WASHINGTON
LEGISLATIVE OFFICE

June 17, 2010

U.S. House of Representatives
Washington, DC 20515

Re: **The ACLU Opposes H.R. 5175, the DISCLOSE Act**

Dear Representative:

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 grave concerns about H.R. 5175, the Democracy is Strengthened by Casting Light on Spending in Elections (DISCLOSE) Act. The ACLU has been involved in the public debate over campaign finance reform for over a decade, 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 bill fails 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 vote against this bill when it comes to the floor in the near future.

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 the 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 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

AMERICAN CIVIL LIBERTIES UNION
WASHINGTON
LEGISLATIVE OFFICE
915 15th STREET, NW, 6TH FL
WASHINGTON, DC 20005
T/202.544.1681
F/202.546.0738
WWW.ACLU.ORG

LAURA W. MURPHY
DIRECTOR

NATIONAL OFFICE
125 BROAD STREET, 18TH FL.
NEW YORK, NY 10004-2400
T/212.549.2500

organization's political speech. It would also restrict speech rights in an arbitrary manner, favoring one type of organization over another. While this bill may have been intended to shine a light on the core funders of political advertising, it goes 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 this bill 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, the DISCLOSE Act both violates individual privacy and chills free speech on important issues.[1] 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.[2] 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.*[3] 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 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 – something *NAACP v. Alabama* clearly protects against.

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[1] H.R. 5175, 111th Cong. § 211 (2010).
[2] *Id.* at § 211(a).
[3] 357 U.S. 449, 460 (1958).

In recent days, reports indicate that bill sponsors have accepted an amendment that highlights our concerns and exacerbates the exclusionary aspects of the bill.[4] The Shuler amendment would exempt large, established organizations such as the National Rifle Association from the donor disclosure obligations. It states that if an organization has over one million members (or, perhaps, 500,000, according to a more recent report), 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 will qualify for the exemption. Conversely, smaller organizations and those just starting out would have to disclose their donors in order to engage in political speech. That means that 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 be 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. This disparity was not present in an amendment previously proposed by Rep. Shuler, which would have exempted all 501(c)(4) organizations.[5] 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 evenhanded manner. The result achieved by the current bill as modified by the so-called NRA amendment is wholly unfair and unjust and must be set aside.

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.[6] 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.[7] 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."[8] The distinction between advertisements 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 those that present a point of view about an issue must be clearly defined to avoid chilling of not just express advocacy, but issue advocacy as well. The bill authors attempt to provide a form

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[4] David Espo, *House Dems yield to NRA on disclosure bill*, The Associated Press, June 14, 2010, *available at* http://www.washingtonpost.com/wp-dyn/content/article/2010/06/14/AR2010061404362.html.
[5] 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.
[6] H.R. 5175 § 201(a).
[7] *Id*.
[8] 540 U.S. 93, 338 (2003).

of safe harbor in the form of the so-called Campaign-Related Activity Account (CRAA), but the safe harbor is neither safe, nor a fully-protected harbor.

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.

Other provisions of the DISCLOSE Act expand the period of time during which these risks occur.[9] The Act would expand the "electioneering communications" period – currently 30 days before a primary and 60 days before a general election— to 30 days before a primary and 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 an additional two 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 when its issue advertisements discuss a candidate.[10] The new language assumes that advocacy is directed at the 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.

[9] H.R. 5175 § 202(a).
[10] 11 C.F.R. § 114.10 (2010).

3. The DISCLOSE Act imposes impractical requirements on those who wish to communicate using broadcasting 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.[11] 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 difficult to even conceive of a way to use 15-second messages. And it is unclear whether the 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 the endorsement of 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 "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 require a "disproportionate amount of time," is vague and therefore 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.

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

The DISCLOSE Act bars certain government contractors,[12] recipients of TARP funding,[13] and corporations having more than 20% foreign ownership[14] 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 other similarly-situated recipients of government funding. The restrictions on contractors and participants in the Troubled Asset Relief Program

[11] H.R. 5175 § 214(b).
[12] *Id.* at § 101(a).
[13] *Id.* at § 101(b).
[14] *Id.* at § 102.

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 the House bill does not apply to those contracts below a $7 million threshold. While this makes the House provision far more acceptable than the Senate version of the bill, which has 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 DISCLOSE Act, an American corporation with a mere 20 percent foreign ownership is subject to speech restrictions. The DISCLOSE Act goes too far by silencing corporations with up to 80 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.

5. Conclusion

The ACLU welcomes reforms that improve our democratic elections by improving the information available to voters. While some elements of this bill move in that direction, the system is not strengthened 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 H.R. 5175.

Sincerely,

Laura W. Murphy
Director, Washington Legislative Office

Michael W. Macleod-Ball
Chief Legislative and Policy Counsel