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July 19, 2022

The Hon. Amy Klobuchar, Chairman  
The Hon. Roy Blunt, Ranking Member  
Committee on Rules and Administration  
U.S. Senate  
Washington, D.C. 20510

## **Testimony Submitted on Behalf of Public Citizen**

**Before the Senate Committee on Rules and Administration**

### **Hearing on the DISCLOSE Act of 2021 (S. 443)**

Public Citizen is pleased that the Senate Committee on Rules and Administration has decided to hold a hearing on the “Democracy Is Strengthened by Casting Light on Spending in Elections” (DISCLOSE) Act of 2021, which has been reintroduced by Sen. Sheldon Whitehouse (D-R.I.). As of this writing, the legislation has already been endorsed by 48 cosponsors in the Senate and 197 cosponsors of companion legislation in the House (H.R. 1334).

Public Citizen respectfully submits testimony to the Committee on behalf of our more than 500,000 members and activists in strong support of this newest version of the DISCLOSE Act and applauds this effort to lift the veil of secrecy cloaking who is funding our elections.

The DISCLOSE Act is an important legislative response to the gravely unfortunate 2010 Supreme Court decision, *Citizens United v. Federal Election Commission*. The Court’s decision to roll back a century of American political tradition banning corporate treasury money in elections has created severe challenges to our democracy. In the electoral arena, this decision has brought a flood of new money into elections, crowding out the television airwaves near elections, ratcheting up the cost of campaigns and increasing the time and resources needed for candidate fundraising. In the legislative arena, the mere threat of corporate political spending gives corporate lobbyists a larger club to wield when negotiating with lawmakers.

The DISCLOSE Act is a desperately-needed step to repair some of the damage caused by the *Citizens United* decision and subsequent political developments over the last decade. It can provide voters with the means to decipher campaign messages by casting light on the true funding sources behind those messages. The legislative proposal also closes major loopholes in

the current disclosure laws – loopholes that have become all the more problematic as foreign entities, corporations and wealthy individuals seek ways to influence elections and pressure lawmakers by funneling money through innocuous-sounding outside groups to handle their advertising campaigns secretly on their behalf.

This legislation is a transparency-only measure. The DISCLOSE Act of 2021 would require all entities that make campaign expenditures to disclose the true sources of those funds. It would require organizations spending money in elections – including super PACs and 501(c)(4) dark money groups – to promptly disclose the true sources of all large donations during an election cycle. The legislation would prevent political operatives from hiding donors behind layers of front groups and explicitly mandates that such operatives certify they are not using foreign money for electioneering purposes. It would also require campaign ads to list the top donors in the ad itself. These measures will help Americans to easily discern who is really spending to influence our elections.

### **The Influx of New Money**

On January 21, 2010, the U.S. Supreme Court startled the American public when it ruled in *Citizens United v. Federal Election Commission*, contrary to long-standing precedent, that corporations have a constitutional right to spend unlimited amounts of money to elect or defeat candidates for public office.

The impact on our elections was felt almost immediately. In just the first year following the decision, campaign spending by outside groups in the 2010 election soared 427 percent over spending levels in the previous midterm election. Spending by outside groups jumped to \$294.2 million in the 2010 election cycle from just \$68.9 million in 2006, the previous mid-term election cycle. The 2010 figures nearly matched the \$301.7 million spent by outside groups in the 2008 presidential cycle. Nearly half of the money spent (\$138.5 million, or 47.1 percent) came from only 10 groups.<sup>1</sup>

As we enter the 2022 election, estimates of the growth of campaign spending, especially by outside groups and super PACs, suggest that it will shatter all previous records. As of July 13 in the upcoming 2022 midterm election, more than \$400 million has already been spent by outside groups to influence our vote choices.<sup>2</sup>

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<sup>1</sup> Public Citizen, 12 Months After: The Effects of Citizens United on Elections and the Integrity of the Legislative Process (January 2011) at 9, available at: <https://www.citizen.org/article/12-months-after/>

<sup>2</sup> Open Secrets, “Total Outside Spending by Election Cycle,” available at: [https://www.opensecrets.org/outsidespending/cycle\\_tots.php](https://www.opensecrets.org/outsidespending/cycle_tots.php)

## Fading Disclosure

Perhaps even more alarming than the flood of new money into elections is the dramatic decline in transparency as to where all this money is coming from.

Before the Roberts Court reversed the precedents of two earlier landmark campaign finance decisions of previous Supreme Courts, the public was able to learn the identities of the sponsors of major campaign advertisements broadcast near federal elections. In the years following passage of the Bipartisan Campaign Reform Act (BCRA) of 2002, the public received nearly complete disclosure of funding sources behind electioneering communications and independent expenditures in the 2004 and 2006 elections. In the 2010 elections, with the sudden rise of corporate campaign money, donor disclosure fell to 34 percent for electioneering communications (ads that depict candidates very near an election but do not use the magic words of express advocacy, such as “vote for” or “vote against”) and fell to 70 percent for express advocacy independent expenditures – marking a collapse of overall donor disclosure from nearly 100 percent in 2004 and 2006 to about 50 percent in 2010.<sup>3</sup>

Today, dark money has become overwhelming. Hand-in-hand with the dramatic increase in outside spending came a dramatic increase in “dark money” – money used in our elections from secret sources, including from well-disguised foreign interests. And dark money does not play party favorites. Dark money topped a staggering \$1 billion in the 2020 elections, much of it boosting Democratic candidates.<sup>4</sup>

This fading disclosure cannot be entirely blamed on the *Citizens United* decision. In fact, the Court voted 8-1 upholding the disclosure requirements in the same ruling. The Court stated: 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>5</sup>

What the Court failed to understand was that in allowing corporate money to flow into our elections, the Court triggered a collapse of the disclosure rules. Following the 2007 *Wisconsin Right to Life v. FEC* decision, in which the Roberts Court ruled that corporations and unions may make electioneering communications so long as the ads could be interpreted as something other than an appeal to support or oppose candidates, the Federal Election Commission (FEC) modified its regulation implementing the disclosure requirement of BCRA.

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<sup>3</sup> Public Citizen, *Disclosure Eclipse* (Nov. 18, 2010) at 4-5, available at: [https://www.citizen.org/wp-content/uploads/eclipsed\\_disclosure111820102.pdf](https://www.citizen.org/wp-content/uploads/eclipsed_disclosure111820102.pdf)

<sup>4</sup> Open Secrets, “Dark Money Topped \$1 Billion in 2020, Largely Boosting Democrats,” available at: <https://www.opensecrets.org/news/2021/03/one-billion-dark-money-2020-electioncycle/>

<sup>5</sup> *Citizens United v. Federal Election Commission*, 558 U.S. 310 (Jan. 21, 2010).

The FEC reasoned that since corporations and labor unions could make electioneering communications, they should not be required to disclose the names of everyone who provides them with \$1,000 or more for purposes unrelated to electioneering. The agency added a separate section to that effect, requiring a corporation or labor organization that makes electioneering communications to disclose “the name and address of each person who made a donation aggregating \$1,000 or more to the corporation or labor organization, aggregating since the first day of the preceding calendar year, *which was made for the purpose of furthering electioneering communications.*” BCRA makes no such qualification; all donors must be disclosed under the plain language of the law.<sup>6</sup>

The new FEC rule, however, has been interpreted by a growing number of outside groups to mean that only those donors who specifically “earmark” funds for a campaign ad need be disclosed. The problem is that very, very few donors earmark their contributions for a specific purpose. Donors simply give chunks of money to outside groups whose political leanings they favor, and let the outside group determine how to spend the money. Since donations to outside groups that are not earmarked for a specific purpose – which is almost all donations – the money need not be disclosed under the new disclosure rules.

Through deregulation and lack of enforcement, very little is left of BCRA, which by all rights should be a very robust transparency law. Couple this lack of transparency with a flood of new money flowing into our elections from the *Citizens United* decision, and it becomes evident that financing campaigns in our country today is returning to the days of old when “Robber Barons” dominated government through secret corporate slush funds.

### **Americans Want More Transparency**

A recent survey found that 92 percent of Americans overwhelmingly agree that the activities of our largest companies have an impact on society and that 86 percent of Americans think companies should be transparent about their societal impacts. The same survey found that 70 percent of Americans agree that companies have a responsibility to protect the democratic process and that 81 percent think it’s important that companies disclose data about their political spending and lobbying.<sup>7</sup> Further, nearly all voters – 94 percent – support making nearly all political contributions fully transparent, 93 percent support providing more transparency into

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<sup>6</sup> 11 C.F.R. § 104.20(c)(9) (emphasis added)

<sup>7</sup> Jennifer Tonti, “SURVEY ANALYSIS: Americans Want to See Greater Transparency on ESG Issues and View Federal Requirements as a Key Lever for Increasing Disclosure,” JUST CAPITAL (February 2022), available at: <https://bit.ly/3Qt8e2g>.

lobbyist fundraising, and 92 percent support prohibiting political candidates from benefiting from unlimited secret corporate money to boost their campaigns.<sup>8</sup>

Shareholders- the owners of Corporate America's money- are concerned about the erosion of democracy and the risks posed by corporations spending undisclosed amounts of shareholder money in politics. Our capital markets need a robust and fully functioning democracy to thrive. Additionally, a company's political spending is relevant to its shareholders because it can present significant reputational risk if not disclosed and managed properly. Many customers and the purchasing public are paying close attention to whether a company's political activity lines up with its corporate values. If there is a disconnect, companies can face bad press, boycotts, or targeted social media campaigns, all things that can impact the bottom line and hurt investors.

Absent clear disclosure around 501(c)4 "dark money" groups, companies can risk additional scandal. For example, FirstEnergy came under fire for funneling \$60 million through nonprofit groups to support the Ohio Speaker of the House, Larry Householder, allegedly in exchange for a bailout of its nuclear power plants.<sup>9</sup> In addition to the scandalous fallout, shareholders have brought a lawsuit against the company that could end up costing \$180 million.<sup>10</sup>

The history of shareholder proposals on political activity demonstrates the intense investor interest in this information. Shareholder proposals asking companies to fully disclose their political activity have been one of the most filed categories of ESG-related proposals since 2013. As of late February, 101 political activity proposals were filed for the 2022 proxy season, up from 89 in 2021.<sup>11</sup> The DISCLOSE Act would make such corporate political spending transparent to both shareholders and the public.

### **Conclusion: The DISCLOSE Act Reinstates Full Transparency, All the While Protecting Non-Electioneering Political Speech**

It is a well-established norm of American politics that voters have a right to know who is paying, and how much they are paying, for campaign ads. The Supreme Court has upheld the

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<sup>8</sup> Global Strategy Group and ALG Research, "NEW POLL: For the People Act is Popular with Voters," NEWSLETTER (March 15, 2021), available at: <https://endcitizensunited.org/wp-content/uploads/2021/03/ECU-For-the-People-Act-Matching-Funds-Memo-F03.15.21.pdf>.

<sup>9</sup> Associated Press, "Angry Shareholders Pile into Lawsuits That Could Cost FirstEnergy Millions of Dollars," *Pittsburg-Post Gazette* (January 1, 2021), available at: <https://bit.ly/3zIwvv0>.

<sup>10</sup> FirstEnergy, "FirstEnergy Agrees on Terms to Resolve Shareholder Derivative Litigation," News release (February 10, 2022), available at: <https://bit.ly/3HzkrOF>.

<sup>11</sup> ProxyPreview, "Corporate Political Influence," ESG PROXY VOTE ALERTS (viewed on June 17, 2022), available at: <https://bit.ly/3HBu931>.

principle of disclosure in election spending over and over again – including most recently in the *Citizen United* ruling 8 to 1 – recognizing that who is paying for campaign advertising is valuable information that helps voters judge the merits of the barrage of ads that overwhelm the airwaves every election. The DISCLOSE Act of 2021 will provide voters with exactly that information.

At the same time, the DISCLOSE Act is not overly burdensome for groups that conduct both electioneering activity and activity unrelated to elections, such as genuine issue advocacy. The measure allows any group that wants to get involved in elections to set up a separate electioneering fund and only disclose the sources of money going into that electioneering fund. If a group decides to spend general treasury revenues, then it must disclose all its donors as required under BCRA.

To ensure that groups take some responsibility for the tone and content of their ads, the legislation also would require electioneering groups to list their top five funders. The head of such an organization must also appear in the ad itself and declare that he or she approves of the message.

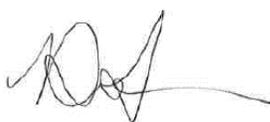
The DISCLOSE Act also addresses the relatively new but growing problem of foreign sources spending to influence our elections through front groups or on social media platforms. Political operatives must certify they are not using foreign money for electioneering purposes – a certification enforced by the comprehensive disclosure requirements – and large social media platforms must also document and disclose the sources of political spending and strictly abide by the ban on foreign money in our elections.

The DISCLOSE Act of 2021 is commonsense, straightforward legislation that would reinstate full transparency of electioneering spending and go a long way toward reining in some of the damage caused by the *Citizens United* decision. Public Citizen enthusiastically supports passage of the DISCLOSE Act.

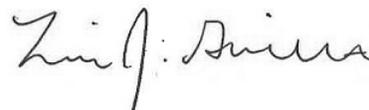
Respectfully Submitted,



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