TESTIMONY OF TREVOR POTTER

BEFORE THE COMMITTEE ON HOUSE ADMINISTRATION

ON H.R. 5175, THE DISCLOSE ACT, May 11, 2010

Thank you for the honor of appearing before you today to discuss the DISCLOSE ACT.

I am a Republican former Commissioner and Chairman of the Federal Election Commission, and am currently a Member of the law firm of Caplin & Drysdale, and President of the Campaign Legal Center, which has worked to encourage faithful implementation of the Bipartisan Campaign Reform Act. However, I am appearing today only on behalf of myself, and not on behalf of any other entity or client.

In Justice Kennedy's majority opinion in Citizens United v Federal Election Commission, 558 U.S. ---- (2010) he made two things very clear: First, it is generally constitutional to require disclosure of the sources of funding for spending in federal elections, whether or not that spending "expressly advocates" the election or defeat of a federal candidate. Second, he and seven other Justices were clear that they thought such disclosure was entirely appropriate and useful in a democracy.

Justice Kennedy stated that disclosure of the sources of funding of political advertising "provide[s] the electorate with information" and "insure[s] that the voters are fully informed about the person or group who is speaking," Citizens United at 52-53, citing McConnell v FEC, 540 U.S. 93, 196 (2005) and Buckley v Valeo, 424 U.S. 1, 76 (1976) (per curiam). He also cited the holding in Bellotti that "Identification of the source of the advertising may be required as a means of disclosure, so that the people will be able to evaluate the arguments to which they are being subjected." Id. At 53 (citing First Nat'l Bank of Boston v. Bellotti, 435 U.S. 765, 792, n. 32 (1978).

As to the argument that disclosure requirements should be limited to "express advocacy," Justice Kennedy's Opinion flatly declared: "We reject this

contention." Id.He noted that the Supreme Court had, in a variety of contexts, upheld disclosure requirements that covered constitutionally protected acts, such as lobbying. Id. "For these reasons", Justice Kennedy stated, "we reject Citizens United's contention that the disclosure requirements must be limited to speech that is the functional equivalent of express advocacy." Id. at 54.

As to the value of disclosure of political speech, Justice Kennedy was equally clear. He wrote:

"With the advent of the Internet, prompt disclosure of expenditures can provide shareholders and citizens with the information needed to hold corporations and elected officials accountable for their positions and supporters. Shareholders can determine whether their corporations political speech advances the corporation's interest in making profits, and citizens can see whether elected officials are 'in the pocket' of so-called moneyed interests." Id. at 55

Justice Kennedy also stated:

"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." Id.

Perhaps most clearly, Justice Kennedy said:

"The public has an interest in knowing who is speaking about a candidate just before an election." **Id.** At 54.

Thus, Justice Kennedy binds together the two elements of his Opinion—independent corporate speech in elections is a First Amendment right, and the funding sources of such speech must be fully disclosed in order to make this constitutional right function in our political system. This section of Justice Kennedy's Opinion was the only one joined by the four Citizens United dissenters, meaning that the fundamental importance of disclosure was recognized by eight of the nine Justices. Full disclosure

is one of the few concepts in this contentious area of law to receive such a broad endorsement from the Supreme Court.

This background is important to your consideration of the DISCLOSE Act, not only because it makes it clear that the disclosure provisions of the bill are constitutional, but because they complete the process begun by the Supreme Court in the Citizens United decision by requiring the sort of disclosure that Justice Kennedy and the other Justices found so essential to our democratic system. I would go so far as to say that unrestricted corporate speech in elections without disclosure of the sources of such speech is contrary to the Court's theory in Citizens United, which paired corporate First Amendment speech rights with the virtues of disclosure of the sources of such speech—disclosure to shareholders and to the general public.

Thus, I commend the provisions of the DISCLOSE Act that require disclosure of the funding sources of political speech. I should note that the Citizens United case referred only to corporate speech and disclosure, because only a corporation was challenging the restrictions in the law. However, the DISCLOSE Act correctly, I think, recognizes that First Amendment rights will be found by courts to apply to unions as well, and therefore includes unions in the Act's provisions as well.

I am fully aware that there are many who attempt to cast this debate as a partisan one between Republicans and Democrats, and I regret that is so. I know the DISCLOSE Act has two distinguished Republican Members of the House as co-sponsors, and I hope there will be more Republican support. This should not be a partisan issue. Many Republicans have long argued for the exact conclusion that Justice Kennedy arrived at: less restriction on political speech in return for "full disclosure." Corporate speech restrictions were struck down by the Supreme Court—it is now up to Congress to supply full disclosure. The Supreme Court had only a narrow 5-4 majority to strike down the restrictions on independent political expenditure by corporations, but it had an 8-1 majority, spanning the philosophical wings of the Court, in favor of disclosure over the Internet and by other means to the public and shareholders of the details of corporate funding of such political expenditures. I hope Congress can muster the same

broad philosophical support for such disclosure, since both political parties have long favored at least that much regulation.

That is not to say that the DISCLOSE Act is a perfect act of legislative draftsmanship—few pieces of legislation are, especially before they have seen the light of public comment and the Committee process. Thus, I hope the Members of the Committee from both sides will work together to improve the Bill. In particular, I have concerns that the provisions on foreign national involvement in the US political process could – and should – be clarified, and improved.

Let me begin by saying that I think there is bipartisan unanimity that we do not want foreign governments, or foreign government officials, or foreign government controlled entities—whether from anti-American governments of countries like Hugo Chavez's Venezuela or Iran, or of global competitors like China and Japan—spending money in US elections, either directly or through US companies they control. This is a serious threat the Bill must address.

However, the Bill goes further, in a manner that I think makes it vulnerable to a constitutional challenge of being both over-inclusive and under-inclusive. For instance, it declares some US companies to be "foreign nationals" if they have a single non-US individual or company owning 20% of its shares, while other companies with three non-US investors together owning 51% of the shares may not be so labeled (if no one of them individually reaches the 20% threshold). This is so even if the single 20% shareholder has no seats on the US company's Board, and the three foreign shareholders nominate a majority of the Board so long as they are not all foreign nationals. These disparities in treatment between US companies seem vulnerable to constitutional challenge.

More broadly, the current draft raises the question of why some US companies—like Anheiser Busch or Chrysler—are treated differently in this Bill than other US companies with whom they directly compete, like Sam Adams and Ford. None of those US companies to my knowledge are agents of foreign governments or controlled by foreign governments or their agents, yet the Bill would forbid the US employees at the first two from using US-generated funds to sponsor a federal PAC, or to

participate in state and local elections in states that have traditionally allowed corporate expenditures. This is so even though both of these activities were permissible for such corporations prior to Citizens United.

I believe the better answer is to clearly prohibit the involvement in US elections of any companies with foreign government, foreign government official, or foreign governmental entity ownership. This definition can be written to prevent the dangers we all seek to guard against, without sweeping in purely commercial entities. The analogy would be to the Foreign Agents Registration Act, which makes exactly this sort of distinction. To ensure it is successful, the Bill's current requirements for certification by the CEO (under threat of perjury) could apply to all US corporations with significant foreign commercial ownership: certifying both that there is no foreign governmental ownership, and that the existing requirements of US law are being met (no foreign national involvement in the political expenditure decision-making process, and only funds earned in the US being spent).

I am sure there are other areas of the proposed legislation which would also benefit from bi-partisan discussion and amendments, and hope that will occur. However, the Bill fulfills an important need by requiring disclosure of who is spending money in US elections. As I have noted, an 8-1 majority of the US Supreme Court has stated that such disclosure is not only constitutional, but is the expected and indeed necessary counter-balance to the new corporate right to expend unlimited funds in US elections. I urge Congress to require such complete disclosure in time for the 2010 elections. I cannot do better in closing than to again quote Justice Kennedy's 8-1 majority Opinion on this point:

"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." Citizens United at 55.

Thank you for the opportunity to testify today.