

Testimony of Fred Wertheimer

President of Democracy 21

Before the Senate Rules Committee

On the DISCLOSE Act of 2012

March 29, 2012

Executive Summary

Democracy 21 strongly supports the DISCLOSE Act of 2012 and urges the Senate to act promptly to pass the legislation. The legislation restores a cardinal rule of campaign finance laws: citizens are entitled to know who is giving and spending money to influence their votes. This fundamental right to know has been recognized for decades in disclosure laws passed by Congress and in decisions by the Supreme Court that upheld the constitutionality of these laws.

The current gaping loopholes in the nation's campaign finance disclosure laws result from a combination of the Supreme Court's decision in *Citizens United v. Federal Election Commission*, 130 S.Ct. 876 (2010), and ineffectual FEC disclosure regulations.

This enormously damaging decision struck down the ban on corporate expenditures in federal elections and paved the way for the rise of Super PACs and the return of secret money to federal elections. The decision also was based on the false assumption that in striking down the corporate ban, there would be effective disclosure for the independent campaign expenditures that followed.

Justice Kennedy wrote for the majority in the *Citizens United* opinion, "A campaign finance system that pairs corporate independent expenditures with effective disclosure has not existed before today." Justice Kennedy had that half right. Corporate independent expenditures did not exist before the decision. The DISCLOSE Act of 2012 will provide the effective disclosure the Court majority thought was constitutional, necessary and in existence when it issued the opinion but which in fact was not and is not there.

In 2010, more than \$135 million in undisclosed, unlimited contributions were injected into the congressional races. The amount of secret money injected into the 2012 presidential and congressional elections is expected to dramatically grow, absent new disclosure requirements.

This has returned the country to the era of the Watergate scandals when huge amounts of secret money were spent in federal elections. Secret money in American politics is dangerous money. As the Supreme Court held in *Buckley v. Valeo* (1976), disclosure requirements "deter actual corruption and avoid the appearance of corruption." Secret money creates the opportunity for influence-buying that is unknown and unaccountable to the American people.

New disclosure laws were enacted during the Watergate era to address this problem. And from the mid-1970s until 2010 there was a consensus in the country and in Congress, among Democrats and Republican alike, in support of campaign finance disclosure. Bipartisan congressional support for disclosure, however, disappeared in 2010.

Democracy 21 strongly urges the Senate to return to the bipartisan approach in support of disclosure that was the rule for almost four decades. The DISCLOSE Act of 2012 is effective, constitutional and fair and deserves the votes of Republican and Democratic Senators.

Chairman Schumer and Members of the Committee, I am Fred Wertheimer, the president of Democracy 21. I appreciate the opportunity to testify today in support of the DISCLOSE Act of 2012 and why it is important for Congress to enact this essential disclosure legislation.

Democracy 21 is a nonpartisan, nonprofit organization which promotes effective campaign finance laws to protect against corruption and the appearance of corruption, to engage and empower citizens in the political process and to help ensure the integrity and credibility of government decisions and elections.

Summary

Democracy 21 strongly supports the DISCLOSE Act of 2012 and urges the Senate to act promptly to pass the legislation.

The legislation restores a cardinal rule of campaign finance laws: citizens are entitled to know who is giving and spending money to influence their votes.

This fundamental right to know has been recognized for decades in disclosure laws passed by Congress and in decisions by the Supreme Court that upheld the constitutionality of these laws.

The current gaping loopholes in the nation's campaign finance disclosure laws result from a combination of the Supreme Court's decision in *Citizens United v. Federal Election Commission*, 130 S.Ct. 876 (2010), and ineffectual FEC disclosure regulations.

This enormously damaging decision struck down the ban on corporate expenditures in federal elections and paved the way for the rise of Super PACs and the return of secret money to federal elections.

The decision also was based on the false assumption that in striking down the corporate ban, there would be effective disclosure for the independent campaign expenditures that followed.

Justice Kennedy wrote for the majority in the *Citizens United* opinion, "A campaign finance system that pairs corporate independent expenditures with effective disclosure has not existed before today." Justice Kennedy had that half right. Corporate independent expenditures did not exist before the decision.

The DISCLOSE Act of 2012 will provide the effective disclosure the Court majority thought was constitutional, necessary and in existence when it issued the opinion but which in fact was not and is not there.

Polls have shown the public overwhelming supports disclosure for outside spending groups. For example, according to a *New York Times* article on a *New York Times/CBS News* poll

released on October 28, 2010, Americans overwhelmingly “favor full disclosure of spending by both campaigns and outside groups.”

Unlike the DISCLOSE Act of 2010, the new DISCLOSE 2012 Act focuses solely on disclosure requirements. It does not contain the nondisclosure provisions that were in the 2010 DISCLOSE legislation and it does not contain exceptions for any groups.

The new legislation would ensure that citizens know on a timely basis the identities of and amounts given by donors who are funding independent campaign expenditures by tax-exempt organizations and other groups.

The legislation would also fix the problem of untimely disclosure of the donors to Super PACs supporting federal candidates. This problem arose in the 2012 presidential nominating race when the disclosure of most of the donors to presidential candidate-specific Super PACs did not occur until after the Iowa caucus and the New Hampshire, South Carolina and Florida primaries were over.

The new legislation also requires Super PACs and other “independent” spending entities that run broadcast ads to identify in each TV ad their top five donors and the amounts they gave, either by listing the information in the ad or by running a crawl at the bottom of the ad with the information. The bill also requires the top official of the group to appear in each TV ad and take responsibility for it.

The Need for Disclosure Legislation

In 2010, more than \$135 million in undisclosed, unlimited contributions were injected into the congressional races. The amount of secret money injected into the 2012 presidential and congressional elections is expected to dramatically grow, absent new disclosure requirements.

This has returned the country to the era of the Watergate scandals when huge amounts of secret money were spent in federal elections.

Secret money in American politics is dangerous money. As the Supreme Court held in *Buckley v. Valeo* 424 U.S. 1, 43-55 (1976), disclosure requirements “deter actual corruption and avoid the appearance of corruption.”

Secret money creates the opportunity for influence-buying that is unknown and unaccountable to the American people.

New disclosure laws were enacted during the Watergate era to address this problem.

And from the mid-1970s until 2010 there was a consensus in the country and in Congress, among Democrats and Republican alike, in support of campaign finance disclosure.

Even opponents of other campaign finance reform laws supported disclosure as appropriate and necessary to provide the public with basic information about who is raising and spending money to influence their votes.

In 2000, for example, in response to a disclosure loophole that was allowing certain 527 groups to spend undisclosed money to influence federal elections, a Republican-controlled Congress acted to close the loophole.

Congress passed the new disclosure legislation with overwhelming support from Republicans and Democrats in both the House and Senate. The vote in favor of the legislation was 385 to 39 in the House and 92 to 6 in the Senate.

Bipartisan congressional support for disclosure, however, disappeared in 2010.

Democracy 21 strongly urges the Senate to return to the bipartisan approach in support of disclosure that was the rule for almost four decades. The DISCLOSE Act of 2012 is effective, constitutional and fair and deserves the votes of Republican and Democratic Senators.

Impact of *Citizens United* Decision

The *Citizens United* decision changed the landscape of American politics.

The decision has brought enormous amounts of unlimited contributions and secret money back into federal elections.

The *Citizens United* decision paved the way for the Super PACs that are flooding federal elections with expenditures financed by huge contributions from the super rich, corporations, labor unions, and other entities.

The Court's decision allowed corporations to make unlimited independent expenditures in federal campaigns. In the subsequent *SpeechNow* decision, the D.C. Circuit Court of Appeals ruled that individuals could make unlimited contributions to groups, like Super PACs, that make independent campaign expenditures. The FEC interpreted *Citizens United* to allow corporations and labor unions to make such unlimited donations to groups, like Super PACs, as well.

The D.C. Circuit Court based its *SpeechNow* decision *directly* on the *Citizens United* decision. The Circuit Court held that the *Citizens United* decision "resolves this appeal" stating:

In accordance with that decision, we hold that the contribution limits of 2 U.S.C. § 441a(a)(1)(C) and 441a(a)(3) are unconstitutional as applied to individuals' contributions to SpeechNow.

The result: according to a recent report by the Campaign Finance Institute, just *seventeen donors* who each gave \$1 million or more accounted for *half of the \$72 million* given to the Super PACs associated with the four remaining Republican presidential primary candidates. And

just *three* donors who each gave \$1 million or more were responsible for *62 percent of the \$6.4 million* raised by the Super PAC associated with president Obama.

The American people get the fact that Super PACs are nothing but trouble for the nation. Nearly seventy percent of the public believes that Super PACs should be illegal. (*Washington Post/ABC News* poll, March 13, 2012)

While we cannot end all Super PACs, as long as the *Citizens United* decision stands, we can get rid of the type of candidate-specific Super PACs that have played a dominant role in the 2012 presidential nominating race and will spread quickly to Congress if they are not eliminated. The Supreme Court left to Congress to define what constitutes “coordination” for purposes of determining whether spending by outside groups is independent, as required by law and the Court.

Democracy 21 has drafted legislation to define “coordination” that would eliminate the kind of candidate-specific Super PACs operating in the 2012 presidential election. The legislation is well within the bounds of the *Citizens United* decision.

The *Citizens United* decision also paved the way for unlimited, secret contributions being injected into federal elections by 501(c) groups, including 501(c)(4) groups, that are defined by tax law as “social welfare” organizations, and 501(c)(6) business associations, like the Chamber of Commerce.

The Court’s decision allowed these tax-exempt groups, almost all of which are corporations, to make unlimited independent expenditures in federal elections. These expenditures had been prohibited prior to the decision. Ineffectual FEC regulations gutted the contribution disclosure requirements that exist for outside spending groups.

Tax-exempt, non-profit groups are not required by tax law to publicly disclose their donors. They could end up spending hundreds of millions of dollars in secret contributions in the 2012 elections.

Contributions to 501(c) groups can come from corporations, labor unions, individuals and other entities. They also can come from foreign entities. Absent effective disclosure requirements, it is exceedingly difficult to monitor and determine if foreign money is being illegally used by any of these groups to pay for expenditures to influence federal elections.

A number of organizations appear to be improperly claiming tax-exempt status as 501(c)(4) “social welfare” organizations in order to keep secret the donors financing their campaign expenditures.

Existing IRS regulations require section 501(c)(4) groups to have as their “primary purpose” engaging in “social welfare” activities. Participation in candidate campaign activities does not qualify as a “social welfare” activity.

Yet some section 501(c)(4) groups, including groups that ran campaign ads in the 2010 election and are doing so again this year, have as their overriding purpose to influence elections. They appear to be engaged primarily, if not almost exclusively, in campaign activity, in violation of IRS rules.

Democracy 21, joined by the Campaign Legal Center, has filed several complaints at the IRS challenging the eligibility of these groups to receive 501(c)(4) tax-exempt status and thereby to keep their donors secret. We also petitioned the IRS last year and again this year to undertake a rulemaking to revise and clarify its regulations that define when a group is eligible for 501(c)(4) tax-exempt status.

The fact that tax-exempt groups are not disclosing the sources of the funds they are using to pay for campaign-related expenditures undermines the integrity of our elections. It also undermines the integrity of the tax laws when groups improperly claim section 501(c)(4) tax-exempt status in order to keep secret the donors whose funds are being used for campaign-related expenditures in federal elections.

The DISCLOSE Act is Constitutional

The DISCLOSE Act of 2012 contains comprehensive new requirements for corporations, labor unions, advocacy groups and trade associations to disclose to the public their campaign-related expenditures.

Reporting organizations are required to disclose on a timely basis the campaign-related expenditures they make and the donors whose funds are being used to pay for these expenditures. These provisions are essential to ensure that effective campaign finance disclosures are made to citizens – and that donors providing tens of millions of dollars to influence federal elections are not hidden from the public through the use of conduits, intermediaries and front groups.

Since *Buckley v. Valeo*, the Supreme Court has upheld the constitutionality of provisions enacted by Congress to require disclosure of campaign expenditures and the donors funding the expenditures.

In *Citizens United*, the Supreme Court held, by an 8 to 1 vote, that disclosure requirements for campaign expenditures “do not prevent anyone from speaking,” and 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.” Importantly, the Court in *Citizens United* specifically noted the problems that result when groups run ads “while hiding behind dubious and misleading names,” thus concealing the true source of the funds being used to make campaign expenditures:

In *Buckley*, the Court explained that disclosure could be justified based on a governmental interest in “provid[ing] the electorate with information” about the sources of election-related spending. 424 U. S., at 66. The *McConnell* Court applied this interest in rejecting facial challenges to BCRA §§201 and 311. 540

U. S., at 196. There was evidence in the record that independent groups were running election-related advertisements “while hiding behind dubious and misleading names.” *Id.*, at 197 (quoting *McConnell I*, 251 F. Supp. 2d, at 237). The Court therefore upheld BCRA §§201 and 311 on the ground that they would help citizens “make informed choices in the political marketplace.” 540 U. S., at 197 (quoting *McConnell I*, *supra*, at 237); see 540 U. S., at 231.

Id. (emphasis added).

The Court in *Citizens United* also specifically rejected the argument that disclosure requirements can constitutionally apply only to ads which contain express advocacy (or its functional equivalent). Indeed, a central issue raised by the plaintiff in *Citizens United* was whether disclosure requirements could constitutionally be applied to broadcast ads run by the group to promote its movie. The ads did not contain express advocacy but they did refer to a candidate, thereby triggering existing “electioneering communications” disclosure requirements.

In rejecting Citizen United’s challenge to the disclosure requirements, the Court said:

The Court has explained that disclosure is a less restrictive alternative to more comprehensive regulations of speech. See, e.g., *MCFL*, 479 U. S., at 262. In *Buckley*, the Court upheld a disclosure requirement for independent expenditures even though it invalidated a provision that imposed a ceiling on those expenditures. 424 U. S., at 75–76. In *McConnell*, three Justices who would have found §441b to be unconstitutional nonetheless voted to uphold BCRA’s disclosure and disclaimer requirements. 540 U. S., at 321 (opinion of KENNEDY, J., joined by Rehnquist, C. J., and SCALIA, J.). And the Court has upheld registration and disclosure requirements on lobbyists, even though Congress has no power to ban lobbying itself. *United States v. Harriss*, 347 U. S. 612, 625 (1954) (Congress “has merely provided for a modicum of information from those who for hire attempt to influence legislation or who collect or spend funds for that purpose”). For these reasons, 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 916 (emphasis added).

Even for the ads at issue in *Citizens United* “which only attempt to persuade viewers to see the film,” and that “only pertain to a commercial transaction,” the Court found there was a sufficient “informational interest” to justify a disclosure requirement in the fact that the ads referred to a candidate in an election context. *Id.*

Additionally, the Court in *Citizens United* noted that among the benefits of disclosure is increased accountability, and in particular the accountability of corporations to their shareholders when corporate managers decide to spend shareholder money to influence federal elections:

Shareholder objections raised through the procedures of corporate democracy, *see Bellotti, supra*, at 794, and n. 34, can be more effective today because modern technology makes disclosures rapid and informative. . . .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 corporation’s 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.” 540 U. S., at 259 (opinion of SCALIA, J.); *see MCFL, supra*, at 261. 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. at 916 (emphasis added).

While a bare majority of five Justices in the *Citizens United* case voted to unleash campaign spending by corporations in federal elections, eight of the nine Justices in the same case strongly endorsed disclosure as a means to “provide shareholders and citizens with information needed to hold corporations and elected officials accountable for their positions and supporters,” and recognized that “transparency enables the electorate to make informed decisions.”

The rationale of the Supreme Court in upholding the constitutionality of disclosure in *Citizens United* is directly relevant to the DISCLOSE Act. The Court’s focus on “groups hiding behind dubious and misleading names,” 130 S.Ct. at 914, goes directly to the central rationale of the Act’s requirement that groups engaging in campaign-related spending disclose the donors whose funds are being used to pay for campaign-related expenditures. This disclosure requirement will provide the public with information about the true source of funding for campaign ads and will thereby allow the public to “make informed choices in the political marketplace.” *Id.*

Congress is unquestionably acting within its constitutional power by requiring groups engaged in campaign-related expenditures to disclose their spending and the donors whose funds are being used to pay for these expenditures. The DISCLOSE Act addresses the problem of generically named front groups and conduit groups being employed to mask the true sources of money used to fund campaign ads.

As the Supreme Court has noted, disclosure requirements do not “prevent anyone from speaking,” but they do serve the interests of “transparency,” accountability and promoting informed decision-making by voters. The DISCLOSE Act of 2012 furthers these important goals that have been endorsed by the Supreme Court.

Responses to Objections Raised

Critics of disclosure legislation have raised constitutional objections to disclosure legislation, but these objections lack validity.

For example, critics have complained that disclosure of donors to groups that make campaign-related expenditures will “chill” such donations. The Supreme Court considered and rejected this argument in *Citizens United* as a general basis for invalidating disclosure requirements. A disclosure requirement might be unconstitutional as applied to a specific organization but *only if* that organization could show “a reasonable probability that the group’s members could face threats, harassment, or reprisals if their names were disclosed.” *Citizens United*, 130 S.Ct. at 916. Absent such a showing, disclosure requirements are not invalid because of a general and theoretical concern about chilling donations.

Further, the DISCLOSE legislation has a number of built-in protections for donors to an organization. A group can set up a separate bank account for its spending on campaign-related expenditures and use only those funds for such expenditures. Under these circumstances, only the donors of \$10,000 or more to this separate account must be disclosed. All other donors to the organization would not be disclosed. In addition, *any* donor can restrict his or her donation to the organization from being used for campaign-related expenditures. If the group agrees to the restriction and segregates the money, the identity of the donor is not disclosed. These measures allow donors and groups to ensure that donors whose funds are not used for campaign-related expenditures are not subject to any disclosure.

Critics also charge that the disclosure legislation will force groups to disclose their membership lists, in violation of the Supreme Court’s ruling in *NAACP v. Alabama*.

This is not correct.

First, the legislation requires disclosure only of donors who give more than \$10,000 in a two-year election cycle to a group which engages in campaign-related spending. That will exclude the vast majority of donors to and members of most membership organizations, and require disclosure only of large donors to such groups. Furthermore, the legislation provides for the additional protections cited above that allow donors to an organization to avoid any disclosure as long as their funds are not being used to make campaign-related expenditures.

Second, the Supreme Court in *McConnell v. FEC*, 540 U.S. 93 (2003), rejected the argument that campaign finance disclosure was similar to the disclosure of membership lists that was struck down in the *NAACP* case. The Court said, “In *Buckley*, unlike *NAACP*, we found no evidence that any party had been exposed to economic reprisals or physical threats as a result of the compelled disclosure.” *Id.* at 198. Absent a showing by a specific organization of a reasonable probability of threats, harassments or reprisals to the group’s donors, campaign finance disclosure requirements are constitutional.

The \$10,000 threshold for disclosing donors appropriately balances the interest in privacy for donors to groups with a major purpose other than to influence elections with the interest of citizens in knowing who is financing campaign-related expenditures to influence their votes. The \$10,000 threshold achieves this balance by requiring disclosure only of substantial donors to such groups whose funds are used to pay for campaign-related expenditures.

Critics also contend that disclosure requirements will impose an unreasonable burden on groups wishing to engage in campaign-related spending. But the legislation only requires a group to disclose its donors of \$10,000 or more over a two-year election cycle. For most membership organizations, this will require the reporting of only a relatively small number of donors. Further, any group that wants to limit the scope of its disclosure obligations can set up a separate bank account from which to make all of its campaign-related expenditures. If it does this, the group is required to disclose only the donors of \$10,000 or more to that separate account, not all of the donors to the organization.

And contrary to the view of some critics of disclosure, the privacy rights of donors are respected as well by the legislation. Any donor to an organization is permitted by the legislation to “restrict” his or her donation from use for campaign-related expenditures. If the recipient organization accepts the restriction and segregates the money, the identity of the donor is not subject to disclosure. By this means, donors concerned about privacy can take steps to ensure that their identity is not disclosed.

Some critics may object to the expanded time frame for disclosure of “electioneering communications” in the bill and claim it is overbroad because it triggers disclosure for broadcast ads that mentions a congressional candidate in the year of the election (and for presidential candidates, starting 120 days before the first primary).

The legislation, however, appropriately reflects the realities of the current campaign season. The post-*Citizens United* experience shows that outside spending groups are running broadcast ads to influence federal elections throughout the course of the election year, and even earlier. The calendar year of an election is an appropriate period to cover because broadcast ads to influence voters are run by outside groups throughout the election year, and campaigns are in full swing during this period. Even if broadcast ads mentioning candidates also discuss issues, the ads can and will influence voters. Citizens are accordingly entitled to know the identity of the groups spending money for these ads as well as the donors whose funds are being used to pay for the expenditures. Further, as discussed above, the Supreme Court has rejected the notion that disclosure is limited only to ads which contain express advocacy or the functional equivalent of express advocacy.

As Justice Scalia wrote in a concurring opinion upholding disclosure requirements in a case about petition signers for ballot measures: “Requiring people to stand up in public for their political acts fosters civic courage, without which democracy is doomed.”

Conclusion

History tells us that secret money in elections is dangerous and leads to scandals.

This is not history we should repeat by allowing hundreds of millions of dollars in undisclosed contributions to be laundered into federal elections through outside spending groups.

The DISCLOSE Act of 2012 addresses this problem effectively, constitutionally and fairly.

Democracy 21 strongly urges Senators to support and promptly pass the DISCLOSE Act of 2012.