WASHINGTON
LEGISLATIVE OFFICE

July 22, 2014

The Honorable Charles E. Schumer
Senate Committee on Rules and Administration
305 Russell Senate Office Building
Washington, DC 20510

The Honorable Pat Roberts
Senate Committee on Rules and Administration
305 Russell Senate Office Building
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Re: ACLU Opposes S. 2516 – The Democracy is Strengthened by Casting Light on Spending in Elections ("DISCLOSE") Act

Dear Senator:

In advance of tomorrow's hearing on S. 2516, the Democracy Is Strengthened by Casting Light on Spending in Elections ("DISCLOSE") Act, we write in opposition to the measure.[1]

It is clear that the sponsors of the DISCLOSE Act seek the laudable goal of fair and participatory federal elections, one that we emphatically share. To that end, we support numerous measures that promote an informed and engaged electorate, including comprehensive public financing like the program proposed in the Fair Elections Now Act,[2] enforcement of laws against straw donations and effective coordination restrictions to prevent campaign or candidate control of outside spending.

We also believe the electorate has a legitimate interest in knowing the source of significant support for a candidate – one of the reasons we are concerned

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[1] S. 2516, 113th Cong. (2014). S. 2516 is identical, save updating to reflect the reintroduction, to S. 3369, 112th Cong. (2012), the previously introduced version of the DISCLOSE Act. The ACLU opposed S. 3369 and other past iterations of the bill. *See* Letter from Laura W. Murphy et al., Director, Am. Civil Liberties Union Washington Legislative Office, to Senate (July 16, 2012), *available at* http://bit.ly/1p2LhO4; Letter from Laura W. Murphy & Michael Macleod-Ball, Am. Civil Liberties Union Washington Legislative Office to Senate on S. 3628, 111th Cong. (July 23, 2010), *available at* http://bit.ly/1nbAeoF; Letter from Laura W. Murphy & Michael Macleod-Ball, Am. Civil Liberties Union Washington Legislative Office to the House of Representatives on H.R. 5175, 111th Cong. (June 17, 2010), *available at* http://bit.ly/1k8xYjn.

[2] H.R. 269/S. 2023, 113th Cong. (2014).

about the abuse of coordination rules. For groups, however, engaged in advocacy around political issues, even in proximity to elections or primaries, we fear that overbroad disclosure requirements will chill the exercise of rights of expression and association. We agree that transparency in our elections serves to protect the integrity of those elections. Nevertheless, caution must be the watchword when any legislation has the potential to restrict or chill political speech, entitled to the highest level of constitutional protection under the First Amendment.[3]

Because campaign finance restrictions like the DISCLOSE Act have the potential to chill political speech, they must be drafted to minimize any burden on free expression. We fear that the DISCLOSE Act as currently written may strike the wrong balance, and could act to suppress a sizeable amount of issue advocacy by groups—including wholly non-partisan groups like the ACLU—that serves to inform the electorate and improve electoral outcomes without expressing support or opposition for particular candidates.

The DISCLOSE Act extends beyond regulating "Super PACs" or 501(c)(4) organizations engaged in direct partisan political advocacy using secret donations.[4] The DISCLOSE Act, as written, would abrogate the anonymous speech rights of donors to non-partisan groups advocating on controversial issues of the day and not advocating for or against candidates for office.

We offer comments on two areas of concern.

1. The DISCLOSE Act Would 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.[5]

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

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[3] *R.A.V. v. City of St. Paul*, 505 U.S. 377, 422 (1992) ("Our First Amendment decisions have created a rough hierarchy in the constitutional protection of speech. Core political speech occupies the highest, most protected position . . . .") (Stephens, J., concurring).

[4] For more on the ongoing controversy over § 501(c)(4) tax exempt social welfare groups, please see the ACLU's comments to the Internal Revenue Service urging it to withdraw its proposed rules governing the definition of political intervention under the relevant regulations, too much of which will jeopardize a group's (c)(4) status. Letter from Laura W. Murphy & Gabe Rottman, Am. Civil Liberties Union Washington Legislative Office, to the Hon. John A. Koskinen on Guidance for Tax-Exempt Social Welfare Organizations on Candidate-Related Political Activities, 78 Fed. Reg. 71,535 (proposed on Nov. 29, 2013) (Feb. 4, 2014), *available at* http://bit.ly/MoPWh4.

[5] S. 2516 § (2)(a)(2).

following the announcement of a special election up to the special election. In concrete terms, the period for communications referring to a member of the House or Senate would extend for a full 10 months before a typical November election, whereas the relevant period under current law is limited to two months.

As a result, the special reporting rules would apply to communications about all members of the House of Representatives 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 House members—any advocacy organization wishing to run an ad that even mentions a candidate's name would have to publicly disclose personally identifying information about some 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 risk the opportunity for additional donations by those supporters. Either way, this bill would have a 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.

To take the 2012 election as an illustration, under current law the electioneering communications disclosure 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. Were the DISCLOSE Act to have been law during the 2012 election season, that disclosure period for presidential candidates would have extended all the way back to September 5, 2011, *and* would have 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 Obamacare, gun control, or the wars in the Iraq and Afghanistan, and even if they assiduously avoid expressing support for or opposition to 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 would begin on January 1 of the election year.

These concerns are further heightened when 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 *sitting* president or vice president, including truly non-partisan criticism on specific policy issues, during more than a fourth of a president's first term. But whether it's the president or a member of Congress, citizens of this country must retain the right to band together and urge an officeholder to take a position on an issue of public importance. This bill, by its very terms, makes it more likely that some citizens will choose to remain silent.

We reiterate our concurrence with the laudable goals of this legislation. At the very least, however, new disclosure rules must distinguish clearly between express advocacy for or against

a candidate for office and commentary on political issues. This legislation fails to draw that bright line, and will therefore chill advocacy at all points on the political spectrum.

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 DISCLOSE Act would require disclosure in two circumstances. A "covered organization"[6] that spends more than $10,000 in a cycle on "campaign-related disbursements,"[7] 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.[8] 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.[9]

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.[10] 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.*[11] In that case, the Supreme Court sternly rebuked government-mandated membership disclosure regimes as thinly veiled attempts to intimidate activist organizations by instilling fear of retaliation among members of the activist group.

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.

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[6] That is, virtually any politically active entity save organizations that are exempt from taxation under § 501(c)(3) of the Internal Revenue Code. S. 2516 § (2)(b)(1) (proposed new 2 U.S.C. § 441k(e)).

[7] Defined in S. 2516 § (2)(b)(1) (proposed new 2 U.S.C. § 441k(d)) to include independent expenditures and electioneering communications.

[8] S. 2516 § (2)(b)(1) (proposed new 2 U.S.C. § 441k(a)(2)(F)). We do note and appreciate the raised threshold for disclosure.

[9] S. 2516 § (2)(b)(1) (proposed new 2 U.S.C. § 441k(a)(2)(E)).

[10] S. 2516 § (2)(b)(1) (proposed new 2 U.S.C. § (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.

[11] 357 U.S. 449, 460 (1958).

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. 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. 3369. 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.[12]

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.

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

Sincerely,

Laura W. Murphy
Director, Washington Legislative Office

Michael W. Macleod-Ball
Chief of Staff/First Amendment Counsel

Gabriel Rottman
Legislative Counsel/Policy Advisor

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