



February 27, 2018

By Electronic Mail (joan.carter.conway@senate.state.md.us)

**The Honorable Joan Carter Conway, Chair
Education, Health & Environmental Affairs Committee
Maryland Senate
Miller Senate Office Building, 2 West Wing
11 Bladen Street
Annapolis, MD 21401-1991**

Re: Constitutional Amendment Ensuring Disclosure

Dear Chair Conway and Members of the Committee:

The Campaign Legal Center (“CLC”) respectfully submits this letter regarding SB 1035 in advance of the Education, Health & Environmental Affairs Committee’s March 1 hearing. CLC is a nonprofit, nonpartisan organization dedicated to improving our democracy and protecting the fundamental right of all Americans to participate in the political process; CLC represents the public perspective in administrative, legislative, and judicial proceedings in the areas of campaign finance, voting rights, and government ethics.

The Legislature is considering SB 1035 to place before Maryland voters a popular referendum to amend the state’s Constitution to include an election disclosure provision. This provision would ensure that voters are informed of who funds electoral campaigns and advertisements. This letter explains the importance of disclosure and its constitutionalization as a right. Disclosure protects and advances the values underpinning the federal First Amendment and its equivalents in Maryland’s Declaration of Rights. Moreover, disclosure is a key element of effective self-government. Enshrining voters’ right to

know the sources of campaign spending in the state's Constitution would help protect Maryland from the deluge of dark money spending that has become so pervasive in elections nationwide.

I. Disclosure Advances the Values of the Federal First Amendment and the Maryland Declaration of Rights

Disclosure of election spending is requisite for effective self-government. It is a vital means by which voters make informed decisions on Election Day.

The Supreme Court has repeatedly reaffirmed that disclosure vindicates First Amendment values. In *Buckley v. Valeo*, the Court recognized that disclosure “provides the electorate with information as to where political campaign money comes from and how it is spent by the candidate in order to aid the voters in evaluating those who seek federal office” 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.”¹ In *McConnell v. FEC*, the Court questioned whether “‘uninhibited, robust, and wide-open’ speech can occur when organizations hide themselves from the scrutiny of the voting public,” and explained that disclosure furthers the “First Amendment interests of individual citizens seeking to make informed choices in the political marketplace.”² And in *Citizens United v. FEC*, eight of the nine Justices of the Supreme Court again upheld disclosure’s 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.³ The Court’s analyses recognize a basic and important fact about disclosure: allowing voters to know the ultimate sources of funding ensures that Marylanders have relevant information by which to gauge the messages they see, hear, and read. This information is critical to their ability to make informed decisions on self-government.

Relatedly, disclosure safeguards honest debate by ensuring that those who seek to influence elections and policy make themselves known rather than hiding behind groups with anodyne or misleading names. As Justice Scalia explained, America’s long tradition of “[r]equiring people to stand up in public for their political acts fosters civic courage, without which democracy is doomed.”⁴

¹ 424 U.S. 1, 66-67 (1976) (internal quotations omitted).

² 540 U.S. 93, 197 (2003) (quoting *McConnell v. FEC*, 251 F. Supp. 2d 176, 237 (D.D.C. 2003)).

³ 558 U.S. 310, 369 (2010) (quoting *Buckley* 424 U.S. at 76).

⁴ *Doe #1 v. Reed*, 561 U.S. 186, 228 (2010) (Scalia, J., concurring).

II. Disclosure Prevents Corruption and Its Appearance

Disclosure is a critical tool in combatting corruption. The Supreme Court has recognized as much over decades of case law, beginning with its assessment in *Buckley* that disclosure “deter[s] actual corruption and avoid[s] the appearance of corruption by exposing large contributions and expenditures to the light of publicity.”⁵ When election-related messaging is done openly, with the true source of funding revealed for all to see, there is a reduced risk that a message’s funders and beneficiaries have engaged in a corrupt bargain. Transparency allows citizens, journalists, and regulators to keep watch over the actions of the beneficiaries to ensure that they work for the public good, rather than private gain. Contrarily, when huge sums of dark money are pumped into an election to support a candidate, it is significantly harder for Marylanders to know whether that support is due to earnest political alignment, or nefarious motives.

III. Disclosure Is a Key Element of Effective Campaign Finance Law

Disclosure is a cornerstone of campaign finance law, originating as early as the Progressive era. Concerns over political corruption prompted passage of the first disclosure laws in the U.S. at the close of the 19th century, and, by the late 1920s, nearly every state had adopted some measure of campaign finance disclosure.⁶ Congress enacted the first federal disclosure legislation, the Publicity of Political Contributions Act (“Publicity Act”), in 1910.⁷ Since then, every major piece of federal campaign finance legislation – including the Federal Election Campaign Act of 1971 (“FECA”),⁸ its 1974 amendments,⁹ and the Bipartisan Campaign Reform Act of 2002 (“BCRA”)¹⁰ – has steadily enhanced disclosure requirements. As the *Buckley* Court noted, disclosure serves to ensure enforcement of other campaign finance rules, through the documentation of campaign receipts and disbursements.¹¹

⁵ 424 U.S. at 67.

⁶ Trevor Potter & Bryson B. Morgan, *The History of Undisclosed Spending in U.S. Elections and How 2012 Became the “Dark Money” Election*, 27 NOTRE DAME J.L. ETHICS & PUB. POL’Y 383, 400 (2014).

⁷ *Id.* at 403; 36 Stat. 822 (1910) (amended in 1911 and in 1925; repealed in 1972).

⁸ Pub. L. No. 92-225, 86 Stat. 3 (1972) (codified as amended at 52 U.S.C. §§ 30101 et seq.).

⁹ Pub. L. No. 93-443, 88 Stat. 1263 (1974).

¹⁰ Pub. L. No. 107-155, 116 Stat. 81 (2002).

¹¹ 424 U.S. at 67-68.

IV. A Constitutional Right to Know Appropriately Affirms the Importance of Disclosure

The foregoing reasons highlight the importance of disclosure to American self-government. By enshrining disclosure as a constitutional right, Maryland has an opportunity to be at the forefront of First Amendment-promoting transparency.

It is difficult to overstate the significance of constitutions both within our government and within the fabric of American society. The federal and state constitutions are foundational documents that establish governing processes and enshrine the rights of citizens. But they are more than that. A constitution is also an articulation of a state's values and priorities.¹² Constitutionalizing a principle as a right democratizes it: over time, citizens become increasingly aware of the importance of the principle and embrace it. Constitutionalizing the right to disclosure will emphasize its centrality to Maryland's self-government.

Moreover, constitutionalizing the right to disclosure can itself have salutary effects. People are protective of their rights. When their right to know is constitutionalized, voters will rightfully resent dark money groups' attempts to exploit legal loopholes to influence elections, making such messages counterproductive and disincentivizing them.

Given the importance of disclosure, amending Maryland's Constitution to include a right to know would be an important signaling of Maryland's public values. Perhaps more importantly, it would emphasize to all Marylanders that their government belongs to them and, as such, they ought to know who funds election spending.

V. Conclusion

For the above stated reasons, CLC strongly endorses referendum language that would provide Marylanders with the opportunity to vote on a constitutional right to disclosure. Accordingly, we respectfully urge the Education, Health & Environmental Affairs Committee to approve referendum language that emphasizes the importance of this issue. We appreciate the opportunity to submit this letter.

¹² See, e.g., *Davis v. Burke*, 179 U.S. 399, 403 (1900) (explaining that even non-self-executing constitutional provisions lay out "certain general principles"); accord *Benson v. State*, 887 A.2d 525, 532-33 (Md. 2005).

Sincerely,


Catherine Hinckley Kelley
Director, Policy & State Programs