WASHINGTON
LEGISLATIVE OFFICE

March 28, 2012

Senate Rules & Administration
United States Senate
Washington, DC 20510

Re: ACLU Opposes S. 2219 – The Democracy is Strengthened by Casting Light on Spending in Elections ("DISCLOSE") Act

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Dear Senator:

On behalf of the ACLU, a non-partisan organization with over half a million members, countless additional supporters and activists, and 53 affiliates nationwide, we urge you to oppose S. 2219, the Democracy Is Strengthened by Casting Light on Spending in Elections ("DISCLOSE") Act when it is considered before the Committee on Rules and Administration.[1]

The ACLU has been involved in the public debate over campaign finance reform for decades, providing testimony to Congress on these issues regularly and challenging aspects of campaign finance laws in federal court.

We acknowledge that the sponsors of the DISCLOSE Act seek the laudable goal of fair and participatory federal elections. We also appreciate the drafters' efforts to address the ACLU's concerns with previous campaign disclosure legislation. And, we do support numerous campaign disclosure and fair election measures that promote and inform the electorate, including disclosures of corporate political spending to shareholders and rules that provide low-cost airtime to all political candidates.

However, we believe this legislation ultimately fails in its attempts to improve the integrity of our campaigns in any substantial way, while significantly harming the speech and associational rights of Americans. We urge you to oppose S. 2219 when it is considered before the Committee.

The election of public officials is an essential aspect of a free society, and campaigns for public office raise a wide range of sometimes competing civil liberties concerns. Any regulation of the electoral and campaign processes must be fair and evenhanded, understandable and not unduly burdensome. It must assure integrity and inclusivity, encourage participation, and protect

[1] S. 2219, 112th Cong. (2012). In significant part, S. 2219 resembles the House version of the DISCLOSE Act (H.R. 4010, 112th Cong. (2012)). While we oppose both bills, these comments will focus on S. 2219, on which there will be a hearing before the Senate Rules and Administration Committee on March 29, 2012.

privacy and rights of association while allowing for robust, full, and free discussion and debate by and about candidates and issues of the day. Measures intended to root out corruption should not interfere with freedom of expression by those wishing to make their voices heard, and disclosure requirements should not have a chilling effect on the exercise of rights of expression and association, especially in the case of controversial political groups.

Small donations to campaigns—and contributions of any size to political communications that are made without any coordination with a candidate's campaign—have not been shown to contribute to official corruption.[2] Although the ACLU supports measures to guarantee the independence of groups making independent expenditures, we are concerned that heavy-handed regulation will violate the anonymous speech rights of individuals and groups that associate with these independent expenditure groups, subjecting them to harassment and potentially discouraging valuable participation in the political process.

The scope of the DISCLOSE Act, of course, extends beyond regulating the "Super PACs" that are currently dominating the news, and have surely prompted this measure. The DISCLOSE Act, as written, would infringe on the anonymous speech rights of donors to groups like the ACLU, which engage in non-partisan issue advocacy that would be covered by the disclosure requirements of the law under consideration.

We offer broad comments in four areas.

1. **The DISCLOSE Act Would Radically Extend the Period During Which Special Reporting Rules for Pure, Non-Partisan Issue Advocacy Apply.**

The DISCLOSE Act expands the period of time during which issue advocates—those taking no position in support of or in opposition to a political candidate—must disclose their donors if they wish to publish issue ads.[3] The Act would expand the "electioneering communications" period—currently the 30 days before a primary and the 60 days before a general election—quite significantly. For communications that refer to a candidate for the House or Senate, the period would begin on January 1 of the election year and end on the election, and would encompass the entire period following the announcement of a special election up to the special election. In concrete terms, were this bill law now, the period for communications referring to a member of this Committee would extend for a full 10 months before the 2012 election in early November, whereas currently the relevant period is limited to two months.

As a result, the special reporting rules would apply to communications about all House members and one-third of senators for effectively the entire second session of each Congress. During this period of time—nearly half of every Congress for members of the House—if any advocacy organization wished to run an ad that even mentioned a candidate's name, that organization would face the obligation of publicly disclosing personally identifying information about many of its donors. Such organizations would face two unsatisfactory choices: protect the privacy of their donors by refraining from issue advocacy or give up the privacy of their donors and place at

[2] We acknowledge the increase in the trigger threshold to $10,000.
[3] S. 2219 § (2)(a)(2).

risk the opportunity for additional donations by those supporters. Either way, this bill would have a deeply chilling effect on political speech about pending legislation for more than 40% of each Congress.

For communications mentioning a presidential or vice presidential candidate, the period would extend from 120 days before the primary or caucus in an individual state, which would radically extend the heightened disclosure period in numerous jurisdictions. Under current law, the electioneering communications period in Iowa—the first state in the Republican presidential nominating process—started on December 4, 2011, 30 days prior to the caucus on January 3, 2012. Under the DISCLOSE Act, with respect to the presidential or vice presidential candidate, that disclosure period for presidential candidates would extend all the way back to September 5, 2011, *and* would continue unabated until the election.

Accordingly, pure non-partisan issue advertising that happens to mention a presidential or vice-presidential candidate—including ads commenting, for instance, on a candidate's record on contraception, gun control, or trade with China, and even if they assiduously avoid support or opposition for the candidate—would be subject to the heightened disclosure rules in most states for significantly more than a year before a general presidential election. For similar ads mentioning other candidates, the special rules period will begin on January 1 of the election year.

The concerns are further heightened when, as in the current presidential election year, one of the candidates is the incumbent president running for reelection. The result of the extended period is a chilling effect on public criticism of the president or vice president, including truly non-partisan criticism on specific policy issues, during more than a fourth of a president's first term.

Both of these rules will impose a dramatic chill on the quantity and vigor of both partisan and non-partisan political speech.

2. The DISCLOSE Act Fails To Protect the Anonymous Speech Rights of Donors Who Have No Intention of Making a Gift for Political Communication Purposes.

The draft under consideration would require disclosure in two circumstances. A "covered organization"[4] that spends more than $10,000 in a cycle on "campaign-related disbursements,"[5] and does not maintain a separate segregated account for such disbursements, would have to disclose the identity, specific payments and aggregate amount donated of any person giving more than $10,000 to the entity during the cycle.[6] Any entity that maintains a separate segregated account for such disbursements would only have to do the same for those individuals donating specifically to that account in an amount greater than $10,000.[7]

[4] That is, virtually any politically active entity save organizations that are exempt from taxation under § 501(c)(3) of the Internal Revenue Code. S. 2219 § (2)(b)(1)(e).
[5] Defined in S. 2219 § (2)(b)(1)(d) to include independent expenditures and electioneering communications.
[6] S. 2219 § (2)(b)(1)(a)(2)(F).
[7] S. 2219 § (2)(b)(1)(a)(2)(E).

Even with a $10,000 trigger, the present exceptions in the DISCLOSE Act may still leave the door open to disclosure when a donor had no intention that a gift be used for political purposes.[8] It is both impractical and unfair to hold contributors responsible for every advertisement that an organization publishes, and even donors who give more than $10,000 may be small relative to the size of the covered organization's donor base as a whole.

Any effort to increase voter awareness of an organization's funding must respect the freedom of private association that the Supreme Court recognized in *NAACP v. Alabama.*[9] In that case, the Supreme Court sternly rebuked government-mandated membership disclosure regimes as thinly veiled attempts to intimidate activist organizations that worked by instilling a fear of retaliation among members of the activist group. The lessons of that time must not be lost simply because the causes of today are different from those of the civil rights era.

The disclosure provisions are likely to do one of two things, particularly when an organization is engaged in advocacy on controversial issues with which typical donors or members might not want to be associated publicly. First, the organization might refrain from engaging in public communications that would subject its donors to disclosure, in which case the organization's speech will have been curtailed. Alternatively, donors sensitive to public disclosure may refrain from giving to the organization (or may cap disclosure just below the trigger threshold), in which case the organization's ability to engage in speech will have been curtailed. And in both cases, those whose names are disclosed would be subject to personal, political or commercial impacts.

3. The DISCLOSE Act's Unwieldy Disclaimer Provisions Threaten to Overwhelm the Communications Being Disclaimed.

The DISCLOSE Act mandates disclaimers on television and radio advertisements that are potentially so burdensome they could either drown out the intended message or discourage groups from speaking out at all.[10] The individual or organizational disclosure statement, and the "top funders" statements, could conceivably take up so much of a television or radio spot that they would overwhelm the political message. The hardship safety valve only applies to the "top two funders" list for radio messages, and, in any event, it is unclear whether a provision for "hardship" situations would satisfactorily resolve any problems.

The DISCLOSE Act would, of course, allow an organization to avoid these disclaimer requirements if it eschews "electioneering communications" and "independent expenditures." This will be exceedingly difficult to accomplish, however, given that the electioneering communications disclosure period will extend potentially more than a year for ads featuring a presidential or vice-presidential candidate, and for almost as long for others. The burdensome disclaimer requirements would be likewise difficult to avoid given the added uncertainty in the definition of "independent expenditures," as expanded by the DISCLOSE Act.

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[8] S. 2219 § (2)(b)(1)(a)(3)(B). The donor would have to specifically prohibit, in writing, use of the funds for any covered payment, and the covered organization would have to agree and then segregate the funds.
[9] 357 U.S. 449, 460 (1958).
[10] S. 2219 § (3).

The top funder statements are additionally troubling because they could require the prominent endorsement of a political message by an individual or organization that has funded a group without intending or desiring to control the content of a specific advertisement. The significant funder for a given ad might be a supporter who has given money without designating its use for the ad in question—or even the general political activity in question. For many organizations, advertising is a small part of their overall operations, and the significant funder might even disagree with the content of an organization's advertisements while supporting the organization as a whole. Any required disclosure statements should not compel individuals to endorse a message with which they disagree or mandate that an organization alter its procedures to seek significant funder approval of specific messages.

At best, the disclaimers could reduce the opportunity for "speech" in many advertisements by a sizeable percentage. At worst, they would drive from the airwaves many organizations that wish to share their views on important public issues. The DISCLOSE Act's "hardship" provisions apply only to radio and are of dubious practical utility. Current law already provides for the disclosure of an advertisement's sponsor. There is no need for further requirements that limit or discourage public discussion of important issues.

4. The DISCLOSE Act's Ostensible Super PAC Provision is Vague and Unnecessary.

Section 4 of the DISCLOSE Act would extend the scope of the disclosure and disclaimer requirements to "[a] political committee with an account established *for the purpose* of accepting donations or contributions that do not comply with the contribution limits or source prohibitions under this Act, but only with respect to the accounts established for such purpose" (emphasis added). We question whether this addition is necessary given the extension of the independent expenditure disclosure requirements discussed above. We are also concerned about the vagueness of the term "for the purpose." Accordingly, we urge the Committee to at least provide greater specificity in the legislation describing those specific entities covered by this provision.

Additionally, we acknowledge the exclusion of organizations classified under 501(c)(3) of the Internal Revenue Code, and appreciate the drafters' attempt to narrow the sweep of the legislation.

5. Conclusion

The ACLU welcomes reforms that improve our democratic elections by providing for a properly informed electorate. Some elements of the DISCLOSE Act move in that direction. Unfortunately, the most promising proposal in past disclosure reform is missing in S. 2219. The provision offering candidates the television advertising rates equal to the lowest amount charged for the same amount of time in the previous 180 days is the type of solution that would increase speech, rather than stifling speech about elections and issues of public importance.[11] We also suggest the inclusion of the shareholder disclosure provision in H.R. 4010, the House version of

[11] *See, e.g.*, DISCLOSE Act, S. 3295, 111th Cong. § 401 (2010).

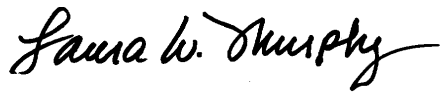
the DISCLOSE Act. Shareholder disclosure is an appropriate and effective way of promoting transparency in political campaign expenditures.[12]

The electoral system is strengthened by efforts to facilitate public participation, not by chilling free speech and invading the privacy of donors to controversial causes. Indeed, our Constitution embraces public discussion of matters that are important to our nation's future, and it respects the right of individuals to support those conversations without being exposed to unnecessary risk of harassment or embarrassment. Only reforms that promote speech will bring positive change to our elections, and overbroad disclosure requirements do the opposite.

Accordingly, the ACLU urges you to oppose the DISCLOSE Act when it comes before the Committee for consideration.

Please contact Legislative Counsel Gabe Rottman if you should have any questions or comments at 202-675-2325 or grottman@dcaclu.org.

Sincerely,



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[12] DISCLOSE 2012 Act, H.R. 4010, 112th Cong. § 4 (2012).