



July 23, 2010

(202) 626-8820

RE: "DISCLOSE Act" (S. 3628)

Dear Senator:

The National Right to Life Committee (NRLC), representing affiliated right-to-life organizations in all 50 states, is **strongly opposed** to the so-called "DISCLOSE Act" (S. 3628), the latest version of which was introduced by Senator Schumer on July 21.

Like previous versions, S. 3628 is an attempt to evade the holdings of the U.S. Supreme Court in *Citizens United v. FEC* (2010). **NRLC is opposed to invoking cloture on the motion to proceed to this legislation, and will include that roll call (currently scheduled for July 27) in its scorecard of key votes for the 111th Congress.**

Enactment of the DISCLOSE Act would not be a curb on corruption, but itself a type of corruption – a corruption of the lawmaking power, by which incumbent lawmakers employ the threat of criminal sanctions, among other deterrents, to reduce the amount of private speech regarding the actions of the lawmakers themselves.

The true purposes of the DISCLOSE Act

NRLC is the furthest thing from a "shadow" group. Our organization's name and contact information always appear on our public communications, and we openly proclaim the public policies that we advocate. But there is very little in this bill, despite the pretenses, that is actually intended to provide useful or necessary information to the public. The overriding purpose is precisely the opposite: To discourage, as much as possible, disfavored groups (such as NRLC) from communicating about officeholders, by exposing citizens who support such efforts to harassment and intimidation, and by smothering organizations in layer on layer of record keeping and reporting requirements, all backed by the threat of civil and criminal sanctions. Indeed, the bill would benefit from a truth-in-labeling amendment to clarify that "DISCLOSE" actually stands for "Deterring Independent Speech about Congress except by Labor Organizations and Selected Elites."

All of the cant by backers of this legislation about "buying elections" and "protecting democracy" is intended to obscure the reality that neither National Right to Life nor any other incorporated group has any power whatever to "influence elections," no matter how much money is available, *except* by informing and persuading individual citizens – all of them adults with a presumed capacity to make up their own minds about which messages they will accept and act on. It is precisely that process of informing and persuading that the crafters of this legislation fear and seek to suppress – all the while seeking to hide their self-serving purposes behind layers of sanctimonious, pseudo-populist rhetoric.

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As eight former members of the Federal Election Commission pointed out in a May 19 letter to the Committee on House Administration, “the FEC now has differing regulations for 33 types of contributions and speech and 71 different types of speakers.” The federal laws and regulations governing “political” speech already consume more than 800 pages, and the FEC has published more than 1,200 pages in the *Federal Register* explaining its decisions. But that is not enough for the sponsors of the DISCLOSE Act, because the bill would add 117 pages of additional barbed-wire regulatory barriers to speech about policymakers and pending legislation.

It is sad, but perhaps not surprising, that the bill is being promoted by many organs of the mainstream media corporations, in reports that are largely silent on the bill’s more odious provisions. Under the bill, these are privileged corporations that are explicitly exempted from its provisions [for example, see Section 103(b)] – even though the U.S. Supreme Court said in *Citizens United*, “We have consistently rejected the proposition that the institutional press has any constitutional privilege beyond that of other speakers.”

“NRA carve-out” does not apply to NRLC or NRLC affiliates

We also note that S. 3628, like the version of the DISCLOSE Act passed by the House of Representatives on June 24 (H.R. 5175), contains the language sometimes referred to as the “NRA carve out,” which exempts from many requirements an organization that meets a list of highly specific criteria, including a dues-paying annual membership roll of 500,000 or more persons. [See Section 211(c).] **This “carve out” *does not apply to the National Right to Life Committee, nor to any of our 50 state affiliates. While the aggregate number of donors and members of the 50 state affiliates and their chapters exceeds the arbitrary 500,000 threshold, no individual affiliated corporation has 500,000 annual dues-paying “members,” nor does the federation headquarters (separately incorporated) meet that criterion.***

Yet, why should our movement, which is comprised overwhelmingly of grassroots citizen-activists, be penalized for working within a federation structure? It is perfectly understandable that another advocacy group that has a centralized corporate structure, and a unitary national membership roll, should wish to protect the privacy rights of its donors, and to avoid some of the crippling administrative burdens and legal traps that would be imposed by multiple provisions of the DISCLOSE Act. But what conceivable public policy justification can be offered for imposing those very same burdens on much smaller state-level organizations that are far poorer in the financial, administrative, and legal resources that would be demanded by the proposed array of legal traps, overlapping and accelerated reporting requirements, verbose “disclaimers,” and other devices contained in S. 3628 -- requirements that were clearly crafted for the very purpose of deterring speech?

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Certainly, there can be no constitutional justification for the carve-out distinction. The U.S. Supreme Court has ruled that the First Amendment protects the right of incorporated groups of citizens to communicate with the public to express opinions about the actions of those who hold or seek federal office. The authors of the DISCLOSE Act have demonstrated that their overriding intent is to impede and deter the exercise of that constitutional right. The justifications offered for such legislation rest on the unspoken premise that the American people lack the capacity to properly evaluate advertising or other forms of mass communication, so the incumbent lawmakers will take it upon themselves to protect their hapless constituents from such troublesome communications, in order to prevent them from being “unduly influenced” -- and all of this is being deemed necessary to “protect democracy.” Yet, by adding the “carve out,” the same authors now in effect propose that such “undue influence” is tolerable if it is exercised by an especially big organization with a centralized corporate structure and large professional staff.

This is yet another demonstration that the real principle guiding the authors of the DISCLOSE Act is no principle at all, except crude self interest: They wish to mute as many as possible of the independent voices that might otherwise convey unflattering information to their constituents regarding legislative records and the policies of the current Administration.

Other speech-restrictive provisions of S. 3628

The bill would codify [in Section 201] a vague and expansive definition of “express advocacy” under which any expenditure for a public communication that “takes a position on a candidate’s character, qualifications, or fitness for office” might be deemed to be an “independent expenditure” and therefore subject to numerous burdensome and intrusive regulations. The bill applies this vague standard not only to broadcast ads very near elections, but to any public communication – broadcast *or print* – at any time of the year, and even to paid ads on the Internet.

In addition, the bill’s re-definition [in Section 202] of so-called “electioneering communications,” which is a broadcast communication that *merely mentions the name of a member of Congress*, will now trigger sweeping and burdensome regulations beginning 120 days (four months) before a general election – a dramatic expansion of the current law (which applies 30 days before a primary and 60 days before a general election). For example, an organization that sponsors a single radio ad costing \$10,000 or more that says no more than, “Call Senator Jones – urge him to support the First Amendment by voting no on S. 3628” – would be required to publicly identify *every donor* of more than \$1,000 to the organization (whether or not the donation was spent on the ad) throughout the year. [See Section 211]

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Our members and supporters have a right to support our public advocacy about important and controversial issues without having their identifying information posted on the Internet, exposing them to harassment or retribution by those who may disagree with their beliefs. As the eight former FEC commissioners noted in their May 19 letter, “In this, DISCLOSE infringes on the First Amendment rights of private association recognized by the Supreme Court in *NAACP v. Alabama*, 357 U.S. 449 (1958) . . . Such information gives political parties and officeholders powerful information to bully advocacy groups and intimidate individuals into supporting their endangered candidates and agenda.”

The bill also seeks [in Section 214] to deter the exercise of First Amendment rights by requiring both chief officers and major donors of issue-oriented organizations to actually appear in broadcast ads (both television and radio) to express their approval of the contents. Some totalitarian governments use radio-frequency “jamming” to try to prevent their citizens from hearing broadcasts that contain information critical of those who hold power; the sponsors of the DISCLOSE Act hope to achieve the same result by requiring incorporated citizen groups to “jam” their own communications with useless verbiage that could consume one-third or even one-half of the message time.

It should be self-evident that the real purpose of such requirements is not to inform, but to deter potential donors from financially supporting the work of groups such as NRLC in the first place.

Under *Citizens United*, curbing corruption is the only permissible justification for restricting political speech. Yet, under the proposed law, the federal government would dictate to a 75-year old woman with health problems, who holds strong religious convictions and who wishes to promote enactment of the Protect Life Act, that she is perfectly free to donate money to a pro-life group to be used for broadcast ads to urge specific elected officials to vote for the bill – but *only* if she is willing to have her name and address posted on the Internet, so that she can be subjected to verbal abuse or even threats by those who disagree with her views – or, if she gives more than \$10,000 and also qualifies as a “significant funder,” if she is willing to submit to the intimidating requirement that she appear in the ads herself. Frankly, the crafters of this bullying political power grab should be ashamed of themselves.

Most of the bill’s byzantine requirements would take effect 30 days after enactment – “without regard to whether or not the Federal Election Commission has promulgated regulations” [see Section 404]. Moreover, the judicial review provision, found in Section 401, “represents the maximum possible effort to leave unconstitutional provisions in effect as long as possible,” as the minority members of the Committee on House Administration pointed out in their dissenting views to that Committee’s report [Report

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111-492], with respect to the very similar slow-walk judicial review language found in the House bill.

Conclusion

This legislation has been carefully crafted to maximize short-term political benefits for the dominant faction of one political party, while running roughshod over the First Amendment protections for political speech that have been clearly and forcefully articulated by the U.S. Supreme Court in a series of landmark First Amendment rulings, culminating in *FEC v. Wisconsin Right to Life*, 551 U.S. 449 (2007) and *Citizens United*. And, the authors of the bill know this full well. Yet, they hope to ram this legislation into law – including a specific provision making it effective 30 days after enactment, without any interpretative regulations from the FEC – in order to set up legal minefields that they hope will, for at least a year or more, deter disfavored organizations from effectively communicating with the public about the public policy agenda of the current Administration and of the dominant faction of the majority party of the current Congress.

We strongly urge you to oppose this pernicious, unprincipled, and unconstitutional legislation. In our scorecard and advocacy materials, the legislation will be accurately characterized as a blatant political attack on the First Amendment rights of NRLC, our state affiliates, and our members and donors.

Sincerely,



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