

May 27, 2010

RE: “DISCLOSE Act” (H.R. 5175)

Dear Member of Congress:

The House of Representatives soon may take up the so-called “DISCLOSE Act” (H.R. 5175), sponsored by Congressman Van Hollen. The National Right to Life Committee (NRLC), representing affiliated right-to-life organizations in all 50 states, is ***strongly opposed*** to this legislation, which was crafted in response to the ruling of the U.S. Supreme Court in *Citizens United v. FEC* (2010). **NRLC intends to include the roll call on passage of this legislation in its scorecard of key votes for the 111th Congress, and reserves the right to also score key procedural votes on the measure.**

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. 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 NRLC 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.

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

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decisions. But that is not enough for the sponsors of H.R. 5175, because the bill would add 90 pages of additional barbed-wire regulatory barriers to speech about policymakers and pending legislation.

Most of the bill's byzantine requirements would take effect 30 days after enactment – without any regulations to guide organizations through the legal minefields it creates. Moreover, Section 401, which contains unusual and convoluted judicial-review provisions, “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 the Committee's report [Report 111-492].

The bill would codify 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, qualification, 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 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 Congressman Jones – urge him to support the First Amendment by voting no on H.R. 5175” – 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.

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 to deter the exercise of First Amendment rights by requiring both chief

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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 H.R. 5175 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.

But of course, 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 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 (if a “significant funder”) is willing to submit to the intimidating requirement that she appear in those ads herself, and also 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.

Enactment of such a law is not 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. Frankly, the crafters of this bullying political power grab should be ashamed of themselves.

(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.”)

Under the pretense of re-defining “coordination” (in Section 103), the legislation also seeks to effectively force issue-oriented corporations such as NRLC to choose between representing their members by lobbying Congress about pending legislation, or acting effectively in the political realm by participating in political discussions about elections. Specifically, an organization such as NRLC would be allowed to urge a “candidate” to

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adopt NRLC's position on an issue, but only "so long as there is no discussion . . . regarding the candidate's campaign for election for Federal office." [See Sect. 103(b)] Thus, any organization that exercises its First Amendment rights by discussing both policy and politics with the same "candidate" would be deemed to forfeit the right to conduct "independent expenditures" ***beginning 90 days before the pertinent primary and extending through the general election – a period of up to 12 months.***

The provisions we have summarized, among others, clearly violate the principles laid down 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 – 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.

In summary, 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. We urge you to reject this attack on the First Amendment rights of your constituents and the private organizations with which they choose to associate, by opposing H.R. 5175.

Sincerely,



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