



215 Pennsylvania Avenue, SE • Washington, D.C. 20003 • 202/546-4996 • www.citizen.org

PUBLICCITIZEN

Government Administration and Elections Committee
Room 2200, Legislative Office Building
Hartford, CT 06106

March 25, 2013

The Hon. Anthony Musto, Co-Chair
The Hon. Ed Jutila, Co-Chair
The Hon. Michael McLachlan, Ranking Member
The Hon. Tony Hwang, Ranking Member

Spoken
3/25/13

Testimony of Craig Holman, Public Citizen,* regarding Changes to Campaign Finance Laws (SB-5)

Public Citizen strongly encourages the Government Administration and Elections Committee to refine and move ahead with the new disclosure requirements to Connecticut's campaign finance laws contained in SB-5. This legislation is intended to enhance transparency of money in politics, especially of what has become known as "dark money" raised and spent by corporations, unions and nonprofit groups.

Public Citizen respectfully submits testimony to the Committee on behalf of our more than 300,000 members and activists nationwide – including well over 5,000 in Connecticut – in support of this effort to lift the veil of secrecy cloaking who is funding our elections.

The campaign finance proposal is an important legislative response to the gravely unfortunate Supreme Court decision in *Citizens United v. Federal Election Commission*. The Court's decision to roll back a century of American political tradition banning corporate treasury money in elections poses severe dangers to our democracy. Connecticut was one of a score of states that also banned corporate money in state elections. *Citizens United* stripped Connecticut of its ability to protect its elections from this type of spending.

Connecticut has a history of strong campaign finance and ethics laws. In 2005, the Connecticut legislature adopted a ground breaking public financing system and pay-to-play restrictions against government contractors and lobbyists financing elections. In 2010, Connecticut strengthened its campaign finance laws further by requiring that campaign ads provide disclaimers of the top five donors behind the sponsors of the ads.

Today, the legislature is considering a desperately-needed step to repair some of the damage caused by *Citizens United*. The legislative proposal can provide voters with the means to decipher campaign messages by casting light on the true funding sources behind those messages.

* Craig Holman, Ph.D., Government affairs lobbyist, Public Citizen.

The measure also is designed to close major loopholes in the current disclosure laws – loopholes that will become all the more problematic as corporations and wealthy individuals seek ways to influence elections and pressure lawmakers by funneling money into innocuous-sounding outside groups to handle their advertising campaigns secretly on their behalf.

In order to fulfill this objective, however, some notable amendments should be made to SB-5. Amendments that would appropriately refine the bill into a more effective transparency measure include:

- Defining clearly “electioneering communications” as campaign communications that refer to one or more specific candidates, targets those candidates’ election districts and air or are distributed within 90 days of an election.
- Requiring outside groups to disclose the sources of funds spent for “electioneering communications” as well as independent expenditures.
- Narrowing disclosures of communications on the Internet to focus on paid communications, rather than communications voluntarily disseminated, such as emails and blogs.
- Expanding the disclosure requirement of corporate political spending to include not just independent expenditures but also electioneering communications and corporate donations to nonprofit groups that could reasonably be expected to be used for campaign activity.
- Broadening the bundling disclosure requirement to include all bundlers above a certain threshold rather than just lobbyist-bundlers.

These modifications to SB-5 would bring the measure in line with its stated objective of casting transparency on otherwise “dark money” in Connecticut elections without imposing undue burdens on free speech.

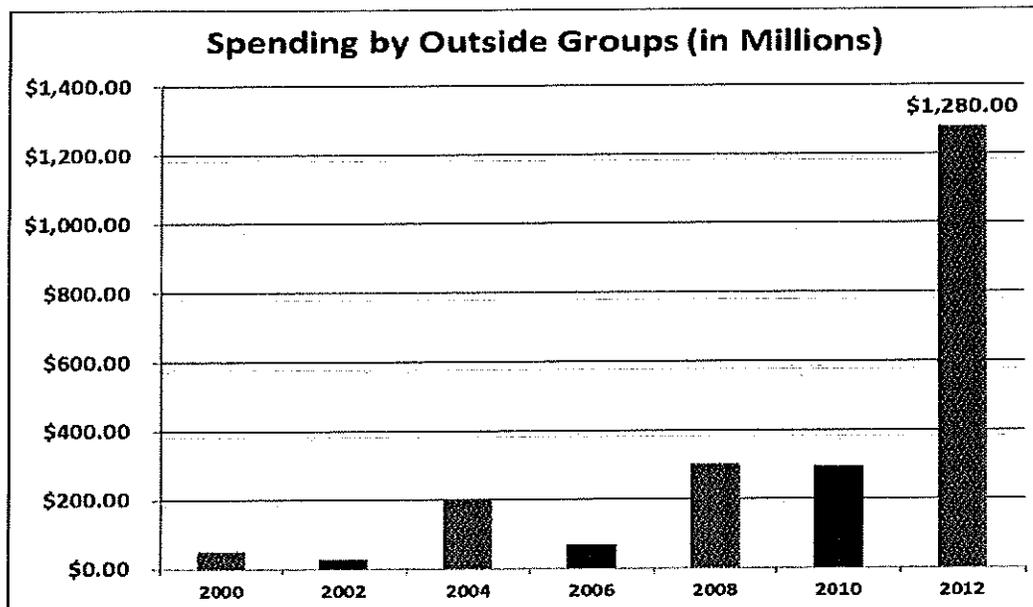
The Influx of New Money

On January 21, 2010, the U.S. Supreme Court startled the American public when it ruled in *Citizens United v. Federal Election Commission*, contrary to long-standing precedent, that corporations have a constitutional right to spend unlimited amounts of money to elect or defeat candidates for public office.

The impact on our elections was felt almost immediately. In just the first-year following the decision, campaign spending by outside groups in the 2010 federal elections soared 427 percent over spending levels in the previous midterm election. Spending by outside groups jumped to \$294.2 million in the 2010 election cycle from just \$68.9 million in 2006, the last mid-term election cycle. The 2010 figures nearly matched the \$301.7 million spent by outside groups in the 2008 presidential cycle.¹ This marked the period when many corporations began dipping their toes in the political waters, wondering if they could get away with spending corporate treasury funds and not be held accountable by the public and shareholders. They quickly learned

¹ Public Citizen, *12 Months After: The Effects of Citizens United on Elections and the Integrity of the Legislative Process* (January 2011) at 9.

that they could get away with it, and outside spending increased another fourfold in the 2012 federal elections. (See Figure 1, “Spending by Outside Groups.”)



Fading Disclosure

Perhaps even more alarming than the flood of new money into elections is the dramatic decline in transparency as to where all this money is coming from.

Before the Roberts Court reversed the precedents of two earlier landmark campaign finance decisions of previous Supreme Courts, the public was able to learn the identities of the sponsors of major campaign advertisements broadcast near federal elections. In the years following passage of the Bipartisan Campaign Reform Act (BCRA) of 2002, the public received nearly complete disclosure of funding sources behind electioneering communications and independent expenditures in the 2004 and 2006 elections. In the 2010 elections, with the sudden rise of corporate campaign money, donor disclosure fell to 34 percent for electioneering communications (ads that depict candidates very near an election but do not use the magic words of express advocacy, such as “vote for” or “vote against”) and fell to 70 percent for express advocacy independent expenditures – marking a collapse of overall donor disclosure from nearly 100 percent in 2004 and 2006 to about 50 percent in 2010.² Donor disclosure in federal elections increased somewhat in the 2012 elections because of the new emphasis on wealthy individuals financing super PACs, but “dark money” remained rampant.

Political donors, such as corporations, have learned that they can conceal their campaign spending in both federal and state elections by laundering it through nonprofit groups that generally are not required to disclose the sources of their funds. This is where legislative

² Public Citizen, *Disclosure Eclipse* (Nov. 18, 2010) at 4-5.

attention is most needed at the federal and state levels, to open up the books on this dark money laundered through nonprofit groups.

In addition, corporations are not subject to federal or state laws or regulations requiring that they disclose their political spending to the public or even to shareholders. Corporate funds generally were not allowed to be used to pay for express advocacy campaign ads (independent expenditures) at the federal level or in state and judicial elections of 24 states; nor could corporate treasury funds be used to pay for "electioneering communications" in federal elections and a small handful of other states since passage of the Bipartisan Campaign Reform Act (BCRA) of 2002.³

As a result, corporate governance procedures guiding corporate decisions to make direct political expenditures out of treasury funds were not really needed and had not been an issue addressed by the Securities and Exchange Commission (SEC) or state regulators.

All that changed following the *Citizens United* decision. Today with corporate money pouring into federal and state elections, there is a need to establish responsible corporate governance procedures for political spending. The SEC is about to take up the issue of regulatory action to mandate disclosure of corporate political spending to the public and shareholders, as is the New York State Attorney General's office for corporate political spending in that state. Alaska, Iowa and Minnesota are among a handful of states that have approved special disclosure laws to pull back the veil on corporate political spending through nonprofit groups. Connecticut's SB-5 joins with these trailblazing efforts.

Strengths and Weaknesses of SB-5

SB-5 would vastly improve the state campaign finance law. However, a few changes to SB-5 would make it a more effective transparency measure.

1. Definition of "Electioneering Communications"

In common parlance, independent expenditures are a narrow class of campaign communications in which ads expressly advocate the election or defeat of candidates by using such words as "vote for" or "elect." Most campaign ads do not use the "magic words" of express advocacy. Even ads sponsored by candidates tend not to say "elect me" or "vote against my opponent."⁴ Most campaign ads are much more subtle, referring to a candidate's character and qualifications while leaving the distinct impression of who to vote for without saying it. That is why the

³ Prior to the *Citizens United* decision, 24 states either prohibited or limited corporate or union spending in state and local elections. [For a listing of states that restrict corporate spending, go to: http://www.citizen.org/documents/Corporate_spending_on_state_candidates.pdf]. In addition, the decision potentially unleashed direct corporate financing of judicial campaigns in the 39 states that allow for election of judges. [For a listing of state judicial selection processes, go to: http://www.citizen.org/documents/Judicial_selection_chart.pdf]

⁴ Only about 10 percent of candidates ad in the 2000 federal elections used the magic words of express advocacy. About 2 percent of campaign ads sponsored by outside groups used terms of express advocacy. Craig Holman and Luke McLoughlin, *BUYING TIME 2000* (Brennan Center for Justice, 2001).

definition of campaign ads needs to be expanded to capture those that identify a candidate, target that candidate's voting constituency and air or are distributed near an election.

SB-5 does indeed offer a definition of electioneering communications, but it is collapsed into the general definition of "expenditure" in Section 3 of the bill. Section 4 then offers a unique definition of "independent expenditure" as everything captured under Section 3, as long as the expenditure is not coordinated with a candidate or party committee. Section 4 goes on to list what would constitute coordination, providing an impressive and sweeping definition of coordination to include the sharing of vendors or campaign staff in the same election cycle.

This is an excellent definition of coordination, one that is sorely needed at the federal level. In federal elections outside groups and campaign committees routinely share common vendors and outside groups frequently are established and controlled by former campaign staff of candidates and party committees. In fact, Public Citizen has found that, unlike regular PACs that tend to support multiple candidates and often cross party lines, more than 52 percent of super PACs active in the 2012 elections were devoted to aiding a single candidate. Of 143 super PACs that reported spending more than \$100,000 to influence the elections, 75 advocated the election of just one candidate. These single-candidate super PACs spent about \$288 million advocating the election of their favored candidate or, more accurately, the defeat of that candidate's opponent. Moreover, these single candidate super PACs were frequently established or staffed by former campaign staff of the same candidate, or even relatives of the candidate.⁵

However, by mixing the definitions offered in Section 3 for "expenditure" with Section 4 for "independent expenditure," some confusion arises. Encompassing the definition of "electioneering communications" within the definition of "independent expenditures," and then imposing special disclosure provisions for independent expenditures, effectively mandates that both electioneering communications and independent expenditures will be subject to disclosure, but it defies what is commonly understood as two distinct terms. In the same vein, the term independent expenditure actually provides a definition of coordination, by listing what activities do not constitute independent expenditures, but this too makes the legislation somewhat confusing.

Though not necessary, it may be worthwhile simply for clarity to keep the terms of electioneering communications and independent expenditures distinct.

2. If Defined as Distinct Terms, Mandate Disclosure for Both Electioneering Communications and Independent Expenditures

Only if "electioneering communications" and "independent expenditures" are defined as distinct terms, then it would be necessary to specify in Section 8 (reporting independent expenditures), Section 9 (disclaimers in ads) and Section 10 (corporate, union and nonprofit disclosure) that these disclosure and disclaimer provisions apply to both electioneering communications and independent expenditures. If the terms are not made distinct, but kept as is in which the

⁵ Taylor Lincoln, Super Connected (Public Citizen, 2013), available at: <http://www.citizen.org/documents/super-connected-march-2013-update-candidate-super-pacs-not-independent-report.pdf>

definition of electioneering communications is folded into the definition of independent expenditures, then no such change to Sections 8, 9 and 10 are necessary. But expect some confusion.

3. Narrow Disclosure of Internet Communications

The one area where SB-5's transparency requirements should be scaled back somewhat is in regard to Internet communications. Currently, all Internet communications, including those provided voluntarily at no cost, are subject to the disclosure and disclaimer requirements. This would include emails and blogs, capturing the entire network of the blogosphere – most of which is not financed by campaign organizations. Not only is this an undue intrusion on free speech, it will likely draw the opposition of those seeking to preserve the integrity of the Internet.

The disclosure and disclaimer provisions should be narrowed to apply only to paid communications on the Internet. When a campaign committee pays to place an ad on the Internet, this should be captured under the transparency regime, but not unpaid sources of Internet communications.

4. Expand Disclosure Requirement for Corporate Political Spending

As noted earlier, most corporate political spending evades disclosure because funds are laundered as donations to nonprofit groups. Corporate donations to, say, Crossroads GPS or the Chamber of Commerce are then used by those nonprofit groups to pay for electioneering communications or independent expenditures. This is the real source of dark money: donations to nonprofits. But these types of expenditures by an "entity" in Section 10 of the bill are not captured for disclosure. Instead, entities only need report independent expenditures to the public and to shareholders and members of the corporation or organization.

The nationwide movement for full transparency of corporate political spending includes donor disclosure of independent expenditures, electioneering communications *and* donations to other groups in which the donor "knew or had reason to know" that the person receiving the transfer or payment would make electioneering disbursements with the funds.⁶ One "knows or has reason to know" the funds will be used for independent expenditures or electioneering communications by the recipient nonprofit group if the organization has a recent history of making campaign expenditures or the nonprofit group acknowledges that it plans on making such expenditures. Without this clause capturing donations from entities to electioneering nonprofit groups, corporate donations to Crossroads GPS, for example, will go unreported.

5. Bundling Disclosure

SB-5 follows in the footsteps of the federal Honest Leadership and Open Government Act (HLOGA) of 2007 by requiring disclosure of bundling activity, but only by registered lobbyists. There is no reason to so limit transparency of bundling campaign funds.

⁶ Quoting from H.R. 148, introduced by Rep. Chris Van Hollen in the 113th Congress, known as the "DISCLOSE Act of 2013."

In HLOGA, the narrow disclosure requirement for only lobbyists was, essentially, a drafting error. HLOGA was originally designed to amend only the Lobbying Disclosure Act (LDA), and not the Federal Election Campaign Act (FECA). As such, the bundling disclosure requirement could only apply to lobbyists. In the end, however, HLOGA was expanded to amend FECA as well as LDA, but the bundling disclosure provision was overlooked in the process and remained limited to lobbyist disclosure.

While it is important to mandate disclosure of lobbyist-bundlers, it is equally important to mandate disclosure of all persons who bundle above a specified threshold – in this case, the forwarding of five or more contributions or hosting a fundraising event. All bundlers, lobbyist or not, should be subject to the same disclosure requirement.

**Conclusion: SB-5 – with Appropriate Modifications – Would Achieve
Full Transparency of Money in State Elections**

It is a well-established norm of American politics that voters have a right to know who is paying how much for campaign ads. The Supreme Court has upheld the principle of disclosure in election spending over and over again – including most recently in the *Citizen United* ruling – recognizing that who is paying for campaign advertising is valuable information that helps voters judge the merits of the barrage of ads that overwhelm them every election. SB-5, with appropriate modifications, will provide voters with exactly that information.

In order to ensure that the disclosure regime is effective, SB-5 should be amended to include: disclosure to the public and shareholders of donations to electioneering nonprofit groups, especially from corporate sources; and disclosure of all bundling sources, not just lobbyist-bundlers. At the same time, to protect free speech rights, disclosure of Internet communications should be limited to apply only to paid communications.

SB-5 provides some confusing terminology by wrapping electioneering communication into independent expenditure, and provides an impressive definition of coordination, though it is sketched into the bill as what *does not* constitute independent expenditures. Confusing or not, it gets the job done.

SB-5 is desperately-needed legislation that could reinstate full transparency of electioneering spending and go a long way toward reining in some of the damage caused by the *Citizens United* decision.

Respectfully Submitted,



Craig Holman, Ph.D.
Government affairs lobbyist
Public Citizen

