



**Testimony of Liz Kennedy, Counsel, and Anthony Kammer, Counsel,
in Support of the New York Attorney General's Proposed Regulations to
Reform Disclosure of Nonprofits' Electioneering Activities
Mineola, New York
February 27, 2013**

Demos is a public policy organization working for an America where we all have an equal say in our democracy and an equal chance in our economy. On behalf of Demos, we would like to thank Attorney General Schneiderman for this opportunity to submit comments on the proposed regulations issued on December 12, 2012 to reform disclosure relating to electioneering by 501(c)(4) organizations.

Demos strongly supports the Attorney General's proposal to require 501(c)(4) organizations that spend at least \$10,000 to influence New York state and local elections to disclose the identity of their donors who have contributed more than \$100. These new regulations will improve accountability and transparency for both donors and the public. The regulations will enable the electorate to make more informed decisions about political candidates, and they will serve donors' interest in knowing how their contributions to tax-exempt entities are being spent. We encourage the Attorney General to move forward to finalize and issue these regulations.

Secret Political Spending Has Risen Sharply Since Citizens United

Since the Supreme Court's 2010 decision in *Citizens United*,¹ there has been an explosion in political spending by groups that hide their true funding sources from the public. 501(c)(4) organizations have emerged as a popular vehicle for anonymous political activity. Under current state and federal regulations, social welfare organizations with anodyne names such as "Americans for Freedom" can accept unlimited contributions from anonymous donors and turn around to spend that money to influence elections. All that is required to avoid federal disclosure requirements is that the donor must not have flagged his or her contribution to fund a specific political advertisement, which donors rarely do in the course of contributing funds.²

¹ *Citizens United v. Federal Election Commission*, 558 U.S. 310 (2010)

² See 11 C.F.R. § 104.20(c)(9); Electioneering Communications, 72 Fed. Reg. 72,899 (Dec. 26, 2007).

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This problem of secret spending is real and growing: “dark money” organizations spent more money than SuperPACs to influence 2012 elections.³ In our recent report, “Billion Dollar Democracy: The Unprecedented Role of Money in the 2012 Elections,” Demos and U.S. PIRG found that “dark money” 501(c)(4) and 501(c)(6) organizations accounted for at least 58% of funds that outside groups spent nationwide on presidential television ads.⁴ Dark money groups spent at least \$309 million in the last election alone.⁵ But because of insufficient reporting, this number likely underestimates the true totals. Another recent study found that nearly one-fifth of business contributions to Super PACs in 2012 were from 501(c)(4) groups and other “dark money” organizations that do not disclose their donors.⁶

The rise in secret spending has important implications for state-level politics. In 2010, American Crossroads and its affiliate 501(c)(4) Crossroads GPS, together spent \$400,000 on attack ads in New York to defeat Dan Maffei.⁷ Maffei had had a 12 point lead two weeks before the election, but ended up losing the election by 567 votes.⁸ And in New York’s 2012 state senate elections,

³ Michael Beckel, *Nonprofits outspent super PACs in 2010, trend may continue*, The Center for Public Integrity (June 18, 2012), available at <http://www.publicintegrity.org/2012/06/18/9147/nonprofits-outspent-super-pacs-2010-trend-may-continue>.

⁴ Blair Bowie and Adam Lioz, *Billion Dollar Democracy: The Unprecedented Role of Money in the 2012 Elections*, Demos & U.S. PIRG Education Fund (Jan. 17, 2013), available at http://www.demos.org/sites/default/files/publications/BillionDollarDemocracy_Demos.pdf.

⁵ *2012 Outside Spending, by Non-Disclosing Groups*, Center for Responsive Politics: Open Secrets, available at <http://www.opensecrets.org/outsidespending/summ.php?cycle=2012&chrt=V&disp=O&type=U>.

⁶ Brendan Fischer, “Elections Confidential” Report Reveals Role of Dark Money Nonprofits and Shell Corporations in 2012, The Center for Media & Democracy’s PR Watch (Jan. 17, 2013), available at <http://www.prwatch.org/news/2013/01/11944/%E2%80%9Celections-confidential%E2%80%9D-report-reveals-role-dark-money-nonprofits-and-shell-corp>.

⁷ American Crossroads/Crossroads GPS Recipients, 2010, OpenSecrets, <http://www.opensecrets.org/outsidespending/recips.php?cycle=2010&cmt=American%20Crossroads/Crossroads%20GPS>.

⁸ See Emily Goodin, Rep. Maffei concedes, GOP gains 63rd seat, The Hill: Ballot Box (Nov. 23, 2010), available at <http://thehill.com/blogs/ballot-box/house-races/130569-rep-maffei-concedes-gives-gop-63rd-house-pickup>; Mark Weiner, Buerkle and Maffei make financial history in NY-25 race, Syracuse NY Local News (Oct. 20, 2010), available at http://www.syracuse.com/news/index.ssf/2010/10/25th_congressional_district_ra.html; Mark Weiner, Dan Maffei leads Anne Marie Buerkle by 12 points in Post-Standard/Siena Poll, Syracuse NY Local News (Oct. 17, 2010), available at http://www.syracuse.com/news/index.ssf/2010/10/dan_maffei_leads_anne_marie_bu.html.

a number of attack ads were linked to a Virginia-based 501(c)(4) organization, which is not required to disclose its donors.⁹

A number of states have taken measures to improve transparency with respect to anonymous and out-of-state donors. In 2012, the California Attorney General filed a lawsuit on behalf of the Fair Political Practices Commission against Americans for Responsible Leadership (ARL), an out-of-state 501(c)(4) that made an \$11 million contribution to a California PAC relating to several California ballot initiatives. The California Supreme Court held ARL was required to submit a full list of its donors to the California Fair Political Practices Commission.¹⁰ Montana has provisions in place that require disclosure of 501(c)(4) spending in the state and has taken strong steps to enforce those requirements.¹¹ Just this month, the American Bar Association House of Delegates passed a resolution calling for disclosure of contributions to and expenditures by 501(c)(4) and other tax-exempt organizations that engage in political spending.¹²

Transparency of Political Spending is Critical in a Democracy

Lack of transparency around political spending by 501(c)(4) organizations belies the Supreme Court's assumption expressed in *Citizens United* that the true sources of funds for political spending would be publicly identified. The Court largely took for granted that this political spending would be transparent when it decided to allow unlimited corporate money into the

⁹ Thomas Kaplan, *3 New York Senate Races Flooded by Money from Outside Groups*, NYTimes.com (Oct. 17, 2013), available at <http://www.nytimes.com/2012/10/17/nyregion/3-new-york-senate-races-flooded-by-money-from-outside-groups.html>.

¹⁰ Julius Chen, *California Supreme Court Orders Arizona Nonprofit to Undergo Audit*, Covington and Burling LLP: Inside Political Law (Nov. 5, 2012), <http://www.insidepoliticallaw.com/2012/11/05/california-supreme-court-orders-arizona-nonprofit-to-undergo-audit/> (last visited Jan. 14, 2013).

¹¹ Paul Abowd, *Inside the Dark-Money Group Fighting Reform in Montana and Beyond*, Mother Jones (Oct. 22, 2012), <http://www.motherjones.com/politics/2012/10/american-tradition-partnership-montana-dark-money>; Kim Barker, Rick Young, and Emma Schwartz, *Mysterious Docs Found in Meth House Reveal Inner Workings of Dark Money Group*, PBS Frontline (Oct. 29, 2012), available at <http://www.pbs.org/wgbh/pages/frontline/government-elections-politics/big-sky-big-money/mysterious-docs-found-in-meth-house-reveal-inner-workings-of-dark-money-group/>.

¹² Debra Cassens Weiss, *Resolution seeks disclosure of secret campaign donations made through nonprofits and super PACs*, ABA Journal, February 11, 2013, available at http://www.abajournal.com/news/article/resolution_seeks_disclosure_of_secret_campaign_donations_made_through/

political process.¹³ In *Citizens United* the Court upheld disclosure requirements in an 8-1 vote, and Justice Kennedy wrote that “transparency enables the electorate to make informed decisions and give proper weight to different speakers and messages.”¹⁴

Unfortunately, the influx of dark money into the political system through 501(c)(4) spending undermines the goal of transparency that the *Citizens United* Court took as a given. Many donors give to these organizations not knowing their money will be used for political purposes. The public has no opportunity to discover where this money comes from, and donors have no opportunity to monitor how their nonprofit contributions are being used.

Voters need transparency in political spending in order to exercise informed judgment, to evaluate the content of political messages, and to hold accountable those who choose to engage in political spending and the candidates who accept their financial support. As the Supreme Court recognized in *Buckley v. Valeo*, a case that upheld federal disclosure requirements, “[a] public armed with information about a candidate's most generous supporters is better able to detect any post-election special favors that may be given in return.”¹⁵

The Proposed Rules Will Improve Accountability and Transparency for Donors and the Public

Under the proposed regulations, all 501(c)(4) organizations that spend at least \$10,000 to influence state and local elections in New York will be required to file itemized schedules of their expenses and contributions. In addition, all such 501(c)(4) organizations must report each contributor’s name, address, employer, and the amount contributed for all donations of \$100 or more. This information will be made available to the public, subject to certain limitations and exceptions.

The \$10,000 reporting threshold ensures that there will be transparency with respect to the spenders most likely to influence legislative or electoral outcomes. It also ensures that social welfare organizations that do not engage in significant political activity will not face these reporting requirements. This threshold is the same currently required under federal law with

¹³ See *Citizens United v. Federal Election Commission*, 130 S.Ct. 876, 898-99 (2010) (“The right of citizens to inquire, to hear, to speak, and to use information to reach consensus is a precondition to enlightened self-government and a necessary means to protect it.”).

¹⁴ *Id.* at 916.

¹⁵ *Buckley v. Valeo*, 424 U.S. 1, 67 (1976).

respect to the disclosure of independent expenditures.¹⁶ The \$100 threshold is similarly a reasonable balance and brings the reporting requirement into harmony with the New York State threshold for identifying those making contributions to political committees.¹⁷

The thresholds set forward in these regulations are reasonable, and the disclosure requirements are within the Attorney General's authority under state law.¹⁸ These regulations are well-tailored to New York State's interest in providing donors and the electorate with information and to reducing corruption or the appearance of corruption in the electoral process.

The Proposed Disclosure Requirements Serve Compelling Interests That Have Repeatedly Been Upheld by the Courts

The Attorney General's proposed regulations to require disclosure from 501(c)(4) social welfare organizations that engage in significant political spending serve constitutionally recognized interests by ensuring that voters know the sources of political spending, and that donors to such organizations are aware that their funds may be used for political purposes.

In *Buckley v. Valeo*, the Supreme Court established the current framework through which disclosure requirements are evaluated under the First Amendment.¹⁹ Since then, the Court has repeatedly upheld disclosure requirements as constitutional and has consistently affirmed that citizens have an interest in knowing who spends money to influence elections.²⁰ In *Citizens United v. FEC*, Justice Kennedy relied on the proposition that voters would know who was funding campaign advertisements and thus would be able to judge the message accordingly:

“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-

¹⁶ 2 U.S.C. § 434.

¹⁷ N.Y. Elec. Law § 14-102(1).

¹⁸ See N.Y. Exec. Law § 172; N.Y. Est. Powers & Trusts Law § 8-1.4.

¹⁹ *Buckley v. Valeo*, 424 U.S. at 64.

²⁰ *Id.*; see also *Citizens United v. Fed. Election Comm'n*, 558 U.S. 310 (2010); *McConnell v. Fed. Election Comm'n*, 540 U.S. 93, 201, 124 S. Ct. 619, 694 (2003); *First Nat. Bank of Boston v. Bellotti*, 435 U.S. 765, 792 n. 32 (1978).

called moneyed interests.’ 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.”²¹

The rationale that the Court applied to shareholders who have a right to know if a for-profit corporation engages in political spending with their invested money extends to donors to 501(c)(4) social welfare organizations. Donors have a similar interest in knowing how a non-profit corporation engages in political spending with their donated money. In both cases, shareholders and donors are seeking to make informed decisions about where to direct their money.

The Attorney General’s proposed regulations are also consistent with the government’s constitutionally recognized interest in providing information to the electorate. The disclosure of 501(c)(4) donors and electioneering activities will enable the electorate to make more informed decisions about political candidates. Knowing the source of a candidate’s financial support enables voters to properly weigh candidates’ statements and priorities.

In sum, the Attorney General’s proposed regulations serve compelling interests that have been repeatedly upheld in court. The regulations will enable the electorate to make more informed decisions about political candidates and will further serve donors’ interest in knowing how their contributions are being spent. We urge the Attorney General to move forward and issue these regulations.

²¹ *Citizens United v. Federal Election Commission*, 130 S.Ct. at 916.