WASHINGTON
LEGISLATIVE OFFICE

July 23, 2010

United States Senate
Washington, DC 20510

Re: ACLU Opposes S. 3628 – 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, and countless additional supporters and activists, we write to express our opposition to S. 3628, the Democracy is Strengthened by Casting Light on Spending in Elections (DISCLOSE) Act.[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 DISCLOSE Act seeks the laudable goal of fair and participatory federal elections. However, despite some elements that enhance participation in federal elections, we believe this legislation would fail 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 cloture when it comes up early next week and to vote 'NO' on S. 3628 if cloture is invoked.

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 process must be fair and evenhanded, understandable, and not unduly burdensome. It must assure integrity and inclusivity, encourage participation, and protect 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 wholly independent of any candidate for

[1] S. 3628 closely resembles the House version of the DISCLOSE Act (H.R. 5175) and an earlier Senate version, S. 3295. While we oppose all three versions of the bill, these comments will be focused on S. 3628, on which there will be a cloture vote on Tuesday, July 27, 2010.

office – have not been shown to contribute to official corruption. Accordingly, disclosure of such donations serves no legitimate public purpose. Unfortunately, the DISCLOSE Act would wipe away such donor anonymity – most notably, that of small donors to smaller and more controversial organizations, even when those donors have nothing to do with that organization's political speech. It would also restrict speech rights in an arbitrary manner, favoring one type of organization over another. While these bills may have been intended to shine a light on the core funders of political advertising, they go far beyond that goal. The DISCLOSE Act blurs the line between issue and campaign advocacy and puts at risk of exposure the heretofore confidential donor records of millions of Americans and thousands of legitimate non-profit advocacy organizations.

Our opposition to the DISCLOSE Act centers on four key issues.

1. **The DISCLOSE Act fails to preserve the anonymity of small donors, thereby especially chilling the expression rights of those who support controversial causes.**

By compelling politically active organizations to disclose the names of donors giving as little as $600, S. 3628 both violates individual privacy and chills free speech on important issues.[2] The earlier Senate version of the DISCLOSE Act would have been marginally less intrusive in that it mandated the disclosure only of donors giving at least $1,000, but the current bill backs away from even that marginal improvement.[3] Anonymity is important to many supporters of organizations that advocate for both popular and controversial causes. This is the case for even a longstanding and well-known organization such as the ACLU, as it surely is for groups of many other viewpoints, sizes, and histories. The pursuit of anonymity is not merely a matter of preference or convenience for individuals who support controversial movements. The harassment and attacks on members of the civil rights movement, for example, show that anonymity can be a matter personal safety.

Especially problematic is that the DISCLOSE Act would typically compel disclosure even when a donor had no intention that a gift be used for political purposes.[4] It is both impractical and unfair to hold relatively small contributors responsible for every advertisement that an organization publishes. 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.*[5] 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 era 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

[2] S. 3628, 111th Cong. § 211 (2010).
[3] S. 3295, 111th Cong. § 211 (2010).
[4] S. 3628 § 211(a).
[5] 357 U.S. 449, 460 (1958).

speech will have been curtailed. Alternatively, donors sensitive to public disclosure might refrain from giving to the organization, 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.

S. 3628 retains a key amendment to the House bill that exempts large, established organizations such as the National Rifle Association from donor disclosure obligations. This special exemption highlights our concerns and exacerbates the discriminatory aspects of the bill. If an organization has over 500,000 members, has existed for 10 years, has a presence in all 50 states, and receives less than 15% of its revenues from corporations or unions, it would qualify for the exemption.[6] Conversely, smaller organizations and those just starting out would have to disclose their donors in order to engage in political speech. That means that, if the DISCLOSE Act had been enacted 100 years ago, the civil rights and reproductive rights organizations of the early 1900s, the lesbian and gay rights groups of the 1960s, the pro-life groups of the 1970s, and the drug law reform groups of today would all have been compelled to disclose their donors if they chose to engage in political speech. However, the large, entrenched, mainstream advocacy groups – the NRA and a few others – would sit undisturbed. Those groups not challenging the status quo would be protected; those challenging the status quo would be suppressed. One proposal in the House, never voted upon, would have exempted all 501(c)(4) organizations.[7] Such a result, while not perfect, would at least have afforded greater protection to donors to smaller and newer public interest advocates. Campaign finance regulations must be applied in an even-handed manner. The result achieved by S. 3628 with its NRA exemption tailored to only the largest and most influential non-profit organizations is wholly unfair and makes a flawed bill even more unjust.

2. The DISCLOSE Act would chill not only express advocacy on political candidates, but also issue advocacy.

The DISCLOSE Act would regulate not only independent expenditures regarding political candidates, but also those communications deemed to be the "functional equivalent" of such communications.[8] This provision is susceptible of several meanings, and its ambiguity will lead individuals and organizations wishing to avoid disclosure obligations to steer clear of issue advocacy as well. Under the DISCLOSE Act, when publishing issue advertisements, an organization would be forced to ask whether a reasonable person would interpret the advertisement as advocating the election or defeat of a candidate.[9] This will not necessarily be an easy task. As Justice Kennedy noted in the 2003 Supreme Court case *McConnell v. FEC* (concurring in the judgment in part and dissenting in part), even proponents of advertising regulations have disagreed about whether specific messages were "suggestive of no plausible meaning other than an exhortation to vote for or against a specific candidate."[10] The distinction

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[6] S. 3628 § 211(c).
[7] Amendment to H.R. 5175, as Reported, Offered by Mr. Shuler of North Carolina, H. Comm. on Rules, 111th Cong. (May 26, 2010), *available at* http://www.rules.house.gov/111/AmndmentsSubmitted/hr5175/shuler_29_hr5175_111.pdf.
[8] S. 3628 § 201(a).
[9] *Id*.
[10] 540 U.S. 93, 338 (2003).

between advertisements a) that are the "functional equivalent" of those that truly advocate for or against a candidate (and as a consequence must be disclosed and might trigger donor disclosure) and b) that reference a political office holder while focusing primarily on presenting a point of view about an issue, must be clearly defined. Failure to create a clear distinction will chill not just express advocacy, but issue advocacy as well. The bill authors attempt to provide a safe harbor in the form of the Campaign-Related Activity Account (CRAA), but the safe harbor is neither safe, nor a fully protected harbor.[11]

Imagine an organization that is uncertain whether it must disclose the names of its donors under the new law, because of the ambiguity of the proposed "functional equivalent" definition. Such an organization could do one of two things. It could refrain from the kind of issue advocacy that it fears might cross the border into "express advocacy" – in which case it will have acted as a self-censor. Alternatively, it could try to limit its disclosure obligations by setting up a CRAA. In the latter case, it would not only be required to disclose donors who contributed to the CRAA, but also, if the organization deposited general treasury funds into the CRAA, general obligation donors who contributed over $6,000, even if they haven't given to the political advocacy efforts of the organization. Aside from the unwarranted disclosure of information about donors who had no intention of supporting such political advocacy, the ambiguity of the functional equivalent test creates a further risk because CRAA funds can only be used for independent expenditures or electioneering communications and the disclosure limitations are set aside if CRAA funds are used for other purposes. If the communication turned out to be "issue advocacy," and not express advocacy or its functional equivalent, the organization would have violated the provisions of the Campaign-Related Activity Account and would have to disclose all general fund donors giving more than $600. While a clear safe harbor for such organizations attempting to act in good faith might resolve much of this problem, such a safe harbor does not currently exist.[12]

Other provisions of the DISCLOSE Act expand the period of time during which these risks occur.[13] The Act would expand the "electioneering communications" period – currently the 30 days before a primary and the 60 days before a general election – to the 30 days before a primary and the 120 days before a general election. This means that any advertisement that mentions a candidate – such as urging a sitting public official to take action or encouraging citizens to contact their representatives regarding a particular issue – would be subject to special rules for an additional two months leading up to a general election. For many 501(c)(4) organizations, this means two additional months out of an election year – in addition to the current 30 days before a primary and 60 days before a general election – in which it would be subject to special reporting requirements (including the DISCLOSE Act's expanded donor disclosures) when its issue advertisements discuss a candidate.[14] The new language assumes that advocacy is directed at the

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[11] S. 3628 §§ 212 - 213.

[12] The final House bill as well as S. 3628 both provide an exception to the mandate requiring use of the CRAA for all campaign-related communications. The exception gives a covered organization protection for paying from a non-CRAA source if it reasonably determined that the expenditure was not intended to influence an election. S. 3628 § 213. While this provision may help prevent a violation of the CRAA requirements and may limit some of the donor disclosure enhancements for violation of CRAA obligations, it does not help in the ultimate determination of whether a communication is the functional equivalent of an independent expenditure.

[13] S. 3628 § 202.

[14] 11 C.F.R. § 114.10 (2010).

election or defeat of a candidate, when in fact many public interest organizations, such as the ACLU, are by policy non-partisan and decline to support or oppose individual candidates. Nevertheless, these organizations are effectively barred from engaging in issue advocacy that is intended in good faith to encourage office holders to take a particular position on a matter of interest before Congress. If that issue happens to be on the legislative schedule during this new expanded period, such advocacy organizations are effectively denied the use of a major communications tool in seeking to advance their priorities.

3. The DISCLOSE Act imposes impractical requirements on those who wish to communicate using broadcast messages.

The DISCLOSE Act mandates disclaimers on television and radio advertisements that are so burdensome they would either drown out the intended message or discourage groups from speaking out at all.[15] The individual or organizational disclosure statement, the significant funder disclosure statement, and the top-five funders statement each take up six seconds, meaning more than half of many 30-second television messages would be filled with compelled disclosures. It is unclear whether a provision for "hardship" situations would satisfactorily resolve such problems. The Act would allow an organization to avoid two of those requirements if it steers clear of "electioneering communications" and "independent expenditures," but even that would be more difficult given the Act's expanded "electioneering communications" period and less certain definition of "independent expenditures."

The significant funder statement is especially troubling in that it might require endorsement 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 would reduce the opportunity for "speech" in many advertisements by more than 50 percent. At worst, they would drive from the airwaves many organizations that wish to share their views on important public issues. The Act's "hardship" provisions, limiting the required statements when they would demand a "disproportionate amount of time," is vague and offers little assurance that the core message of an issue advertisement will be preserved. 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.

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[15] S. 3628 § 214(b).

4. The DISCLOSE Act imposes unjust restrictions on contractors, TARP participants and corporations with minimal foreign participation.

The DISCLOSE Act bars certain government contractors,[16] recipients of TARP funding,[17] and corporations having more than 20% (or, in some cases, 5%) foreign ownership[18] from engaging in independent expenditures. The restrictions are unfair because they are not tied to a demonstrated risk of corruption and they do not apply to many similarly situated recipients of government funding. The restrictions on contractors and participants in the Troubled Asset Relief Program aim to silence businesses with government connections while allowing speech by labor unions and non-profits with comparable monetary links to the government. To the extent that restrictions on free speech might be tolerated at all, it is essential that they refrain from discriminating based on the identity of the speaker. Moreover, political candidates have little or no control over most such contracts or funding mechanisms (though the earmark process might provide a notable opportunity for such a nexus). The government contractor provision in S. 3628 does not apply to those contracts below a $10 million threshold. While this provision is far more acceptable than the earlier Senate version of the bill, which had a $50,000 limit, the restriction is insufficiently narrow to justify the speech restriction.

The restrictions on "foreign" corporations also sweep too broadly. Under the S. 3628, an American corporation with merely 5 percent or 20 percent foreign ownership (depending on the identity of the foreign shareholder) is subject to speech restrictions. The DISCLOSE Act goes too far by silencing corporations with up to 95 percent American ownership. Further, this restriction discriminates in much the same manner as the rules for government contractors by allowing speech by labor unions and non-profits with foreign leadership or a large proportion of foreign members. Any attempt to curtail foreign influences in elections should be carefully constructed to preserve the First Amendment rights of Americans.

For the same reasons that we oppose these restrictions, we favor the decision to remove the Kucinich amendment to the House bill aimed at a particular type of business.[19] It would have banned independent expenditures and electioneering communications by businesses that have entered negotiations or obtained the rights to explore for and produce oil and gas under the Outer Continental Shelf Lands Act. As unpopular as companies like BP might be at the moment, frustration with an industry's conduct does not justify discriminatory limitations on speech.

5. Conclusion

The ACLU welcomes reforms that improve our democratic elections by improving the information available to voters. Some elements of the DISCLOSE Act move in that direction. Unfortunately, the most promising proposal in the original Senate bill is absent from S. 3628. 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

[16] S. 3628 § 101(a).
[17] S. 3628 § 101(b).
[18] S. 3628 § 102.
[19] H.R. 5175 § 101(c).

increase speech, rather than stifling speech about elections and issues of public importance.[20] We are disappointed that this helpful provision was excluded from the newly filed bill.

The electoral system is strengthened by such efforts to facilitate public participation, not by chilling free speech and invading the privacy of even modest 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 risks of harassment or embarrassment. Only reforms that promote speech, rather than limit it, and apply evenhandedly, rather than selectively, will bring positive change to our elections. Because the DISCLOSE Act misses both of these targets, the ACLU opposes its passage and urges a "NO" vote on the cloture vote scheduled for Tuesday, July 27, and on S. 3628 if cloture is successfully invoked.

Please contact Michael Macleod-Ball if you should have any questions or comments at 202-675-2309 or mmacleod@dcaclu.org.

Sincerely,

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[20] S. 3295 § 401.