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3/25/13



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Supporting S. 5: An Act Concerning Campaign Finance Reform

Government Administration and Elections Committee

Prepared for March 25, 2013

Senator Musto, Representative Jutila, and Distinguished Members of the
Government Administration and Elections Committee:

I am testifying today as a law student in the Legislative Advocacy Clinic in the
Jerome N. Frank Legal Services Organization at Yale Law School in partnership
with Common Cause in Connecticut.¹

Common Cause supports Senate Bill 5, which contains many of the provisions
included in last year's strong disclosure bill that passed the House and Senate.
Senate Bill 5 will:

- Require disclosure of all donors who fund independent expenditures,
including the donors who fund transfers between organizations;
- Speed up the disclosure of independent expenditures made shortly before
elections;
- Improve disclaimers in independent expenditure advertisements by
providing a link to a website where voters can look up all donors who funded
the ad;
- Tighten rules that restrict coordination between candidates and
organizations making independent expenditures to ensure independent
expenditures are truly independent;
- Protect shareholders by requiring corporations to disclose their political
spending in Connecticut elections in their periodic reports to shareholders;
and
- Allow for segregated independent expenditure accounts so that nonpolitical
donors can contribute to organizations that make independent expenditures
and remain anonymous.

One of the principal holdings of Citizens United was the Supreme Court's
recognition of the important role disclosure and disclaimer laws play in maintaining
the integrity of our elections. Effective laws for disclosure and disclaimer of
independent spending are all the more important in Connecticut given our state's
innovative Citizens' Election Program. Senate Bill 5 will help ensure that
Connecticut law gives voters "the information needed to hold corporations and

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elected officials accountable for their positions *and* supporters,” Citizens United v. Federal Elections Commission, 130 S. Ct. 876 (2010), which the Supreme Court has repeatedly upheld as constitutional.

1. Senate Bill 5 requires disclosure of all donors funding independent expenditures, including disclosure of donors behind transfers between organizations making independent expenditures.

Current law requires organizations making independent expenditures to report their donors, Conn. Gen. Stat. Ann. § 9-612(e)(1) (West), but many organizations still manage to make it difficult for voters to determine the source of spending in Connecticut elections. Thus, Common Cause supports Senate Bill 5’s requirement that organizations making independent expenditures report the source of *all* donations of \$1,000 or more made to that organization’s general treasury, unless the organization pays for independent expenditures out of a segregated bank account for political spending, in which case only donors to the segregated bank account would need to be reported.

Further, Common Cause supports Senate Bill 5’s requirement that disclosures of independent expenditures include disclosure of donors who are the source of funds that are *transferred* between organizations that make independent expenditures. Navigating the State Elections Enforcement Commission (SEEC) eCRIS website to identify who paid for independent expenditures in the last election shows why this provision is necessary. The biggest spender in Connecticut’s 2012 election, making more than a third of all independent expenditures, called itself “Voters for Good Government, Inc.”² Voters who search the SEEC eCRIS website for that organization will find five independent expenditure reports filed by “Voters for Good Government, Inc.” during the general election. **The filings from 2012, however, shed little light on who donated the funds to “Voters for Good Government.”**

The last independent expenditure report filed by “Voters for Good Government, Inc.,” just four days before the November 2012 election, lists \$127,925.53 of independent expenditures in support of two candidates for the General Assembly and in opposition to four others. But even though “Voters for Good Government, Inc.” is required to report the names of its top five contributors during each spending period, only one of its top five listed contributors is an individual. Two of its top five donors, meanwhile, are organizations with the names “Americans for Job Security” and “American Justice Partnership” that give voters no real information about who is behind the spending. Other filings I encountered failed to list a single contributor to the organization making the independent expenditure.³

Voters can be justifiably confused when organizations making independent expenditures use benign names that reveal little to nothing about the organization’s identity or the identity of its supporters. But this confusion is exacerbated when the

² The most recent independent expenditure report filed by “Voters for Good Government,” referred to above, is available at http://seec.ct.gov/ecrisreporting/Data/Attachment/Unassigned/SEEC26_129007_1.PDF (last accessed February 10, 2013).

³ One example is this filing from the Roger Sherman Liberty Center, available at http://seec.ct.gov/ecrisreporting/Data/Attachment/Unassigned/SEEC26_129008_1.pdf (accessed February 10, 2013).

donors to such independent organizations, as “disclosed” under Connecticut’s independent expenditure law, are organizations with misleading names whose donors are also unknown.

This loophole must be closed. Expanding disclosure requirements to also cover transfers between organizations, as required by S.B. 5, will ensure that such organizations cannot, as Justice Stevens warned in his dissent from Citizens United, “conceal their identity” as the sponsor of those communications, thereby frustrating the utility of disclosure laws.” Citizens United, 130 S. Ct. at 968 (Stevens, J., dissenting) (citation omitted). It will also ensure that individual donors and corporations cannot hide the true source of independent expenditures by transferring funds through shell organizations, intermediaries, or other groups.

2. Senate Bill 5 strengthens Connecticut’s requirements for the disclosure of independent expenditures made shortly before an election.

Most voters will probably learn about the source of independent expenditures from the news media or from candidates responding to independent expenditures themselves. That’s why many independent expenditure advertisements are made late in the election cycle, giving the news media little time to report on the spending. In the 2012 election in Connecticut, for example, **more than a quarter of reported independent expenditures were made in the week before Election Day.**⁴

Senate Bill 5 shortens the time period for disclosure of independent expenditures in the ninety days before an election from 24 to 12 hours. Speeding up the disclosure of independent expenditures made shortly before elections will give candidates who are the subject of such independent expenditures—as well as the news media and the public—a chance to respond to the spending and inform voters about its source. That way, even if voters cannot check the eCRIS website, they can learn about the true source of campaign messages.

Strengthening Connecticut’s disclosure requirements will “provid[e] the electorate with information,’ and ‘insure that the voters are fully informed’ about the person or group who is speaking,” 130 S. Ct. at 915 (citations omitted), important goals highlighted by the Supreme Court in Citizens United.

3. Senate Bill 5 improves disclaimers in independent expenditure advertisements.

As mentioned above, voters are more likely to learn about independent expenditures on the news or in response advertisements rather than by looking them up on the

⁴ Reported independent expenditures were identified using the State Election Enforcement Commission’s eCRIS Search website, which has a page dedicated to independent expenditures available at <http://seec.ct.gov/ecrisreporting/SearchingIndependentExpenditure.aspx>. Figures for independent expenditures made during the week before Election Day were found by searching for “Independent Expenditure General Election” reports filed in 2012 and sorting reports by their “period covered end date.” Out of a total of approximately \$710,000 in independent expenditures reported to the State Elections Enforcement Commission during the 2012 primary and general elections, \$181,938, or 25.6%, were made in the week before Election Day.

State Elections Enforcement Commission website. Disclaimers, however, give voters information about an advertisement's source in the advertisement itself. The Supreme Court upheld disclaimer requirements for independent expenditures in Citizens United, because they "provide information to the electorate, . . . insure that the voters are fully informed about who is speaking, . . . [and] avoid confusion by making clear that the ads are not funded by a candidate or political party," Citizens United, 130 S. Ct. at 885. Thus, to better serve the interest of helping Connecticut voters make informed political choices, Senate Bill 5 enhances Connecticut's innovative disclaimer requirements in independent expenditure advertisements.

Unfortunately, the use of misleading or vague organizational names has undermined the usefulness of basic disclosures, such as the "stand by your ad" provisions of Federal law upheld in Citizens United. See 2 U.S.C.A. § 441d (West). To prevent the same problem from happening in state elections, Senate Bill 5 requires that disclaimers in independent expenditure advertisements in Connecticut include disclosure of *all* donors behind the ad. It does that by requiring that advertisements include a link to a website that lists all the donors who contributed to the organization's political spending. Putting the information voters need at their fingertips will help voters hold politicians accountable without requiring them to spend hours to get the information they need.

4. More effective disclosure and disclaimer laws are essential to preserving Connecticut's Citizens' Election Program.

In Connecticut, more effective disclosure and disclaimer laws will also help to preserve the Citizens' Election Program, see Conn. Gen. Stat. Ann. § 9-702 (West), which allows candidates to compete in elections without reliance on contributions from special interests, increases citizen participation in elections, and enhances public confidence in the electoral process. Central to the Citizens' Election Program is a voluntary spending limit agreed to by candidates who choose to take public funds. Importantly, though, independent expenditures spent on a candidate's behalf do not count toward that candidate's spending limits under the program.

Because independent expenditures do not count under the Program's spending limits, undisclosed independent expenditures may allow candidates who choose to take public financing—and tell their voters that they are abiding by campaign spending limits—to nonetheless benefit from spending by corporations, unions, or individuals that seek to promote their election. **Organizations spent over \$700,000 on independent expenditures in the 2012 elections in Connecticut.**⁵ Although Citizens United prevents the state from prohibiting independent expenditures on behalf of candidates who take public financing, our state can strengthen our disclosure laws at least to inform voters about those candidates' sources of support. Furthermore, because any coordination—even implicit—between a candidate receiving public funding and independent organizations would undermine the Citizens' Election Program's goal of eliminating a candidate's reliance on special interest funding, Senate Bill 5 tightens coordination rules that ensure independent expenditures remain truly independent.

In addition to tightening coordination rules, requiring more rapid disclosures of independent expenditures shortly before an election is also important for preserving the Citizens' Election Program. Without the chance at least to respond to

⁵ See footnote 4.

independent expenditures made during their races, candidates will be less likely to choose public financing and the limits it places on candidate fundraising. By giving candidates more time to respond to late election spending in their races, candidates participating in the Citizens' Election Program will be more able to respond to independent expenditures by exposing their source.

5. Citizens United makes clear that courts will uphold comprehensive disclosure and disclaimer requirements for independent expenditures as a constitutional means of empowering Connecticut voters to make informed political choices.

In Citizens United v. Federal Elections Commission, 130 S. Ct. 876 (2010), the Supreme Court struck down the federal ban on corporate and union "independent expenditures" that expressly advocate for or against a candidate's election. This made Connecticut's ban on such spending unconstitutional. But although the Court said unlimited independent expenditures must be allowed, the Court also upheld—and even praised—disclosure and disclaimer requirements for independent expenditures because it recognized a compelling public interest "in knowing who is speaking about a candidate shortly before an election." Citizens United, 130 S. Ct. at 915.

The Supreme Court has long upheld disclosure requirements for political spending. Although the Court has recognized that disclaimer and disclosure requirements "may burden the ability to speak," Citizens United, 130 S. Ct. at 914, and thus must be subjected to "exacting scrutiny," the Supreme Court has upheld disclosure requirements when they serve a "sufficiently important" government interest. Citizens United, 130 S. Ct. at 914. Strengthening Connecticut's disclosure and disclaimer requirements would serve at least two public interests long recognized as "sufficiently important" by the Supreme Court.

First, "disclosure requirements deter actual corruption and avoid the appearance of corruption by exposing large contributions *and expenditures* to the light of publicity," Buckley v. Valeo, 96 S. Ct. 612, 657 (1976) (emphasis added). As the Supreme Court noted in Buckley v. Valeo, in addition to preventing corruption during elections, this exposure allows the public to detect when politicians give "special favors" to their "most generous supporters" 96 S. Ct. at 657, *after* the election. This interest is particularly important in Connecticut, where, as explained above, voters understandably want to know what groups are making independent expenditures on behalf of candidates who receive public financing from taxpayers under the Citizens' Election Program.

Second, as recognized in Citizens United, effective disclosure laws provide voters with the information they need to make "informed choices in the political marketplace," Citizens United, 130 S. Ct. at 915, a sufficiently important interest in its own right. By informing voters about who supports a candidate for office, effective disclosure laws help voters predict "the interests to which a candidate is most likely to be responsive," Buckley v. Valeo, 96 S. Ct. at 657, thus enhancing electoral accountability.

To be sure, some groups may wish to participate in elections anonymously or without providing the names of their donors. And in fact, in the Citizens United case, the Citizens United organization contended that requiring disclosure of its donors violated the First Amendment because its supporters would be chilled from political participation. But the Supreme Court rejected that argument. Most

importantly, the Court pointed out that such an objection, at most, only applies to some organizations—organizations that have a substantial fear that disclosure would cause retaliation. For that reason, the Court held, disclosure requirements are only unconstitutional when applied to organizations that provide specific evidence “show[ing] a ‘reasonable probability’ that disclosure of its contributors’ names ‘will subject them to threats, harassment, or reprisals from either Government officials or private parties,’” Citizens United, 130 S. Ct. at 914. As applied to all other organizations, disclosure requirements are constitutional. Since Citizens United failed to provide any evidence that they would face reprisals or harassment from revealing their donors, the Court upheld federal disclosure requirements as applied to them.

By giving organizations the option to set up a segregated fund for political purposes, Connecticut can avoid the potential for chilling anyone from exercising his or her First Amendment rights. Organizations that fear disclosing their entire membership list or list of supporters because of retaliation can create a segregated bank account for political expenditures and keep donations to their general treasury—or their membership list—anonymous. Only donors who contribute to independent expenditures in elections would be disclosed and potential constitutional issues can be avoided. The opportunity to set up a segregated fund for political purposes is a narrowly drawn solution in S.B. 5 to minimize any alleged “chilling” effect.

6. Requiring disclosure of all individual donors behind independent expenditures in Connecticut elections is consistent with the Supreme Court’s precedent.

In Governor Malloy’s message explaining his veto of House Bill 5556 last year, the Governor wrote that the ACLU of Connecticut had articulated to him that requiring disclosure of individual donors might conflict with the Supreme Court’s 1958 ruling in NAACP v. Alabama, 78 S.Ct. 1163. But in that case, the NAACP *did* show specific evidence that disclosure of its entire membership list would subject its members to retaliation. As Justice Harlan wrote:

[The NAACP] has made an uncontroverted showing that on past occasions revelation of the identity of its rank and file members has exposed these members to economic reprisal, loss of employment, threat of physical coercion, and other manifestations of public hostility.

NAACP v. Alabama, 78 S. Ct. at 1172. Also lacking in NAACP v. Alabama was any “sufficiently important” government interest to justify disclosure. Alabama was seeking the NAACP’s membership list in a hearing to enjoin the NAACP from conducting any further business in the state, 78 S. Ct. at 1167, and the Court was “unable to perceive that the disclosure of the names of . . . rank-and-file members ha[d] any bearing” even on that questionably legal hearing. Finally, and also important, Alabama requested the NAACP’s entire membership list and gave its members no option to make anonymous contributions for nonpolitical purposes. Thus, although NAACP v. Alabama provides that the state cannot make baseless requests for disclosure that would threaten the physical and economic well being of an organization’s members, that ruling is inapplicable to the disclosures proposed here today.

7. Senate Bill 5 requires disclosure of corporate political spending to shareholders.

Citizens United opened the door for corporations to use their shareholders' money to fund political speech. In many situations, this will result in corporations using shareholders' money without their knowledge or their consent for causes with which they may fundamentally disagree. Forcing shareholders to support political causes in this way, even indirectly, may be problematic under the First Amendment doctrine of "compelled speech." In the labor union context, for example, the Supreme Court has held that the use of general treasury funds for political purposes without notice to or consent from dues-paying nonunion employees is unconstitutional. See Aboud v. Detroit Bd. of Ed., 431 U.S. 209 (1977); see also Knox v. SEIU, Local 1000, 132 S. Ct. 2277 (2012).

Although it has yet to rule on whether corporate expenditures can, similar to union political spending, be considered "compelled speech" for dissenting shareholders, the Supreme Court in Citizens United identified shareholders' interests in knowing about—and potentially checking against—unfettered corporate spending in elections. Responding to the government's argument that lifting the ban on corporate independent expenditures would harm shareholders' interests, the Court wrote:

Shareholder objections raised through the procedures of corporate democracy can be more effective today because modern technology makes disclosures rapid and informative. . . . With the advent of the Internet, prompt disclosure of expenditures can provide *shareholders* and citizens with the information needed to hold corporations and elected officials accountable for their positions and supporters. Shareholders can determine whether their corporation's political speech advances the corporation's interest in making profits

Citizens United, 130 S. Ct. at 916 (emphasis added). Unfortunately, "rapid and informative" disclosures of political spending to shareholders do not yet happen in Connecticut, and shareholders do not yet have "the information needed to hold corporations and elected officials accountable," potentially forcing dissenting shareholders to support speech they find objectionable. At the time of Citizens United, the Court observed that "[a] campaign finance system that pairs corporate independent expenditures with effective disclosure has not existed before today." 130 S. Ct. at 916. In Connecticut, at least, that remains true more than three years later.

Other states, however, have taken steps to enhance corporate transparency and shareholder accountability in the wake of Citizens United. Maryland, for example, requires corporations to disclose all political expenditures in their periodic reports to shareholders. MD ELEC LAW § 13-307 (West). Iowa requires the governing board of corporations to authorize all political spending by a majority vote before corporations can make independent expenditures. Iowa Code Ann. § 68A.404 (West). Neither state law has been successfully challenged in court.⁶ Connecticut should follow these states and protect shareholders by adopting Senate Bill 5's proposal to require shareholder notification of all corporate political spending.

⁶ Iowa's prior-board-approval requirement was challenged in federal district court in 2011, but the lawsuit was dismissed because the court held that the plaintiffs lacked standing to sue. See Iowa Right to Life Comm., Inc. v. Tooker, 795 F. Supp. 2d 852, 870 (S.D. Iowa 2011).

8. Conclusion: Senate Bill 5 is a necessary and constitutional measure that will help protect the integrity of Connecticut elections.

Although the Supreme Court's decision in Citizens United means that corporate and union independent expenditures cannot be limited, the decision specifically highlights that disclosure and disclaimer requirements "impose no ceiling on campaign-related activities, and do not prevent anyone from speaking," Citizens United, 130 S. Ct. at 914 (internal quotation marks and citations omitted). Indeed, strong disclosure and disclaimer laws that show Connecticut voters who is speaking in their elections are not only made necessary by Citizens United, but are in the spirit of the opinion itself. As Justice Kennedy wrote:

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.

Citizens United, 130 S.Ct. at 916. In another Supreme Court case decided that year, Doe v. Reed, 130 S.Ct. 2811, Justice Scalia also emphasized the important role that disclosure can play in our democracy:

Requiring people to stand up in public for their political acts fosters civic courage, without which democracy is doomed. For my part, I do not look forward to a society which, thanks to the Supreme Court, campaigns anonymously . . . This does not resemble the Home of the Brave.

Doe v. Reed, 130 S.Ct. at 2837. As Justice Scalia simply put it, "a long history of practice shows that the First Amendment does not prohibit public disclosure." Doe v. Reed, 130 S.Ct. at 2832. Indeed, that strong disclosure and disclaimer laws can provide transparency and accountability in a system without limits on corporate spending was a bedrock assumption of Citizens United. Thus, Senate Bill 5, by enhancing Connecticut's disclosure and disclaimer requirements, is fully consistent with the Supreme Court's modern First Amendment jurisprudence.

Thank you.