

May 9, 2012

TO THE MEMBERS OF THE UNITED STATES SENATE:

We write about the so-called DISCLOSE 2012 Act, S. 2219, which the Senate Committee on Rules and Administration may consider in the coming days.

This legislation, like its predecessors in the 111th Congress, is designed to chill the political speech of corporations, business interests, and others, while giving labor unions special protections. As discussed below, the bill does not propose genuine reform—its disclosure requirements are transparently political and ultimately unconstitutional.

The bill favors labor unions over corporations and business associations. The bill purports to be even handed in its treatment of labor unions, corporations, and business associations, but the reality is that it is designed to burden business groups significantly more than labor unions. The bill has two key provisions that protect from disclosure the flow of money from union members to local union chapters and then to the large “international” labor unions. First, an organization that engages in political conduct is only required to disclose payments to it that exceed \$10,000 in a two-year election cycle. This means, as a practical matter, that local union chapters will not have to disclose the payments of individual union members to the union, even if those funds will be used for political purposes. Second, the bill exempts from the disclosure requirements transfers from affiliates that do not exceed \$50,000 for a two-year election cycle. As a result, an international union will not have to disclose the transfers made to it by many of its smaller local chapters.

Although the exemptions that shield unions from burdensome disclosure may be facially applicable to business associations, they are of little use to them, because business associations generally lack the labor unions’ unique, pyramid-style business model. Unlike labor unions, business associations do not have a ground-up funneling structure built on the mandatory dues of millions of members. Many of a business association’s corporate members might give it more than \$10,000 over a two-year period, which would trigger the bill’s disclosure provisions. Similarly, most business associations do not have a vast network of local affiliates from which they can draw up to \$50,000 in exempted transfers.

The bill’s structural favoritism of labor unions is no accident. Labor unions have been—and continue to be—some of the heaviest spenders during election season. Indeed, labor unions are preparing to spend immense sums in the upcoming elections—more than \$400 million, according to one recent report. *See, e.g., Unions Spending for Obama, Democrats Could Top \$400 Million in 2012 Election*, WASH. POST (Feb. 22, 2012). AFSCME reportedly expects to spend more than \$100 million “on political action, including television advertising, phone banks and member canvassing,” while the SEIU plans to spend at least \$85 million in the coming year, and has already donated \$500,000 to a pro-Obama Super PAC. *Id.* Similarly, the AFL-CIO has established its own Super PAC for the upcoming elections, which has so far raised \$3.7 million.

The bill would unconstitutionally target certain speech based on the identity of the speaker. The bill's manifest purpose is to impose exceptional burdens on the speech of corporations and business interests based on their identity as corporations and their presumed hostility to the political objectives of the bill's supporters. As the Supreme Court held in *Citizens United*, "the First Amendment generally prohibits the suppression of political speech based on the speaker's identity." *Citizens United v. FEC*, 130 S. Ct. 876, 905 (2010).

This impermissible intent is evident from the crafting of the bill and many of the statements of its sponsors. Senator Schumer acknowledges that the bill is aimed primarily at *corporate speech*. Press Release, *Senators Announce New Legislation to Shine Light on Anonymous Campaign Spending* (Office of Sen. Whitehouse) (Mar. 21, 2012) (emphasis added). Senator Patrick Leahy echoed this sentiment, making clear that the bill seeks to limit "*corporate money*" and "*corporate influence*," in other words, corporate political speech. Press Release, *Senators Announce New Legislation to Shine Light on Anonymous Campaign Spending* (Office of Sen. Whitehouse) (Mar. 21, 2012) (emphasis added). Incumbents, of course, have a vested interest in restricting political speech and "outing" critical voices. But such discriminatory speech restrictions do not pass constitutional muster.

The clear purpose of the bill is to facilitate retaliation against certain speakers, in violation of the First Amendment. By requiring groups to disclose the names and addresses of their donors, the bill is intended to facilitate retaliation against unpopular or unfavorable political views. This also infringes constitutional rights, because the First Amendment does not permit the government to require membership disclosure if there is a "reasonable probability" that the donors will be subject to "threats, harassment, or reprisals." *Doe v. Reed*, 561 U.S. ___, 130 S. Ct. 2811, 2820-21 (2010) (quoting *Buckley v. Valeo*, 424 U.S. 1, 74 (1976) (per curiam)); see also *NAACP v. Alabama ex rel. Patterson*, 357 U.S. 449 (1958).

The probability of unconstitutional reprisals against political speakers is palpable here; partisan interest groups already are announcing plans for them. For example, the interest group Media Matters has made clear that it would use campaign spending disclosure to "provoke backlashes among companies' shareholders, employees, and customers, and the public-at-large." Media Matters, *A Three Year Campaign* (2012).

Groups from across the political spectrum have recognized the threat this bill poses to First Amendment interests. The bill would "infringe on the anonymous speech rights of individuals and groups," the ACLU has said, "subjecting them to harassment and potentially discouraging valuable participation in the political process." Letter from ACLU to Senate Committee on Rules & Administration (Mar. 28, 2012).

The bill is premised on misdirection and does not respond to an actual problem. The bill's sponsors promote the bill using the same sort of inaccuracies employed during the last Congress to promote the previous iteration of this bill. For example, Senator Schumer describes the new legislation as a "disclosure and disclaimer" bill, "[p]lain and simple," meant to address the "aftermath of the *Citizens United* decision." Kevin Bogardus and Rachel Leven, *Senate Dems Push 'Disclose Act 2.0', The Hill* (Mar. 21, 2012). But the Supreme Court's decision in *Citizens United* actually upheld the neutral disclosure requirements at issue in that case, and it

did not change the requirements applicable to corporations or Super PACs. Indeed, a decision from a federal appellate court, *SpeechNow.org v. FEC*, 599 F.3d 686 (D.C. Cir. 2010), has applied *Citizens United* to uphold the applicability of disclosure requirements to “independent-expenditure-only” political committees (e.g., the “Super PACs”). Thus, Super PACs are required to disclose their donors under existing federal law.

In addition, the bill’s single-minded focus on corporate speech is ironic, because even some mainstream media are now acknowledging that warnings of “[c]ampaign finance-reform advocates” that “unlimited donations from corporations, newly empowered to give limitless sums, would have a corrupting influence on American democracy . . . **have not materialized.**” Adam Sorensen, *Among Romney Super PAC’s Corporate Donors, Big Names Not All Easy to Spot*, Time.com (Feb. 22, 2012) (emphasis added). The bill is a poorly constructed solution to a manufactured problem.

* * *

It is plain that DISCLOSE 2012 is a purely partisan effort to silence one, and only one, group of speakers—the business community. The Senate should resist the urge to engage in such blatant election-year chicanery and should focus instead on the many pressing issues that are facing this nation’s economy. We urge you to oppose this legislation.

Sincerely,

60 Plus Association
ABC Heart of America Chapter
ABC South Texas Chapter
Aerospace Industries Association
Agricultural Retailers Association
Aircraft Owners and Pilots Association
Airlines for America
American Apparel & Footwear Association
American Bakers Association
American Chemistry Council
American Council of Engineering Companies (ACEC)
American Frozen Food Institute
American Gaming Association
American Hotel & Lodging Association
American Insurance Association
American Lighting Association
American Moving & Storage Association
American Petroleum Institute
American Supply Association
American Trucking Associations
American Wholesale Marketers Association
Arizona-New Mexico Cable Communications Association
Arkansas Home Builders Association

Arkansas State Chamber of Commerce
Associated Builders & Contractors Central Pennsylvania Chapter
Associated Builders & Contractors Chesapeake Shores
Associated Builders & Contractors New Orleans/Bayou Chapter
Associated Builders & Contractors Northern Ohio Chapter
Associated Builders & Contractors of Greater Houston
Associated Builders & Contractors of Western Washington
Associated Builders & Contractors Rhode Island Chapter
Associated Builders & Contractors Southeast Texas Chapter
Associated Builders & Contractors, Inc.
Associated Builders & Contractors, Inc. Golden Gate Chapter
Associated Builders and Contractors Eastern Pennsylvania Chapter, Inc.
Associated Builders and Contractors Massachusetts Chapter
Associated Builders and Contractors San Diego Chapter
Associated Builders and Contractors, Keystone Chapter
Associated Equipment Distributors
Associated General Contractors of America
Associated General Contractors of Maine
Associated Industries of Massachusetts
Associated Oregon Industries
Association for Corporate Growth
Association of Washington Business
Automotive Aftermarket Association Southeast, Inc.
Automotive Aftermarket Industry Association
Bismarck-Mandan Chamber of Commerce (ND)
Business Council of Alabama
Business Services Etc., Inc.
Business Solutions Association
CalChamber (CA)
Central Florida Chapter Associated Builders and Contractors, Inc.
Chester County Chamber of Business & Industry (PA)
Colorado Association of Commerce & Industry
Commerce Lexington Inc. (KY)
Construction Industry Round Table
Design Professionals Coalition (DPC)
Dot Foods, Inc.
Draper Utah Area Chamber of Commerce
Edison Electric Institute
Electronics Representatives Association International
Empire State Chapter of Associated Builders and Contractors
Family Research Council Action
Food Marketing Institute
Gases and Welding Distributors Association (GAWDA)
Greater North Dakota Chamber of Commerce
Greater Springfield Chamber of Commerce (VA)
Heating, Air-Conditioning & Refrigeration Distributors International (HARDI)

Hilton Head Island – Bluffton Chamber of Commerce
Huron County Chamber of Commerce (OH)
International Dairy Foods Association
International Foodservice Distributors Association
International Sign Association
ISSA – The Worldwide Cleaning Industry Association
Lake Havasu Area Chamber of Commerce (AZ)
Little Rock Regional Chamber of Commerce (AR)
Los Angeles Area Chamber of Commerce
Metals Service Center Institute
MHEDA – Material Handling Equipment Distributors Association
National Association of Chemical Distributors
National Association of Home Builders
National Association of Manufacturers
National Association of Wholesaler-Distributors
National Council of Chain Restaurants
National Federation of Independent Business
National Grain and Feed Association
National Marine Distributors Association
National Restaurant Association
National Retail Federation
National Roofing Contractors Association
National Stone, Sand & Gravel Association
New Jersey Motor Truck Association
North American Equipment Dealers Association
North Country Chamber of Commerce (NY)
North-American Association of Uniform Manufacturers & Distributors
Ohio Valley Chapter of Associated Builders and Contractors
Outdoor Power Equipment and Engine Service Association (OPEESA)
PA Chamber of Business and Industry
Palm Desert Area Chamber of Commerce (CA)
Pelican Chapter Associated Builders and Contractors, Inc.
Printing Industries of America
Retail Industry Leaders Association
Rhode Island Chamber of Commerce Coalition
Rochester Area Chamber of Commerce (MN)
Rocky Mountain Chapter, Assoc. Builders & Contractors
Schuylkill Chamber of Commerce (PA)
Small Business & Entrepreneurship Council
SouthWestern Equipment Dealers Association
St. Tammany West Chamber of Commerce (LA)
Texas Association of Business
TEXO, The Construction Association
The FPDA Motion & Control Network
The Greater Michigan Chapter of Associated Builders & Contractors
The Kansas Chamber

The Non-Ferrous Founders' Society
The Salisbury Area Chamber of Commerce (MD)
U.S. Chamber of Commerce
West Virginia Chamber of Commerce
Wholesale Florist & Florist Supplier Association
Wichita Independent Business Association
Wisconsin Grocers Association
Wisconsin Small Business United
Women Construction Owners & Executives, USA