Democracy21
Fred Wertheimer, President

# *CITIZENS UNITED* DECISION MAKES CLEAR THAT DISCLOSURE PROVISIONS IN H.R. 5175 ARE CONSTITUTIONAL

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Dear Representative,

In response to the Supreme Court's decision in *Citizens United v. FEC,* 130 S.Ct. 876 (2010), H.R. 5175, the DISCLOSE Act, contains comprehensive new requirements for corporations, labor unions, trade associations and advocacy groups to promptly disclose to the public their campaign-related expenditures.

Reporting organizations are required to disclose the campaign-related expenditures they make and the donors who are funding these expenditures. These provisions are necessary to ensure that effective campaign finance disclosures are made to citizens – and that the donors providing tens of millions of dollars to influence federal elections are not hidden or masked from the public through the use of conduits, intermediaries and front groups.

The Supreme Court in *Citizens United* affirmed more than three decades of prior Court decisions in making clear that disclosure of money spent by for-profit and non-profit corporations and labor unions for campaign-related expenditures is constitutional.

Since *Buckley v. Valeo,* 424 U.S. 1, 43-55 (1976), the Supreme Court has upheld the constitutionality of provisions enacted by Congress to require disclosure of money spent to influence federal elections.

Indeed, in *Citizens United* itself, the Court – by an 8 to 1 vote – reaffirmed the constitutionality of disclosure requirements for election-related spending. The Court said, "Disclaimer and disclosure requirements may burden the ability to speak, but they 'impose no ceiling on campaign related activities,' *Buckley*, 424 U. S., at 64, and 'do not prevent anyone from speaking,' *McConnell*, supra, at 201 (internal quotation marks and brackets omitted)." 130 S.Ct. at 914 (emphasis added).

The Court said that disclosure laws 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." *Id.*

Importantly, the Court in *Citizens United* specifically took note of the problems that result when groups run ads "while hiding behind dubious and misleading names," thus hiding 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 the existing "electioneering communications" disclosure requirements.

In rejecting Citizen United's challenge, 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 requirement to disclose the ads in the fact that the ads referred to a candidate in an election context. *Id.*

Additionally, the Court 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 opened the door to unlimited campaign spending by corporations, eight of nine Justices in the same case strongly endorsed disclosure as the 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 Court for 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 who are funding the campaign spending. 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 spending to disclose their spending and their donors. The DISCLOSE Act is intended, in particular, to address 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 decisionmaking by voters. The DISCLOSE Act furthers these important goals that have been endorsed by the Court.

Sincerely,

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