



**Testimony of Liz Kennedy, on behalf of Demos  
Submitted to the United States Senate Committee on Rules and Administration  
Hearing on the DISCLOSE Act of 2012, S. 2219  
March 29, 2012**

Chairman Schumer, Ranking Member Alexander, and Members of the Committee, thank you for the opportunity to submit testimony on behalf of Demos for the record in support of the Democracy is Strengthened by Casting Light on Spending in Elections Act of 2012. DISCLOSE is a straightforward solution to the serious and pressing problem of “dark” money in our elections. Congress has a responsibility to protect voters’ interests and the integrity of our democracy with common sense disclosure and disclaimer legislation. We urge you to move forward to enact these reforms without delay.

**Secret political spending is a threat to our democracy**

The need for transparency in political spending to inform voters and prevent corruption has been uncontroversial, nonpartisan, and widely recognized for decades. In *Citizens United v. FEC*<sup>1</sup> the Supreme Court relied on the assumption that the true sources of political spending would be disclosed to support its decision to allow unlimited corporate money into the political process. Justice Kennedy wrote that disclosure “enables the electorate to make informed decisions and give proper weight to different speakers and messages.”<sup>2</sup> Unfortunately, the disclosure rules that Justice Kennedy thought would ensure transparency and accountability are not in place. Voters lack the tools 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.

In the 2010 election, political spending by outside groups rose dramatically. These groups spent more than four times as much as they did in the prior mid-term elections in 2006, from almost \$70 million to over \$294 million.<sup>3</sup> Secret spending also shot up. Groups that didn’t disclose their underlying donors report spending over \$130 million, meaning over 46 percent of the outside spending in the election was unaccountable.<sup>4</sup> Moreover, seven of the top ten outside spending groups did not disclose the identities of their funders – this accounted for almost three-quarters of all of the outside spending directed to influence the 2010 election.<sup>5</sup>

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In our recent report “Auctioning Democracy: The Rise of Super PACs and the 2012 election,” Demos and U.S. PIRG found that six out of the top ten Super PACs that raised the most money in 2011 received money from untraceable sources.<sup>6</sup> The report, which is attached, also highlights the use of shell corporations to obscure the original source of contributions. Additionally, the analysis found that secret spending spiked dramatically right before the 2010 election, which is a pattern we expect to see repeated.

This cycle is predicted to break all spending records and we continue to see practices resembling legal money laundering. Donors can give to certain tax-exempt organizations that can themselves spend on elections, or can give to other groups that spend on elections, all without the public knowing where the money is really coming from. Currently, non-profit groups with anodyne names such as “Americans for Freedom” can accept unlimited contributions from anonymous donors. Their financial backers can remain anonymous because FEC regulations only require the identification of donors who specify that their funds were to be used for a particular political ad. “Americans for Freedom” can spend this dark money itself. Or it can direct the money to an independent political committee such as the ubiquitous Super PACs, even an affiliated one such as “Americans love Freedom.” While political committees are required to disclose their funders, there is no true informational value for a voter to learn that “Americans love Freedom” is funded by “Americans for Freedom.” The real identity of the source of the money remains hidden.

When secret spending is directed through these conduits voters are denied the information they need “to make informed decisions and give proper weight to different speakers and messages.”<sup>7</sup> Moreover, secret political spending breeds unaccountable political favoritism, undermining the health of a representative democracy, whereas disclosure requirements can deter corruption. The Supreme Court recognized in the seminal campaign finance case *Buckley v. Valeo* that “[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.”<sup>8</sup>

### **Congress must act to bring transparency and accountability to political spending**

DISCLOSE would close the loopholes in the disclosure regime. It would require the identification of donors who give over \$10,000 in a two-year cycle to any organization that engages in political spending, unless these donors prohibit the organization from using their money to fund political spending or the organization only funds its political activities through a separate

account. This would improve transparency and allow the public to see who is really providing the financial backing for efforts to influence elections. With this information a voter can learn about the funder's own motivation and interests, and judge their political speech accordingly.

DISCLOSE also contains "stand by your ad" disclaimer rules that would require all leaders of outside spending groups that make campaign-related advertisements to appear in the ads saying they "approve the message." In addition, the top funders of the group financing the advertisement would be disclosed in the ad. This will ensure that voters have access to real time information in order to exercise judgment and seek accountability. Candidates have to stand by the ads run by their campaigns. Outside groups and funders responsible for these ads should have to include the identity of their top funders, and the leader of the group should have to take responsibility for the ad, just like the candidates. This is particularly important since this cycle has seen an outsourcing of negative advertisements from the campaigns to outside spending groups. In the 2012 Republican primaries, Super PACs have run more advertisements than the candidates themselves, and while 27 percent of candidate campaign money has gone to fund negative ads, Super PACs have spent 72 percent of their money on negative ads.<sup>9</sup>

People and groups should not be allowed to conceal their political spending in order to avoid controversy. Those who choose to use their financial resources to influence elections should not be isolated from the legitimate criticism that such activities may incur. The First Amendment was never intended to prevent political actors from being held accountable for their actions in the political marketplace. In 2009, a federal Judge in California refused to exempt the groups who supported the passage of Proposition 8 from California's disclosure laws, writing:

Plaintiffs' exemption argument appears to be premised . . . on the concept that individuals should be free from even legal consequences of their speech. That is simply not the nature of their right. Just as contributors [] are free to speak in favor of the initiative, so are opponents free to express their disagreement through proper legal means.<sup>10</sup>

In a recent Supreme Court case upholding disclosure requirements, Justice Scalia wrote:

Requiring people to stand up in public for their political acts fosters civic courage, without which democracy is doomed. For my part, I do not look forward to a society

which . . . campaigns anonymously [ ] and even exercises the direct democracy of initiative and referendum hidden from public scrutiny and protected from the accountability of criticism. This does not resemble the Home of the Brave.<sup>11</sup>

These disclosure and disclaimer provisions will enable voters to know in real time who is behind efforts to influence their vote and who a candidate relies on for financial support.

### **Disclosure requirements are clearly constitutional**

In *Buckley*, the Supreme Court held that requiring disclosure of political spending was justified by several compelling interests: 1) it serves voters' interest in knowing who is funding a political message, and about a candidate's allegiances; 2) it prevents corruption and the appearance of corruption; and 3) it protects against circumvention of contribution limits by disclosing the identities of those making contributions and the amounts contributed.<sup>12</sup> These interests continue unabated.

The Supreme Court has repeatedly upheld as constitutional broad disclosure requirements, affirming that citizens have a right to know who spends money to influence elections. Indeed, in *Citizens United*, 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. 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 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.' 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.<sup>13</sup>

Thus, it is inaccurate to describe attempts to improve transparency in political spending as an attempt to get around or overturn *Citizens United*. First, eight of the nine Justices joined together in upholding the disclosure provisions challenged in the case. Second, effective

disclosure of the source of funds used in political spending is a cornerstone of the reasoning in the *Citizens United* decision.

## Conclusion

To protect the integrity of our elections and democratic government from the corruption inherent in secret political spending, we urge all members of the Committee to support the DISCLOSE Act.

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<sup>1</sup> 130 S. Ct. 876 (2010).

<sup>2</sup> *Id.* at 916.

<sup>3</sup> Public Citizen, *12 Months After: The Effects of Citizens United on Elections and the Integrity of the Legislative Process* (2011), available at <http://www.citizen.org/documents/Citizens-United-20110113.pdf>.

<sup>4</sup> *Id.*

<sup>5</sup> *Id.*

<sup>6</sup> Adam Lioz, Demos, & Blair Bowie, U.S. PIRG, *Auctioning Democracy: The Rise of Super PACs & the 2012 Election* (2012), available at <http://www.demos.org/publication/auctioning-democracy-rise-super-pacs-and-2012-election>.

<sup>7</sup> *Citizens United*, 130 S.Ct. at 916.

<sup>8</sup> *Buckley v. Valeo*, 424 U.S. 1, 66 (1976) (per curiam).

<sup>9</sup> T. W. Farnam, "Study: Negative campaign ads much more frequent, vicious than in primaries past", *The Washington Post*, February 20, 2012, available at [http://www.washingtonpost.com/politics/study-negative-campaign-ads-much-more-frequent-vicious-than-in-primaries-past/2012/02/14/gIQAR7ifPR\\_story.html](http://www.washingtonpost.com/politics/study-negative-campaign-ads-much-more-frequent-vicious-than-in-primaries-past/2012/02/14/gIQAR7ifPR_story.html). See also, Felicia Sonmez, "Negative ads: Is it the campaigns, or the super PACs?" *The Election 2012 Blog of The Washington Post* (March 22, 2012) [http://www.washingtonpost.com/blogs/election-2012/post/negative-ads-is-it-the-campaigns-or-the-super-pacs-thursdays-trail-mix/2012/03/22/gIQAOf8VTS\\_blog.html](http://www.washingtonpost.com/blogs/election-2012/post/negative-ads-is-it-the-campaigns-or-the-super-pacs-thursdays-trail-mix/2012/03/22/gIQAOf8VTS_blog.html).

<sup>10</sup> *ProtectMarriage.com v. Bowen*, --- F.Supp.2d ----, 2011 WL 5507204 (E.D.Cal.,2011).

<sup>11</sup> *Doe v. Reed*, 130 S.Ct. 2811 (2010) (J. Scalia, concurring).

<sup>12</sup> *Buckley v. Valeo*, 424 U.S. 1 (1976) (per curiam).

<sup>13</sup> *Citizens United*, 130 S.Ct. at 916 (2010).