Democracy 21

THE CAMPAIGN LEGAL CENTER

November 14, 2013

Dear Senator,

In the 2010 *Citizens United* decision, the Supreme Court by an 8 to 1 vote made crystal clear that campaign finance disclosure requirements for groups making expenditures to influence candidate elections are constitutional and provide citizens with information to make voting decisions.

In the nearly three years since the *Citizens United* decision, disclosure laws have been upheld by courts throughout the country which have rejected multiple challenges to their constitutionality.

The *Citizens United* case involved disclosure of contributions to and expenditures by a nonprofit corporation that did not have a major purpose to influence elections and that was sponsoring communications that referred to candidates, some of which did not contain "express advocacy" or its functional equivalent.

The Supreme Court in *Citizens United* flatly rejected claims that these disclosure requirements violate First Amendment free speech rights. In doing so, the Court cited its decision in *Buckley v. Valeo* (1976) which upheld campaign finance disclosure laws on the grounds that they deter corruption and provide voters with information to aid them in evaluating candidates.

The Supreme Court stated in *Citizens United* that campaign finance disclosure laws serve governmental interests in "providing the electorate with information" about the sources of money spent to influence elections so that voters can "make informed choices in the political marketplace."

The *Citizens United* decision also noted that the Court earlier had upheld disclosure laws in order to address the problem that "independent groups were running election-related advertisements while hiding behind dubious and misleading names."

Despite the Supreme Court's 35-year record of consistently upholding campaign finance disclosure laws, opponents have been conducting a nationwide legal assault on the constitutionality of such laws.

Opponents argue that disclosure requirements for groups that make expenditures to influence elections violate First Amendment free speech rights and subject donors to harassment and reprisals. In so doing, they are presenting arguments that the Supreme Court has repeatedly rejected in upholding disclosure requirements.

Some disclosure opponents also have been creating the misleading impression that courts around the country are rejecting disclosure laws.

For example, a recent column by George Will (October 30, 2013), said "Brick by brick, judges are dismantling the wall of separation that legislators have built between political activity and the First Amendment's protections of free speech and association."

Mr. Will cited for this proposition cases in Mississippi and Alabama that are still working their way through the appeals process. Notably, both cases involve spending in ballot measure campaigns, not candidate campaigns.

Will's "brick by brick" analysis, furthermore, is wrong and ignores the fact that since the *Citizens United* decision, the vast majority of federal district courts and courts of appeal throughout the country have been following *Citizens United*'s lead to uphold the constitutionality of laws requiring disclosure by outside groups that spend money in candidate elections.

Since the *Citizens United* decision, strong disclosure laws applicable to groups making independent expenditures in state candidate elections have been upheld as constitutional in more than 20 cases decided by federal district courts and courts of appeal. This has included decisions by the First, Fourth, Seventh, Ninth and Eleventh U.S. Circuit Courts of Appeal.

The Campaign Legal Center and Democracy 21 have filed *amicus* briefs in many of these cases defending the disclosure laws.

Only a handful of cases have run counter to this trend and those decisions have mostly been concerned with ballot measure disclosure laws which involve different considerations and where legal precedent is somewhat less clear.

The Campaign Legal Center and Democracy 21 are aware of only two cases since the *Citizens United* decision in which laws requiring the disclosure by outside spending groups in candidate elections have been invalidated.

The Tenth Circuit Court of Appeals is the principal outlier and has taken the position that disclosure requirements can extend only to communications containing "express advocacy" and the functional equivalent of "express advocacy," and to political committees whose major purpose was to influence elections.

In so doing, however, the Tenth Circuit has misinterpreted the Supreme Court ruling in *Citizens United.* The Court in *Citizens United* upheld disclosure requirements for organizations that *did not* have a major purpose to influence elections and that *did not* apply to "express advocacy" communications or their functional equivalent.

Beyond the more than 20 decisions upholding disclosure laws without qualification, in four additional cases, the courts have upheld basic disclosure requirements while rejecting a narrow aspect of such laws.

For example, the Fourth Circuit upheld most aspects of West Virginia's disclosure law but found that the state "electioneering communications" disclosure requirement could not include print media, a form of media that is not covered by the *Citizens United* decision. Similarly, the Eighth Circuit Court of Appeals upheld the state laws in Minnesota and Iowa requiring disclosure by outside spending groups in candidate elections, but rejected some provisions of these laws that extended beyond the parameters of federal disclosure laws.

Overall, however, federal courts at the district, court of appeals and Supreme Court level have overwhelmingly upheld the constitutionality of disclosure laws applicable to groups making independent expenditures in candidate elections.

The argument that the lower courts are rejecting these disclosure laws is just plain wrong. The reality is that in the nearly three years since the *Citizens United* decision, courts throughout the country have repeatedly rejected arguments that disclosure laws applicable to outside groups making expenditures in candidate elections violate First Amendment free speech rights.

Furthermore, although critics often claim that disclosure triggers donor harassment, we are aware of no court decision post-*Citizens United* that has found that any alleged instances of donor harassment warranted an exemption from the applicable disclosure statute.

The repeated rulings by the courts that disclosure requirements are constitutional represent a major legal success story in the courts for campaign finance disclosure laws.

The nation, however, is still left with gaping loopholes in federal disclosure laws that have resulted in hundreds of millions of dollars in secret contributions being spent to influence federal elections. These problems must be solved by enacting new disclosure requirements for outside spending groups and by ensuring that existing laws applicable to disclosure are implemented by proper regulations.

We urge you and your colleagues to find a bipartisan path to legislation that closes the disclosure loopholes that are allowing hundreds of millions of dollars of secret contributions to be spent against candidates of both parties. Effective new disclosure requirements are essential to provide voters with the information they need, as the Supreme Court said in *Citizens United*, to make "informed choices in the political marketplace."

Federal courts at all levels have made it clear that disclosure laws for outside groups making expenditures in candidate elections are constitutional and do not violate First Amendment free speech rights.

/s/ Fred Wertheimer	*/s/ Trevor Potter*
Fred Wertheimer	Trevor Potter
President	President
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