable depending on Congress's purposes—setting very low levels, as the Chamber suggests, would needlessly expose the law to legal attack.

Lastly, the Chamber's sudden desire for lower reporting thresholds is simply not credible. It is certain to also oppose any law that contains lower reporting thresholds—particularly if these requirements were applicable to "its" side as well. Indeed, if its opposition to S. 2219 was truly animated by a narrow concern regarding the dollar amount of a reporting threshold, the obvious fix would be simply

[1] The reports are posted on the Department of Labor website and are available to the public at www.unionreports.gov.

to urge a reasonable amendment of the threshold, not to oppose the entire bill. Supporting hypothetical reporting thresholds that are not part of any bill before Congress simply allows the Chamber to make a good talking point without meaningful policy consequences.

IV. Conclusion

Corporations and unions routinely participated in federal elections before the *Citizens United* ruling. They could pay for and control political action committees that could spend unlimited money on advertising on behalf of candidates, but the funds had to be voluntarily contributed by individuals and fully disclosed to the American public.

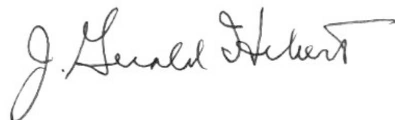
The difference now is that corporations and unions can spend in elections without establishing a PAC and without complying with the federal PAC disclosure requirements. As a result, corporations and unions are now able to spend their shareholders' and members' money without their consent or knowledge and public disclosure has sunk to a level not seen since Watergate.

While there will surely be many millions spent by outside groups in key states to influence the presidential race, it is far more likely that they will concentrate on close Senate and House contests, where an extra $5 million or $10 million would be a large percentage of campaign expenditures—and could make a huge difference in the outcome of an election. This is not to argue that money is determinant in elections, or that candidates with the most money spent on their behalf always win. Just usually.

The Supreme Court has been unusually clear: the sources of political ad funding and other spending can constitutionally be required to be disclosed. This applies not only to Super PACs, but to (c)(4)s, (c)(6)s, and other groups running campaign ads. We just need the political will to do so, because S. 2219 does exactly that.

The Campaign Legal Center urges you to support efforts to bring our outdated campaign finance disclosure laws into the 21st Century. We would be pleased to answer any questions you may have and to provide any assistance you may need in responding to this critical situation.

Sincerely,



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