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S. 2219, THE DEMOCRACY IS STRENGTHENED
BY CASTING LIGHT ON SPENDING
IN ELECTIONS ACT OF 2012
(DISCLOSE ACT OF 2012)

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THURSDAY, MARCH 29, 2012

United States Senate,
Committee on Rules and Administration,
Washington, D.C.

The committee met, pursuant to notice, at 10:07 a.m., in Room 301, Russell Senate Office Building, Hon. Charles E. Schumer, Chairman of the committee, presiding.

Present: Senators Schumer, Feinstein, Durbin, Tom Udall, Leahy, Alexander, and Blunt.

Staff Present: Jean Bordewich, Staff Director; Josh Brekenfeld, Deputy Staff Director; Adam Ambrogi, Chief Counsel; Veronica Gillespie, Elections Counsel; Julia Richardson, Counsel; Nicole Tatz, Professional Staff; Lynden Armstrong, Chief Clerk; Jeff Johnson, Staff Assistant; Mary Suit Jones, Republican Staff Director; Shaun Parkin, Republican Deputy Staff Director; Paul Vinovich, Republican Chief Counsel; Michael Merrell, Republican Counsel; Lindsey Ward, Republican Professional Staff; and Rachel Creviston, Republican Professional Staff.

OPENING STATEMENT OF CHAIRMAN SCHUMER

Chairman Schumer. Good morning and the Rules Committee will come to order.

I would like to thank my friend, Ranking Member Alexander for joining us at this hearing and all of my colleagues to discuss the DISCLOSE Act of 2012, which our colleague Sheldon Whitehouse introduced last week.

The Supreme Court's Citizens United decision, in conjunction with other cases, has radically altered the election landscape by unleashing a flood of unlimited, often secret, money into our elections. In response to that disastrous decision, we introduced the DISCLOSE Act of 2010, which would have increased transparency by requiring full disclosure of the real sources of money behind political advertising. The House passed it. The President was ready to sign it. But in the Senate, it failed to get cloture by one vote.

Now the problem is no longer hypothetical. The public is now living with the aftermath of the Citizens United decision every time they turn on their TV sets. An

45 endless stream of negative ads is now drowning out all other voices, including the
46 candidates themselves. The events of the 2010 election cycle and what we have seen
47 so far in 2012 have confirmed our worst fears about the impact of Citizens United and
48 subsequent court decisions.

49

50 Two years ago, we were warned about these harmful effects, but the results are
51 even worse than expected. Just this morning, we woke up to the breaking story
52 reported by Bloomberg News that major corporations, including Chevron and Merck,
53 gave millions to groups who ran attack ads in the 2010 elections and no one knew about
54 it until now. That means voters two years ago were left totally in the dark about who
55 paid for the attack ads hitting the airwaves.

56

57 The trend is disturbing. According to the Center for Responsive Politics, a study
58 they did showed that the percentage of campaign spending from groups that do not
59 have to disclose their donors rose from a mere one percent in 2006 to 47 percent in
60 2010. We can only imagine by what percentage it will grow by the end of 2012, almost
61 certainly over 50. So more than half the ads now run in America have no disclosure.
62 That is incredible and awful, in my opinion.

63

64 And the money is coming overwhelmingly, of course, from the wealthiest
65 Americans, as you would expect. A recent study in Politico found that 93 percent of
66 the money that was contributed by individuals to super PACs in 2011 came in
67 contributions of \$10,000 or more. And here is the most astounding thing about
68 Politico's study. Half of that money came from just 37 donors. Half of the money in
69 the super PACs came from 37 donors. Is that democracy?

70

71 Even more worrisome, we are increasingly seeing contributions to super PACs
72 from nonprofit organizations, groups that can use the tax code to hide their sources of
73 money, and from shadowy shell corporations. Some of these groups are nothing more
74 than a post office box in the middle of an office park.

75

76 By now, it should be clear to everyone that better disclosure is desperately
77 needed. The 2012 DISCLOSE Act introduced by Sheldon Whitehouse, our Rules
78 Committee colleague Senator Tom Udall, and myself, among others, is already
79 supported by 40 Senators. It is a bill that should be acceptable to people of every
80 stripe. That is how it was designed. That is how Senator Whitehouse and those of us
81 working with him designed it.

82

83 The previous bill imposed bans on government contractors and foreign-owned
84 corporations, but those bans have been taken out, even though most of the sponsors
85 thought it was the right thing to do. The 2010 legislation also required reporting
86 donations of \$600, but that threshold has been raised to \$10,000 because, as we have
87 seen, these huge donations dwarf that amount and make a donation of \$100 seem
88 irrelevant.

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The new bare bones DISCLOSE Act has two key components, disclosure and disclaimer, and it is very simple. Disclosure means outside groups who make independent expenditures in electioneering communications should disclose all their large donors in a timely manner--all their large donors. The bill includes a way to drill down to the original source of money in order to reveal those who are using intermediaries as a conduit to obscure the true funders. Through this covered transfer provision, even the most sophisticated billionaires will find it difficult to hide behind a 501(c) organization or shell corporation.

Disclaimer means that voters who are watching the political ad will know who paid for it. Under current law, candidates are required to stand by their ads. Why should outside organizations engaging in this same kind of political activity be any different? The 2012 DISCLOSE Act would make super PACs, 501(c)s, 527s, corporations, and labor unions identify their top five funders in their TV ads and top two funders in radio ads. The leader of the organization would have to stand by the ad, just like candidates must do.

Transparency is not just a Democratic priority. My colleagues on both sides of the aisle have declared their support for greater disclosure as a way to prevent corruption. And eight of nine Supreme Court Justices in the Citizens United decision supported disclosure. The potential for corruption in the post-Citizens United era is all too clear. It is time to get serious about full transparency. This bill would do that.

That is why we are holding this hearing: to examine the need for better disclosure and to discuss this particular legislation. And before we turn to our distinguished panel of experts, I want to ask my good friend Ranking Member Alexander and any other member who is here if they would like to make opening statements. As is the usual practice, I would ask that statements by members and witnesses are limited to five minutes. So without further ado, let me call on Senator Alexander.

OPENING STATEMENT OF SENATOR ALEXANDER

Senator Alexander. Thank you, Mr. Chairman. It is good to be with you on this beautiful spring day, and this hearing is as predictable as the spring flowers. In the middle of an election, my friends on the other side of the aisle are trying to change the campaign finance laws to discourage contributions from people with whom they disagree, all to take effect by July 1, 2012. I deeply appreciate the sympathy that the Chairman is showing for the victimized Republican primary candidates Santorum and Gingrich in this whole process and I am sure they would want me to thank you for that, as well.

This is a quickly called hearing—

133 Chairman Schumer. Their thanks are accepted with gratitude and humility.

134

135 Senator Alexander. Thank you. A quickly called hearing, quickly drawn up bill.
136 Most of the enthusiasm for this hearing and this bill comes, as the Chairman indicated in
137 his remarks, because of the Citizens United legislation, which basically says that rich
138 non-candidates and corporations have the same rights rich candidates have to spend
139 their money in support of campaigns.

140

141 This legislation is in the name of full disclosure. I am in favor of full disclosure,
142 but there is nothing in the Constitution about full disclosure. There is something in the
143 Constitution about free speech. I often go by the Newseum down the street.
144 Congress shall make no law abridging the freedom of speech, it says on the wall. The
145 provisions in this bill chill and discourage free speech.

146

147 There is a way to have full disclosure and free speech, and that is to take all the
148 limits off campaign contributions. The problem is the limits. These new super PACs
149 exist because of the limits we have placed upon parties and contributions. Get rid of
150 the limits on contributions and super PACs will go away and you will have full disclosure
151 because everyone will give their money directly to the campaigns and the campaigns
152 must disclose their contributions in ways that we have already agreed do not discourage
153 free speech.

154

155 I have done some research in preparation for this and I found an especially
156 compelling statement before this committee that was rendered just exactly 12 years
157 ago today, March 29, 2000. Some of you were actually here that day. It was given by
158 an obscure former Governor who had run for President and who had permanently
159 retired from politics, and he came before this committee and these were the words that
160 he said. "I have come to Washington to argue one practical proposition, that the
161 \$1,000 individual contribution limit in our Presidential nominating system makes it
162 virtually impossible for anyone except the front runner or a remarkably rich person to
163 have enough money to run a serious campaign. This has a number of bad effects for
164 our democracy. It limits the voters' choices and the opportunity to hear more about
165 the issues. It gives insiders and the media more say, outsiders less. It protects
166 incumbents, discourages insurgents. It makes raising money the principal occupation
167 of most candidates, which in turn makes campaigns too long. The \$1,000 limit was put
168 in place in 1974 after Watergate to reduce the influence of money in politics. It has
169 done just the reverse. I have also come with this practical solution. Raise the limit."
170 That obscure retired former Governor was me.

171

172 And a few years earlier, Senator McCarthy, a better known retired politician,
173 came before this committee and said he never would have been able to challenge
174 Lyndon Johnson if Stewart Mott and others who agreed with him had not given him so
175 much money in the 1968 campaign.

176

177 Now, the reason I am talking about limits is because if we took the limits off, we
178 would solve the disclosure problem. Rich candidates can continue their campaigns.
179 The super PACs have actually permitted candidates like Gingrich and Santorum and
180 others to continue to run. Presidential races before this year were like the Patriots
181 lose the first three games, we tell them to get out of the race. If Tiger Woods shoots
182 40 on the front nine, we say, end the Master's. In the NFL and at the Master's, you
183 play all the way through to the end. Having money is what you need to play all the
184 way through to the end. And if Senator Kerry and Steve Forbes have their own money,
185 then others ought to be able to contribute their money.

186

187 So, Mr. Chairman, as long as we have a First Amendment to the Constitution,
188 individuals and groups have a right to express themselves. And the best way to
189 combine free speech with full disclosure in a way that does not chill free speech is to
190 take off all the limits which would cause most contributors to give to campaigns. It
191 would drop the super PACs. And it would make this legislation, which chills free
192 speech, completely unnecessary.

193

194 Thank you, Mr. Chairman.

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196 Chairman Schumer. Thank you, Senator Alexander.

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198 Senator Feinstein.

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200 OPENING STATEMENT OF SENATOR FEINSTEIN

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202 Senator Feinstein. Mr. Chairman, I thank you very much.

203

204 Given what we have seen in the Republican primary this year, I really believe we
205 must try to pass the DISCLOSE Act. In 2010, we came close to passing it and it looks
206 like we need just one additional vote to move the bill forward now.

207

208 This new Act is a critical step, really, to ensure that corporate dollars will not
209 flow in the dark to one candidate against another, but instead, our election process will
210 regain the transparency it has lost after Citizens United.

211

212 I find this whole hidden, shadowy world of the super PAC to be really
213 discouraging, and I suspect it is going to have a very discouraging impact on candidates
214 that have not yet run for office but might be considering to run for office. There is
215 really no way the average person, new candidate, can fight it. So if a company does
216 not like what you are doing, whether it is a big bank and you are for financial reform, go
217 out and get this person with untold, unknown millions of dollars. I do not think it is the
218 American method of electing candidates.

219

220 I think this is the first step forward. I was really surprised at the Supreme

221 Court, and I want to thank the author and I want to thank you and hopefully we can
222 move on with this.

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224 Chairman Schumer. Thank you, Senator Feinstein.

225

226 Senator Blunt.

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228 OPENING STATEMENT OF SENATOR BLUNT

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230 Senator Blunt. Thank you, Mr. Chairman. Thank you for holding this hearing
231 today. I appreciate the opportunity to discuss the DISCLOSE Act.

232

233 I have some concerns with the bill. As a former Secretary of State of Missouri,
234 where I also served as the chief election official, I am particularly interested in policies
235 that affect elections. I believe this bill would place additional burdens on nonprofits as
236 they seek to advocate for public policies. I am also concerned, as Senator Alexander
237 was, about the First Amendment challenges that I believe this bill would present.

238

239 Before we consider adding new restrictions, I think we would be well served to
240 carefully examine our current laws and ensure they are having their intended effect.
241 Mr. Chairman, I would suggest that might be a good topic for another hearing,
242 particularly in this election year, to look at the laws we have on the books now.

243

244 I am pleased we are having this hearing. I look forward to hearing from the
245 witnesses and thank you for holding it, Mr. Chairman.

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247 Chairman Schumer. Thank you, Senator Blunt.

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249 Senator Durbin.

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251 OPENING STATEMENT OF SENATOR DURBIN

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253 Senator Durbin. Chairman Schumer, thank you for the hearing. I support the
254 DISCLOSE Act.

255

256 We are not talking about super PACs. We are talking about super secret PACs,
257 and the question is whether there ought to be any transparency so the people of
258 America know who is paying for the information that is being shoveled at them.

259

260 We have seen a dramatic increase in these independent expenditures to the
261 point where mere mortals who dare run for office have to wonder whether they are
262 going to be overrun by some super PAC or some individual or some special interest
263 group, regardless of the merits of their campaign or what the voters may care for in
264 their district.

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And I think what we are doing here is introducing an element into the body politic which is fundamentally corrupting. Senators who have to wonder whether this morning's speech on the floor or this afternoon's vote or tomorrow's amendment just might irritate a Los Vegas casino magnate, or two billionaire brothers who made a fortune in oil, or a retired plutocrat lounging in Jackson Hole, because tomorrow, the world may change for you.

We have seen candidates in this race already for the Senate, for reelection, with more than \$5 million being spent by March before the election in negative ads by super PACs in their States. That is a phenomena which is not conducive to an active, positive, and productive debate among voters in this country about where this country should go and how it should move forward.

And now, for something totally different, I support the DISCLOSE Act, but I really believe that we need to get to the heart of the matter, and that is why I have introduced the Fair Elections Now Act, public funding. States as diverse as Maine and Arizona have voted by referendum to move to public funding. Take the special interests and the fat cats out of the picture. Shorter campaigns, less money spent, direct contact with voters instead of sitting for endless hours on a telephone begging for money from strangers, that is what they think is the right thing for the future of their States. I think it is the right thing for the future of this country.

Major reform, unfortunately, often requires a major scandal. Sadly, this year's campaign for President is building up to a major scandal when it comes to fundraising and the amount of money spent. Will it be enough? Will it be the breaking point for real change? I hope that this bill passes. I hope the DISCLOSE Act starts basically lifting the veil on some of the expenditures that are taking place. But we need to step beyond this or we run the risk of dramatically changing this democracy which we all love.

Chairman Schumer. Thank you, Senator Durbin.

I just want to thank particularly Senator Udall for being here. He has been an active member of the task force, has introduced legislation, which does not come before this committee, it comes before our most junior member's committee—

[Laughter.]

Chairman Schumer. --Chairman Leahy, which would undo Buckley v. Valeo, which is the whole decision that started us in this somewhat convoluted way of dealing with campaign finance reform and has been a real leader here. So we thank him for coming and call on him for an opening statement.

OPENING STATEMENT OF SENATOR UDALL

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311 Senator Udall. Thank you, Chairman Schumer. This is an important bill and I
312 really appreciate you holding a hearing on it.

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In January 2010, the Supreme Court issued its disastrous opinion in Citizens United v. FEC. Two months later, the D.C. Circuit Court of Appeals decided the SpeechNow v. FEC case.. These two cases gave rise to super PACs. Millions of dollars now pour into negative and misleading campaign ads, and often without disclosing the true source of the donations.

The Citizens United and SpeechNow decisions renewed our concerns about campaign finance, but the Court laid the groundwork for this broken system many years ago. In 1976, the Court held in Buckley v. Valeo that restricting independent campaign expenditures violates the First Amendment right to free speech. In effect, the Court established the flawed precedent that money and speech are the same thing.

The damage is clear. Elections become more about the quantity of cash and less about the quality of ideas, more about special interests and less about public service. I don't think we can truly fix this broken system until we undo the flawed premise that spending money on elections is the same thing as free speech. That can only be achieved if the Court overturns Buckley or we amend the Constitution. Until then, we fall short of the real reform that is needed.

But we can still do all that we can in the meantime to make a bad situation better. That is what we are trying to do with the DISCLOSE Act. It is not the comprehensive reform that I would like to see, but it is what is possible under the flawed Supreme Court precedents that constrain us. The DISCLOSE Act of 2012 asks the basic and imminently fair question, where does the money come from and where is it going? This is a practical, sensible measure. It does not get money out of our elections, but it does shine a light into the dark corners of campaign finance.

341 A similar bill in the last Congress had broad support with 59 votes in the Senate
342 and it passed the House. Now that we are seeing the real impact of Citizens United
343 and SpeechNow decisions on our elections, the need for this legislation has become
344 even more apparent. The downpour of unaccountable spending is wrong. It
345 undermines our political process. And it has sounded an alarm that is truly bipartisan.
346

347 I recall the debate when we considered the DISCLOSE Act in the last Congress.
348 Many of our concerns then were still hypothetical. We could only guess how bad it
349 might get. Well, now we know. Unfortunately, our worst fears have come true.
350 The toxic effect of Citizens United and subsequent lower court rulings have become
351 brutally clear. The floodgates to unprecedented campaign spending are open and
352 threaten to drown out the voices of ordinary citizens.
353

354 Look at what we have seen already, and we are already in the primary season.
355 Huge sums of money flooding the airwaves. An endless wave of attack ads paid for by
356 billionaires. The poisoning of our political discourse. The spectacle of 501(c)(4),
357 so-called "social welfare" organizations, abusing their nonprofit status to shield their
358 donors and funnel money into super PACs. They spend at will and they hide at leisure.
359

360 The American public, rightly so, looks on in disgust. A recent Washington
361 Post-ABC News poll found that nearly 70 percent of registered voters would like super
362 PACs to be illegal. Among independent voters, that figure rose to 78 percent.
363 Supporters of super PACs and unlimited campaign spending claim they are promoting
364 the democratic process, but the public knows better. Wealthy individuals and special
365 interests are buying our elections. Our nation cannot afford a system that says, "come
366 on in" to the rich and powerful and says, "do not bother" to everyone else. The faith
367 of the American people in their electoral system is shaken by big money. It is time to
368 restore that faith. It is time for Congress to take back control.
369

370 There is a great deal to be done to fix our campaign finance system. I will
371 continue to push for a constitutional amendment. We need comprehensive reform.
372 But in the interim, let us at least shine a light on the money. The American people
373 deserve to know where this money is coming from and they deserve to know before,
374 not after, they head to the polls. That is what the DISCLOSE Act will achieve.
375

376 Chairman Schumer, I want to thank you again on this hearing and look forward
377 to hearing from our witnesses and ask that my entire statement will be put in the
378 record.
379

380 [The prepared statement of Senator Udall included in the record]
381

382 Chairman Schumer. Without objection.
383

384 Last, but not least, and we joke about him being the member way down there,

385 but his knowledge of all of these issues and the fact that the Judiciary Committee is
386 actively involved in this issue, particularly on the constitutional side, make us really glad
387 that he is a member of this committee. It will help us as we move forward greatly in
388 this effort. So Chairman Leahy.

389

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OPENING STATEMENT OF SENATOR LEAHY

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392 Senator Leahy. Well, thank you, Mr. Chairman. I appreciate the fact that we
393 new guys get a chance, also, to speak on this.

394

395 I did join with you and the others in reintroducing the DISCLOSE Act. I think it is
396 an important hearing and I appreciate you having this. Our efforts to restore
397 transparency in campaign finance laws were gutted by a narrow conservative activist
398 majority of the Supreme Court and we cannot wait any longer. By the stroke of a pen,
399 five Supreme Court Justices overturned a century of law designed to protect our
400 elections from corporate spending, ran roughshod over longstanding precedent, struck
401 down key provisions of our bipartisan campaign finance laws.

402

403 And I remain troubled today that the Supreme Court extended to corporations
404 the same First Amendment rights of the political process that are guaranteed by the
405 Constitution to individual Americans. Corporations are not the same as individual
406 Americans. Corporations do not have the same rights or the same morals or the same
407 interests. They cannot vote in our democracy. If you followed them to logic, you
408 would say, logically, what the Supreme Court has said about them being persons, you
409 would say, well, this country elected General Eisenhower as President. Should we not
410 elect General Electric as President? We know we have elected a lot of yahoos as Vice
411 Presidents. I think of people like Millard Fillmore. Why not elect Yahoo!, a
412 corporation, as Vice President?

413

414 The Founders understood this. Americans across the country long understood
415 that corporations are not people in this political process. And unfortunately, a very
416 narrow majority of the Supreme Court apparently did not want to believe what all
417 Americans have believed.

418

419 Like all Vermonters, I cherish our democratic process, cherish the fact that
420 Vermont has one of the highest turnouts for elections of any State in the Union. But
421 we ought to be heard as Vermonters and not be undercut by corporate spending, but
422 that is exactly what is happening with the waves of corporate money being spent on
423 elections around the country. And it will continue to happen until we start to take
424 action by passing the DISCLOSE Act.

425

426 When I cosponsored the first DISCLOSE Act after the Supreme Court's decision in
427 2010, I hoped Republicans would join with Democrats to mitigate the impact of it. We
428 were trying to restore much of the McCain-Feingold law. All we needed was to have

429 one Republican vote to restore McCain-Feingold, and we could have done it. Instead,
430 we did not and they filibustered it and we needed that one vote and we did not get it.

431

432 I think this is going to hurt both parties if they are unable to do that. It has
433 ensured that the flood of corporate money flowing from undisclosed and unaccountable
434 sources, such as Citizens United, would continue. And the Chairman mentioned the
435 sudden and dramatic effects in the Republican primaries, but this could happen on
436 either side, this barrage of negative advertisement from so-called super PACs. I would
437 advise my colleagues on both sides of the aisle, this uninhibited, undisclosed spending is
438 hurting every one of us.

439

440 It is one of the reasons why the American people are so turned off on how
441 government is run and politics are run. It is going to hurt every single person. But
442 more importantly, it is going to hurt the institutions I cherish. The Congress--it is going
443 to hurt the ability of Republicans and Democrats to work together for the best interests
444 of the country.

445

446 My State of Vermont is a small State. It would not take more than a tiny
447 fraction of the corporate money playing the airwaves to outspend every single
448 Republican and every single Democrat in our State running for anything. That is
449 wrong. You know, if the local city council or the zoning board is considering an issue of
450 corporate interest, what is to stop the corporations from just wiping them out?

451

452 So I would urge my colleagues, whether you are a Republican or a Democrat, you
453 have an interest in getting government back where everybody knows who is involved in
454 the government, everybody knows who is spending in the government, and you have a
455 chance for the candidates actually to have their voices to be heard.

456

457 I will tell you, if we do not do this, the inability of good people in either party to
458 come forward is going to stop and the disrespect of our institutions, including the
459 United States Supreme Court, will grow, and I can tell you right now, this country will
460 suffer.

461 Thank you.

462

463 Chairman Schumer. Thank you, and I would like to thank all of our colleagues
464 for their excellent statements.

465

466 Now, we will ask our witnesses to come forward. Okay. I have a brief
467 introduction for each witness, all of whom are well known in this area.

468

469 Mr. Fred Wertheimer is the President of Democracy 21, which he founded in
470 1997. He was previously President of Common Cause and has served as a Fellow at
471 Harvard University and visiting lecturer at Yale Law School. He has been a nationally
472 recognized leader on campaign finance and transparency reform. He serves as an
473 analyst at CBS News and ABC News.

474

475 Mr. David Keating is the President of the Center for Competitive Politics and
476 former Executive Director of the Club for Growth. Previously, he served as Executive
477 Vice President of the National Taxpayers Union and Executive Director of Americans for
478 Fair Taxation. He founded the SpeechNow.org in 2007.

479

480 Rick Hasen is a Chancellor's Professor of Law at the University of California, the
481 Irvine School of Law, and is the author of the Election Law Blog. He has written more
482 than four dozen articles on election law issues and several books, including the Supreme
483 Court and Election Law. He previously taught at Loyola Law School in Los Angeles and
484 at the Chicago Kent School of Law.

485

486 Thank you all for coming, gentlemen. Each of your statements will be read into
487 the record and we would ask you to limit your opening statements to five minutes each.

488

489 Mr. Wertheimer.

490

491 STATEMENT OF FRED WERTHEIMER, FOUNDER AND PRESIDENT, DEMOCRACY 21

492

493 Mr. Wertheimer. Chairman Schumer and members of the committee, I am
494 Fred Wertheimer, President of Democracy 21, and I appreciate the opportunity to
495 testify today in support of the DISCLOSE Act.

496

497 If the opportunity arises later on, I would like to address Senator Alexander's
498 long-held views about contribution limits, but I will focus my comments now on the
499 DISCLOSE Act.

500

501 The DISCLOSE Act restores a cardinal rule of campaign finance laws. Citizens
502 are entitled to know who is giving and spending money to influence their votes. This
503 fundamental right to know has been recognized for decades by Congress in passing
504 campaign finance laws and by the Supreme Court in repeatedly upholding the
505 constitutionality of the laws.

506

507 In 2010, more than \$135 million in undisclosed, unlimited contributions were
508 injected into the Congressional race. This amount is expected to dramatically grow in
509 2012 in terms of the undisclosed contributions absent new disclosure requirements.
510 This has returned the country to the era of the Watergate scandals, when huge amounts
511 of secret money were spent in Federal elections. Secret money in American politics is
512 dangerous money. As the Supreme Court held in Buckley v. Valeo, disclosure
513 requirements deter actual corruption and avoid the appearance of corruption.

514

515 The DISCLOSE Act would ensure that citizens know on a timely basis the
516 identities of and amounts given by donors whose funds are being used to pay for
517 outside spending campaigns in Federal elections.

518

519 New disclosure laws were enacted during the Watergate era to address the
520 problem of secret money in Federal elections, and from the mid-1970s until 2010, there
521 was a consensus in the country and in the Congress among Democrats and Republicans
522 alike in support of campaign finance disclosure. In 2000, for example, in response to a
523 disclosure loophole that was allowing certain 527 groups to spend undisclosed money in
524 Federal elections, a Republican-controlled Congress acted to close the loophole.
525 Congress passed the new disclosure legislation with overwhelming support from
526 Republicans and Democrats. The House vote was 385 to 39. The Senate vote was 92
527 to six.

528

529 Bipartisan support for disclosure, however, disappeared in 2010. The policy
530 issues have not changed, but the votes have. We urge the Senate to return to the
531 bipartisan approach of support for campaign finance disclosure that was the rule for
532 almost four decades in the Senate and in the House.

533

534 These gaping loopholes in the disclosure laws were caused by a combination of
535 the Citizens United decision and ineffectual FEC regulations. This problem has been
536 made all the more worse by groups improperly claiming tax-exempt 501(c)(4) social
537 welfare organization status in order to keep secret their donors. We have petitioned
538 the IRS to change their regulations to deal with eligibility for this tax status and I would
539 like to enclose those petitions in the record.

540

541 [The information of Mr. Wertheimer included in the record]

542

543 Chairman Schumer. Without objection.

544

545 Mr. Wertheimer. The Citizens United decision was based on a false assumption
546 that in striking down the corporate ban, there would be effective disclosure for the
547 independent campaign expenditures that followed. Justice Kennedy wrote, "A
548 campaign finance system that has corporate independent expenditures with effective
549 disclosure has not existed before today." That effective disclosure still does not exist,
550 and that is what will be cured by the DISCLOSE Act.

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There is no constitutional problem with disclosure and no constitutional problem with the DISCLOSE Act. The Supreme Court, by an eight-to-one vote in Citizens United, upheld disclosure for the kinds of expenditures that are dealt with in this legislation.

The Court specifically noted the problems that result when groups run ads while hiding behind dubious and misleading names and thereby conceal the true source of their funds. The Court also explicitly rejected the argument that disclosure requirements can only apply in the case of express advocacy or the functional equivalent of express advocacy.

Thank you very much, Mr. Chairman.

[The prepared statement of Mr. Wertheimer included in the record]

Chairman Schumer. Thank you, and you finished exactly in five minutes. You are a well rehearsed witness, Mr. Wertheimer, as well as a very good one.

Mr. Keating.

STATEMENT OF DAVID KEATING, PRESIDENT, CENTER FOR COMPETITIVE POLITICS

Mr. Keating. Mr. Chairman and members of the committee, thank you for inviting the Center for Competitive Politics to present our analysis of S. 2219.

While the stated goal of the bill is to increase disclosure on spending to elect or defeat candidates, the radical proposal actually chills speech, forces nonprofits to fundamentally alter their fundraising and public advocacy efforts, and hijack 25 percent or more of the advertising copy during an election year if it simply mentions the name of a Congressman. I think many of these provisions will generate significant First Amendment questions and will generate litigation that has a good chance of success.

Now, perhaps the most infamous provision of the McCain-Feingold bill was its restriction on the ability of groups to even mention the name of a Congressman running for reelection within 60 days of a general election or 30 days of a primary. This bill would stretch that restriction to the entire election year for members of Congress. That change would wreak havoc on groups that want to use TV or radio ads to lobby Congress or candidates.

In my testimony, I give the example of an environmental group that might want to run an ad urging support for a bill to regulate carbon dioxide. Under the bill, it might have to disclose all significant donors, several of whom might even work for a utility or maybe even a coal company. Now, these donors might have supported the group's clean water efforts in response to appeals for funds on that basis, yet had not

595 thought to earmark their checks. Yet they may be listed on the ad itself as supporting
596 the ad when, in fact, they do not support any such thing.

597

598 Now, another thing that is not talked about in this bill at all, from what I can tell,
599 is the disclaimer requirements, which are just totally ridiculous. Consider, under
600 today's law, a radio ad that would run right now, when there is no primary within 30
601 days. The ad for this group that I list in my testimony, which I made up, American
602 Action for the Environment, the radio ad would just say at the end, "Paid for by
603 American Action for the Environment." Well, I think most Americans would think that
604 is a pretty good disclaimer under the law today. You know who is running the ad.
605 You know who paid for it.

606

607 But the bill would require this, and it is going to take about ten percent of my
608 testimony to read the disclaimer on this radio ad. It would have to say something like
609 this, and no editing really is allowed. The FEC Commissioners behind me could affirm
610 this because the group that I used to work at once asked for an exemption from some of
611 these disclaimers and they said the FEC could not grant it due to the law.

612

613 It would say, "Paid for by American Action for the Environment,
614 www.AmericanActionfortheEnvironment.org," or the address or phone number, "not
615 authorized by any candidate or candidate's committee, and I am John Smith"--I am not
616 really John Smith, obviously--"the Chief Executive Officer of American Action for the
617 Environment, and American Action for the Environment approves this message. Major
618 funders are Ronald B. Coppersmith and Donald Wasserman Schultz."

619

620 Now, that disclaimer took about 20 seconds to speak. How are groups
621 supposed to purchase a 30-second radio ad if you have a 20-second disclaimer? And I
622 have not even mentioned groups with longer names, such as the American Academy of
623 Otolaryngology, Head and Neck Surgery. This is ridiculous to have this kind of
624 disclaimer on a radio ad.

625

626 Now, all this is totally unnecessary. Current law already requires disclosure of
627 all spending to the FEC for all independent expenditures and electioneering
628 communications and all contributions over \$200 a year to further such communications.
629 I have given examples of this disclosure in my written statement.

630

631 Now, there is more in this bill that goes far beyond disclosure and adds
632 confusion to an election code and regulations and that are already just too complicated.
633 I tell people election law makes the tax code look simple by comparison. There is a
634 new and, what I consider, indecipherable definition of express advocacy and that really
635 should be deleted from the bill.

636

637 In conclusion, I want to emphasize that, this bill piles new costs on nonprofits
638 and other speakers, costs that are certain to chill speech and appear intended to

639 accomplish indirectly through costly and arbitrary compliance provisions, long
640 disclaimers, what Congress may not do directly under the First Amendment, and that is
641 silence dissent and speech. Thank you.

642

643 [The prepared statement of Mr. Keating included in the record]

644

645 Chairman Schumer. Mr. Hasen. Professor Hasen, excuse me.

646

647 STATEMENT OF RICHARD L. HASEN, CHANCELLOR'S PROFESSOR OF LAW AND POLITICAL
648 SCIENCE, UNIVERSITY OF CALIFORNIA-IRVINE SCHOOL OF LAW

649

650 Mr. Hasen. Chairman Schumer, Ranking Member Alexander, and members of
651 the Rules and Administration Committee, thank you very much for the opportunity to
652 be here today to testify about the DISCLOSE Act.

653

654 I strongly support the measure as a way of closing loopholes and requiring the
655 disclosure of information which will deter corruption, provide the public with relevant
656 information, and allow for the enforcement of other laws, such as the bar on foreign
657 money in U.S. elections.

658

659 The proposed legislation uses high-dollar thresholds and enables contributors to
660 tax-exempt organizations to shield their identity when making non-election-related
661 contributions. These steps ensure that the First Amendment rights of free speech and
662 association are fully protected. I hope the Senate returns to its prior bipartisan
663 consensus in favor of full and timely disclosure.

664

665 We have heard what Justice Kennedy thought the world after Citizens United
666 would look like, and unfortunately, that world has not materialized. The main problem
667 is that action has shifted from PACs and 527 organizations, which have to disclose all of
668 their contributors, to new 501(c)(4) and other types of 501(c) organizations which
669 require no public disclosure of contributors. And under the FEC rules, most
670 contributors who are funding electioneering communications are not disclosed.

671

672 How serious of a problem is secret money? The Center for Responsive Politics
673 found that in 2010, the spending coming from groups that did not disclose rose from
674 one percent to 47 percent since the 2006 mid-term elections and that 501(c) spending
675 increased from zero percent of total spending by outside groups to 42 percent in 2010.

676

677 Furthermore, with the rise of super PACs, contributors can easily shield their
678 identity from the public, hiding behind innocuous names like Americans for a Strong
679 America. The public does not get the information on who is funding the ads when it
680 needs it the most, when it hears the ads.

681

682 Even worse, contributors can shield their identities by contributing to a

683 501(c)(4), which in turn donates to a super PAC, as recently happened when nearly half
684 of FreedomWorks' super PAC contributions came from its sister 501(c)(4). Disclosing
685 that FreedomWorks' contributions came from FreedomWorks is not helpful to voters.
686

687 I now turn to the benefits of the bill. The first benefit of all disclosure bills is
688 that they can prevent corruption and the appearance of corruption. While the first
689 best solution might be to return to the days before Citizens United and bar corporate
690 spending in elections, disclosure is an important, though second-best, alternative to
691 corporate spending limits to ferret out corruption.
692

693 Second, disclosure laws provide valuable information to voters. This was
694 apparent to California voters recently when they turned down a ballot proposition that
695 would have benefitted Pacific Gas and Electric. PG&E provided almost \$46 million to
696 the Yes on 16 Campaign, compared to very little spending on the other side. Thanks to
697 California's disclosure laws requiring top contributors' names to be mentioned, PG&E's
698 name appeared on every Yes on 16 ad and the measure narrowly went down to defeat.
699 The DISCLOSE ACT has a similar kind of provision.
700

701 Third, the DISCLOSE Act would help enforce other campaign finance laws. If
702 you are worried about foreign money in elections or conduit contributions, where one
703 person gives through another, the only way to find these out is through adequate
704 disclosure.
705

706 Finally, let me turn to the question of whether the DISCLOSE Act would face First
707 Amendment challenge. We have heard that in *Buckley v. Valeo* and in *Citizens United*
708 and in other cases, the Supreme Court has repeatedly and nearly unanimously upheld
709 disclosure laws, going much further than just the requirement of disclosure as to
710 express advocacy. But the Supreme Court has also stated that if a group can
711 demonstrate a history or a threat of harassment, it is entitled to a constitutional
712 exemption from those rules.
713

714 As to harassment, in a forthcoming article in the *Journal of Law and Politics* of
715 the University of Virginia, I closely analyzed the claims of harassment that have been
716 made in recent court cases surrounding controversial ballot measures about gay
717 marriage and gay rights. Both of the district courts found that harassment is not a
718 serious problem, and if it is, there is the entitlement to an exemption.
719

720 The DISCLOSE Act provisions are ingenious in allowing contributors to nonprofits
721 to keep information private when their money is going to be used for non-election
722 purposes. The nonprofit can set up a separate account only for election purposes.
723 The DISCLOSE Act sensibly targets the activity, contributing money to election-related
724 ads, rather than the type of organizational forum. If someone is contributing money to
725 run an election ad, that should be disclosed, regardless of the name of the organization
726 that is used.

727
728 Thank you again for the opportunity to speak and I welcome your questions.

729
730 [The prepared statement of Mr. Hasen included in the record]

731
732 Chairman Schumer. Thank you, and I thank all three witnesses for their
733 testimony.

734
735 My first question is to Mr. Keating. Mr. Keating, as you know, the example
736 Professor Hasen used, where somebody contributes a great amount of money to a
737 501(c)(4), the 501(c)(4), a shell organization, gives it to the super PAC or the 501(c)(3)
738 and just discloses the name of that 501(c)(4), your written testimony does not account
739 for that loophole. Do you not agree that there is no effective disclosure when a
740 501(c)(4) is given a large contribution and a certain percentage--a large percentage of
741 that money is used to put ads on TV?

742
743 Mr. Keating. Well, I think there are already laws--a law against contributing in
744 the name of another. It is already in the election laws—

745
746 Chairman Schumer. No, no, no. But what—

747
748 Mr. Keating. If—

749
750 Chairman Schumer. Mr. Keating, let me—

751
752 Mr. Keating. Yes.

753
754 Chairman Schumer. You have got to answer the specific question. He said
755 that FreedomWorks, just having FreedomWorks be the listing is not adequate. It does
756 not tell us anything. You can have a false name in your example. Citizens Against
757 Pollution could be funded by people who want to remove pollution controls. So just
758 having any name on the ad does not tell you anything. The name could be deliberately
759 deceptive. Do you disagree with that, that simple proposition that 99 percent of all
760 Americans would say, yes, sure, obviously.

761
762 Mr. Keating. So if a group like the Sierra Club runs an ad, we need to know, are
763 the donors to the Sierra Club--I mean, that is the implied—

764
765 Chairman Schumer. No, but let us say the Sierra Club—

766
767 Mr. Keating. --behind the question—

768
769 Chairman Schumer. Let us say the Sierra Club wants to take out somebody
770 who is a defender of--in a State where coal is used and they set up an ad campaign

771 saying, Citizens for Coal Use, and then fund ads against that person, that candidate, that
772 incumbent, on an unrelated issue. Disclosure does no good. In fact, it is deceptive.
773 Yes, if they use the name the Sierra Club, people know what the Sierra Club is. You are
774 using an obvious example. But they could set up a shell organization with a totally
775 opposite name, the Pollution Club.

776
777 Mr. Keating. And under the law today—

778
779 Chairman Schumer. All that would be disclosed, and you seem to be defending
780 it, is the name Pollution Club.

781
782 Mr. Keating. No, that is incorrect, Mr. Chairman.

783
784 Chairman Schumer. That is absolutely correct if they give to a 501(c)(4).

785
786 Mr. Keating. No, you are incorrect about that. If it is an independent
787 expenditure, that group needs to report the donors used for that independent
788 expenditure. That would be listed in the FEC filings. So we would know that the
789 Sierra Club gave to this front group that you are talking about here.

790
791 Mr. Wertheimer. If I could—

792
793 Chairman Schumer. Go ahead, Mr. Wertheimer.

794
795 Mr. Wertheimer. --step in at this point, the statute does require contributors
796 to be disclosed. The regulations issued by the FEC have gutted the disclosure
797 provision.

798 Chairman Schumer. Explain how.

799
800 Mr. Wertheimer. That is how--because they have limited the disclosure to only
801 individuals who give for the specific purpose—

802
803 Chairman Schumer. Exactly.

804
805 Mr. Wertheimer. --of running those ads, and no one says they do. That is
806 how we wound up with \$135 million—

807
808 Chairman Schumer. Right.

809
810 Mr. Wertheimer. --in undisclosed contributions.

811
812 Chairman Schumer. Correct, and the effect, the practical effect is we do not
813 know where this 501(c)(4) money is coming from, and we will never know. That is the
814 bottom line, is that not correct, Professor Hasen?

815

816 Mr. Hasen. Yes. I think that if you listen to Mr. Keating very closely, he talked
817 about disclosure of contributions funding independent expenditures.

818

819 Chairman Schumer. Right.

820

821 Mr. Hasen. What is happening, technically speaking, is that these groups are
822 running electioneering communications, which as Mr. Wertheimer explained,
823 contributions to fund electioneering communications are not adequately disclosed
824 thanks both to FEC regulations as well as a deadlock on the FEC as to how the rules
825 should be—

826

827 Chairman Schumer. So my example is correct.

828

829 Mr. Hasen. I believe so, yes.

830

831 Chairman Schumer. Thank you. Okay. My time is running out, and we will
832 try to have a second round, but I want to try to stick to the five minutes.

833

834 So my second question just goes to Mr. Wertheimer. Senator Alexander and
835 others have suggested removing contribution limits for candidates and parties--that was
836 a key part of McCain-Feingold--would be a solution. Can you just give us a brief sketch
837 of what would happen in the political landscape if we did that? I take it, Senator
838 Alexander, your proposal would be that then everything would be disclosed. If
839 someone wanted to give to a 501(c)(4) or an independent expenditure, there would be
840 disclosure of that if we lifted all limits, is that--

841

842 Senator Alexander. I am assuming, Senator Schumer, that if the limits were
843 lifted, that people would give to campaigns and the campaigns and candidates would
844 disclose. There would be no reason to give to a political—

845

846 Chairman Schumer. Except—

847

848 Senator Alexander. --super PAC or operation.

849

850 Chairman Schumer. Unless you did not want to disclose.

851

852 Senator Alexander. Well—

853

854 Chairman Schumer. Okay. But anyway, why does Mr. Wertheimer not just
855 give us a little example of why--a little sketch of what might happen, in his opinion.

856

857 Mr. Wertheimer. Well, I think, in my view, that would take us back to a system
858 of legalized bribery that we used to have years ago, and let me give a few comments

859 from people other than me about this.

860

861 The Supreme Court in Buckley v. Valeo said contributions were necessary to deal
862 with the reality or appearance of corruption inherent in a system permitting unlimited
863 financial contributions. An inherently corrupt system is what the Supreme Court called
864 a system of unlimited contributions.

865

866 Former Republican Senate Whip Alan Simpson said about the unlimited soft
867 money system, the system of unlimited contributions to national parties, quote,
868 "prostitutes ideas and ideals, demeans democracy, and debases debates. Who, after
869 all, can seriously contend that a \$100,000 donation does not alter the way one thinks
870 about, and quite possibly votes on, an issue?"

871

872 Former Republican Senator Warren Rudman said about the unlimited soft
873 money system, "I know firsthand and from working with colleagues just how beholden
874 elected officials and their parties can become to those who contribute to their
875 campaigns and to their parties' coffers. Individuals on both sides of the table
876 recognize that larger donations effectively purchase greater benefits for donors."
877 Unlimited contributions to the parties, quote, "affect what gets done and how it gets
878 done. They affect outcomes, as well."

879

880 And one last quote from a former colleague, a late former colleague of the
881 Senate, Senator Russell Long, the Chairman of the Finance Committee, who well knew
882 his way around campaign money. He once said, "The distinction between a large
883 campaign contribution and a bribe is almost a hairline's difference."

884 So my view is, we go back to a system of buying results in Congress, direct
885 purchases, if we go back to a system of unlimited contributions.

886 Chairman Schumer. But certainly in--and I am not going to ask you to respond
887 to this because my time is up--what Senator Alexander, my good friend, who I have
888 tremendous respect and affection for--and that is God's honest truth -- is suggesting we
889 would go back to the old system. Basically, he is saying, let us go back to the system
890 with no limits which was in existence 30 years ago, right?

891

892 Mr. Wertheimer. It was in existence when we got Watergate.

893

894 Chairman Schumer. Before 1974, right. Okay.

895

896 Senator Alexander.

897

898 Senator Alexander. Thank you, Senator Schumer. Thanks for asking Mr.
899 Wertheimer that question. I was going to ask him that if you did not.

900

901 Of course, Senator McCarthy in testimony before this committee said the
902 following. "Watergate was cited as an example of corruption of the system, although

903 there was nothing in Watergate that would have been prevented or made illegal by the
904 1975 Act," which was the Act identifying limits on contributions.

905

906 I would like to come back to limits on contributions just a minute with Mr.
907 Keating. Let me ask you, do you think if the DISCLOSE Act as it is written passed, there
908 would be less spending by the groups affected on elections?

909

910 Mr. Keating. It is hard to say, Senator. There is no way of knowing in
911 advance. I think there probably would be less spending. There certainly would be
912 massive disruption in the way many of these organizations need to handle their
913 fundraising efforts.

914

915 And I did want to mention something, which is what one of the other witnesses
916 identified as a problem in the regulations or the law. If there is a problem with that,
917 why would you not just take a surgical knife and just fix that one small problem?

918

919 I can tell you, I recently worked at the Club for Growth, and that group was a
920 qualified nonprofit corporation. Before Citizens United, that group, as well as the
921 League of Conservation Voters, Planned Parenthood, and some other groups, were
922 allowed to do independent expenditures from their general funds. We did not raise
923 money for independent expenditures from people. We ran independent expenditures
924 out of our general budget. Now, that is something that I think most people--most
925 Americans would agree that groups like--whether it is the Sierra Club or something
926 else--should be able to fund these ads out of their own budget.

927

928 If there is consensus that the problem with disclosure is created by a vague law
929 or the regulations being vague about raising money for independent expenditures or
930 electioneering communications, then why not just fix that one thing? This bill goes
931 way beyond that, way beyond that, to cover anything that is run during an entire
932 election year.

933

934 Senator Alexander. Mr. Keating--

935

936 Mr. Keating. I think that goes too far.

937

938 Now, as far as—

939

940 Senator Alexander. Mr. Keating, you are using up all my time.

941

942 Mr. Keating. Oh, I am sorry.

943

944 Senator Alexander. Let me ask you this question. Do you think if we took all
945 the limits off contributions to campaigns, do you think that would tend to dry up super
946 PACs?

947

948 Mr. Keating. I think a lot of this money going to super PACs would go directly
949 to the candidate. I do not have any doubt in my mind, because—

950

951 Senator Alexander. And if it went to the candidate, it would be fully disclosed,
952 is that right?

953

954 Mr. Keating. Absolutely.

955

956 Senator Alexander. Under current rules. On limits, I have a little different
957 view than Mr. Wertheimer and I have a little different experience than he does. I have
958 actually run in a Presidential campaign with limits and in other campaigns, and here is
959 the way it works. Because of the limits in 1995, when I was a candidate, I went to 250
960 fundraisers to try to get money from people who could not give more than \$1,000. So
961 I spent a lot of time with people who could afford to give \$1,000, 70 percent of my time,
962 probably, over a year. That is 250 events. That raised \$10 or \$11 million.

963

964 At the same time, Steve Forbes was able to spend \$43 million of his own money.
965 That is what he did in 1996, and in 2000, he spent \$38 million of his own money.

966

967 I told that to Senator Kerry when I was on the Harvard faculty in the early 2000s
968 and I said, you know, there has never been a credible candidate for President who spent
969 his own money, and if you are ever in that position and you did it, it would probably
970 help you. He was in that position in 2003. Howard Dean was beating him pretty
971 badly in terms of the amount of money raised. Dean had raised \$14 million, Kerry \$4
972 million, and the media was saying, Kerry cannot raise money. Therefore, he will not
973 make a good President. Kerry put \$6 or \$7 million of his own money in and won the
974 Iowa caucus and became the nominee.

975

976 I watch FOX and MSNBC sometimes when I am down in the gym with Senator
977 Schumer watching television and they run ads regularly, just the way that--I mean, their
978 broadcasts are ads, in many cases, for a political point of view. That is their right to do.
979 In countries where we do not have a democracy, the first thing the leaders do is to take
980 over the television stations and keep everybody else from having enough money or
981 resources to advertise their views.

982

983 So it seems to me that as long as we have a First Amendment, as long as we have
984 a First Amendment that permits Steve Forbes, a fine American, John Kerry, a fine
985 American, and others to spend their own money, that all we are doing with limits is
986 turning Washington into a city of panderers for \$1,000 and \$2,000 contributions.
987 Before 1975, we did not spend all our time at fundraisers. After 1975, Congressmen
988 did, and the only reason you do is because you cannot raise money in sufficient
989 amounts to run a campaign that buys enough television time to compete with the ads
990 the TV stations are already running or the ads that rich Americans might buy because

991 they have the money themselves.

992

993 So taking the limits off would solve almost all of the disclosure problem because
994 the money would then be given to candidates and campaigns and more people would
995 participate, campaigns would run longer, as they have this year in the Republican
996 primary, more voters would have a chance to vote, and elected officials would spend a
997 lot less time with people who are trying to give them money.

998

999 Chairman Schumer. Thank you, Senator Alexander, but just one point I would
1000 make. If you do not--still, if you do not require disclosure of the super PACs, there will
1001 be people who will want to give undisclosed, so you will still have that ability to do it.
1002 But if you want to give a million dollars to the candidate, you will have to disclose it.

1003

1004 Senator Alexander. Yes. If you give to the President's super PAC, you have to
1005 disclose that.

1006

1007 Chairman Schumer. So my only question, just for clarification, because he has
1008 put out an alternative, is are you recommending that there be some kind of disclosure in
1009 the 501(c)(4)s, (c)(6)s, (c)(3)s, in addition to removing the limits?

1010

1011 Senator Alexander. If you are willing to remove the limits, I am willing to
1012 discuss with you what the disclosure definition ought to be.

1013

1014 Chairman Schumer. Thanks. Okay. I appreciate that.

1015

1016 Senator Feinstein.

1017

1018 Senator Feinstein. I have been sitting here reflecting on the change in times.
1019 Mr. Keating mentioned that disclosure, sunlight, knowledge, was a radical idea, and I
1020 was really taken aback by that because I do not see how it possibly can be. This bill is
1021 modest. You can give under \$10,000 without disclosure to a super PAC. It is over
1022 \$10,000. Now, someone that contributes over \$10,000 generally has some kind of
1023 motivation to contribute. The disclosure simply allows individuals to look at this and
1024 see who is supporting a candidate or a cause. What about this is such a radical idea,
1025 Mr. Keating?

1026

1027 Mr. Keating. Well, Senator, it sounds like I may have been misinterpreted or I
1028 misspoke, but I was talking about the bill itself, not the concept of disclosure being a
1029 radical concept.

1030

1031 There are provisions in this bill that I consider radical and I think perhaps the
1032 most radical is the government-mandated disclaimer that goes on for 20 seconds or
1033 more, in many cases, on a radio ad. Now, this would cover all radio ads that mention
1034 the name of a Congressman, something as simple and innocuous as a bill being before

1035 Congress and it says, "Call Congressman Smith and urge him to vote for the bill." You
1036 would have to run an ad at least a minute long to even hope of getting your message
1037 across.

1038

1039 So you are going to drive up the costs of these ads, and I do not understand why
1040 we need a disclaimer that goes on for 20 seconds when something as simple as "Paid for
1041 by Americans for Action for the Environment" does the trick. To me, that is a radical
1042 approach, requiring groups to state a bunch of bureaucratic nonsense in a disclaimer
1043 that drives up the cost of advertising by a tremendous amount.

1044

1045 Senator Feinstein. Well, I am running for reelection, in a big State, very
1046 expensive for television, and yet I should be responsible for the ads I put up on
1047 television. Therefore, the disclaimer is important because it says to people that the ad
1048 is speaking for me and I take responsibility for it. What is radical about that?

1049

1050 Mr. Keating. Well, I think what is radical about it is the bill specifies a
1051 disclaimer that goes on seemingly forever when it could be said in far fewer words.

1052

1053 Senator Feinstein. Mr. Wertheimer.

1054

1055 Mr. Wertheimer. Mr. Keating has focused on the radio ads. Let us move to
1056 the TV ads for a minute. The TV ads require the head of an organization to take
1057 responsibility for the ad in the same way that you have to take responsibility for your
1058 ad, so that there is accountability and responsibility for campaign ads. The TV ads also
1059 require the ad to list the top five donors, but that can be done in a crawl and would take
1060 up no time from the content of the ads.

1061

1062 With respect to the radio ads, there were provisions added last time that are still
1063 in this bill that give the FEC the power through regulation to exempt the kinds of ads
1064 that Mr. Keating—

1065

1066 Mr. Keating. That is incorrect.

1067

1068 Mr. Wertheimer. It is correct. It is in the bill.

1069

1070 Mr. Keating. No, it is not. For radio? It is not correct. It only exempts the
1071 major donor listing, not the rest of the disclosure.

1072

1073 Mr. Wertheimer. Well—

1074

1075 Senator Feinstein. My time—

1076

1077 Chairman Schumer. Let me just--there is a hardship exception which the FEC
1078 can use for just what you are talking about. You are correct, Mr. Wertheimer.

1079

1080 Senator Feinstein. If the disclosure is too long or burdensome—

1081

1082 Chairman Schumer. Now, it takes eight seconds. Of course, if you say it very
1083 slowly, you could stretch it out to 20 seconds if you should want to. It takes eight.

1084 There is a hardship exception.

1085

1086 Senator Feinstein. Yes, please.

1087

1088 Mr. Hasen. I would just add that as a fellow Californian, I can tell you that we
1089 have rules very much like this. We hear political ads on the radio all the time. They
1090 mention the top two funders. It is really not a burden. You can get your message
1091 out, and everyone does.

1092

1093 Senator Feinstein. Yes. I was--well, my time is up, but I was just reading—

1094

1095 Chairman Schumer. You have an extra couple of minutes because--

1096

1097 Senator Feinstein. I was just reading about the PG&E case, where--oh, I wish I
1098 had it in front of me. I put it down somewhere. Oh, here it is. That the PAC raised
1099 approximately \$46.2 million, all of which was donated by PG&E. Now, PG&E is a good
1100 company. It has fallen on very hard times for certain things. I do not want to get into
1101 that. But at one point, it donated \$9 million in one day. There is a consumer group
1102 called TURN, The Utility Reform Network. They were the main opponents and they
1103 were able to raise \$33,000. The PAC outspent 500-to-one, which amounts to
1104 approximately \$25 per vote, and they lost. And I think the reason they lost--this is my
1105 opinion -- is because of the disclaimer, and then everybody was able to come to the
1106 conclusion, this is not fair. This is the company about which this initiative is and it is
1107 not fair.

1108

1109 Now, the company is not necessarily an individual speaking. It is a group. It is
1110 a kind of oligarchy, if you will. It is a board of directors, I would assume, who makes
1111 that decision. But it seems to me that this is a very good example of disclosure. In
1112 other words, the entity that does the super PAC without disclosure has a very unfair
1113 position on the ballot. You would disagree with that, Mr. Keating, would you?

1114

1115 Mr. Keating. Well, I am not familiar with the details of California law, but if it
1116 worked there, then great. I have no problem with that.

1117

1118 Senator Feinstein. Thank you, Mr. Chairman.

1119

1120 Chairman Schumer. Just two points. I believe our law is quite the same as
1121 California. And second, the hardship exemption I mentioned, if for some reason the
1122 man's name is Richard Q. Quiddlehopper the Fourteenth and it takes 20 seconds to say

1123 their name, the hardship exception is on page 21, lines five through 14. It is in the bill.

1124

1125 With that--

1126

1127 Senator Blunt. And, Mr. Chairman, is the hardship exemption you are talking
1128 about eight seconds? If it takes more than eight seconds?

1129

1130 Chairman Schumer. They say if it takes—

1131

1132 Senator Feinstein. Read the language.

1133

1134 Chairman Schumer. I will read it. If the communication is transmitted
1135 through radio and is paid for in whole or in part with a payment which is treated as a
1136 campaign-related disbursement under 324, the top two funders list, if applicable,
1137 unless, on the basis of criteria established in regulations by the Commission, the
1138 communication is of such short duration--perhaps a 30-second ad--that including the
1139 top two funders list in the communication would constitute a hardship to the person
1140 paying for the communication by requiring a disproportionate amount of content of the
1141 communication to consist of the top two funders--I imagine if you had a 30-second ad
1142 with 20 seconds, the disclosure would take 20 seconds, that would clearly be a hardship.
1143 I would be happy to say on the floor that that is the legislative intent.

1144

1145 Senator Blunt. And I guess the FEC would maybe decide that.

1146

1147 Mr. Wertheimer, I do not want to take a lot of time on this, but let me be sure I
1148 understand. You said earlier on disclosure, the statute currently required
1149 disclosure--that the FEC, I think, has gutted the disclosure.

1150

1151 Mr. Wertheimer. The contribution disclosure.

1152

1153 Senator Blunt. And how has the FEC gutted the contribution disclosure?

1154

1155 Mr. Wertheimer. By defining the only contributions required to be disclosed as
1156 the contributions that were given for the specific purpose of making campaign-related
1157 expenditures.

1158

1159 Senator Blunt. And these would be contributions to these various groups—

1160

1161 Mr. Wertheimer. Organizations, yes.

1162

1163 Senator Blunt. --like the Sierra Club or Democracy 21 or whatever other group
1164 might spend money for that purpose.

1165

1166 Mr. Wertheimer. Yes.

1167

1168 Senator Blunt. Okay. Do you think we should be having a hearing on
1169 enforcing the statute?

1170

1171 Mr. Wertheimer. I think you ought to have a separate hearing on
1172 fundamentally reforming the Federal Election Commission, but I do not think a hearing
1173 on enforcing the statute on this regulation is going to get us to solve the problem of
1174 disclosure.

1175

1176 Senator Blunt. But the statute, you said, required disclosure.

1177

1178 Mr. Wertheimer. Under the current rules of the statute, there is a contribution
1179 disclosure provision which has resulted, as I said, in more than \$130 million not being
1180 disclosed.

1181

1182 Senator Blunt. All right. Let me be sure I understand. Mr. Keating made a
1183 statement that groups like the Sierra Club or Club for Growth should be able to run ads
1184 out of their own budget, is that a fair—

1185

1186 Mr. Keating. Yes.

1187

1188 Senator Blunt. And do you all agree with that, that groups like the Sierra Club
1189 or Club for Growth should be able to run ads out of their own budget, just a yes or no.

1190

1191 Mr. Wertheimer. Yes, and the statute accounts for that.

1192

1193 Senator Blunt. And Mr. Hasen?

1194

1195 Mr. Hasen. Yes. I think so long as they apply with the applicable disclosure
1196 rules, sure.

1197

1198 Senator Blunt. And what would those be, Mr. Keating, the applicable disclosure
1199 rules for running ads out of your own budget?

1200

1201 Mr. Keating. Well, you have to--if it is an independent expenditure, you must
1202 list the independent expenditure to the FEC within 48 hours, or 24 hours, depending on
1203 when it was run, and if it is an electioneering communication, you need to disclose the
1204 expenditure.

1205

1206 If money was given for the independent expenditure, and this is where I alluded
1207 to the confusion both from the statute and the regulations, different people take
1208 different interpretations of what that means. I can tell you that when I worked at Club
1209 for Growth, we interpreted that to mean that if you raised money just generally for an
1210 independent expenditure, the donor would have to be disclosed. Now, other people

1211 may take a different view of that. So that is how our group took the view.

1212

1213 So when we ran independent expenditures, we only did it from our general
1214 funds. We never asked anyone for money for independent expenditures—

1215

1216 Senator Blunt. And from your general funds, you did not disclose all the donors
1217 to Club for Growth on any report anywhere?

1218

1219 Mr. Keating. That is correct, because no money was given for independent
1220 expenditures. Now, Club for Growth today has a super PAC, Club for Growth Action,
1221 and it uses that entity to raise money for independent expenditures, and all the donors
1222 to that organization are disclosed.

1223

1224 Senator Blunt. So the super PAC donors for Club for Growth are disclosed, but
1225 the regular donors for Club for Growth or the Sierra Club, the two examples we have
1226 used here, are not disclosed.

1227

1228 Mr. Keating. Correct. Now, if a group did raise money for independent
1229 expenditures, you know, it is my view that this would have to be disclosed under the
1230 current law.

1231

1232 Senator Blunt. And other—

1233

1234 Mr. Keating. Other people may interpret the requirements of the law and
1235 regulations differently and may not disclose.

1236

1237 Senator Blunt. And under the law we are talking about today, is it accurate that
1238 a member of the House or Senate, that some groups, outside groups--which groups
1239 cannot mention their name for the entire year of the election?

1240

1241 Mr. Keating. Well, any group, unless it would want to--if we are talking about
1242 this bill becoming law—

1243

1244 Senator Blunt. Right.

1245

1246 Mr. Keating. --any group that wanted to run an ad during an entire election
1247 year, if they spend more than \$10,000, would have to meet the requirements of this
1248 Act.

1249

1250 Senator Blunt. And how would you mention the name of a House member or
1251 Senator?

1252

1253 Mr. Keating. Well, you could not unless you complied with all the provisions in
1254 this bill.

1255

1256 Senator Blunt. Mr. Wertheimer, do you want to say something about that?

1257

1258 Mr. Wertheimer. Well, there are no restrictions in this bill. There are
1259 disclosure requirements.

1260

1261 Senator Blunt. Well, there are restrictions that say you cannot mention
1262 somebody's name from January 1 until the election. That seems like a pretty big
1263 restriction to me.

1264

1265 Mr. Wertheimer. That is not a restriction in the bill.

1266

1267 Senator Blunt. It is not in the bill?

1268

1269 Mr. Wertheimer. The bill does not have restrictions. The bill has disclosure
1270 requirements if you run ads.

1271

1272 Mr. Hasen. The bill provides a definition of an electioneering communication,
1273 which already exists in the law, and extends it. But if something is triggered as an
1274 electioneering communication, all that this does is provide for disclosure of information.
1275 It does not prevent anyone. There were limits before in the McCain-Feingold law.
1276 Those were struck down—

1277

1278 Senator Blunt. So we take the 60 or 90 days that were--30 or 60 days in the law
1279 now and we take that same principle and expand it for an entire year?

1280

1281 Mr. Hasen. As to disclosure to the election year, that is right.

1282

1283 Senator Blunt. So I would think that members of the House and Senate would
1284 like that, that they could not have their name mentioned without these restrictions for
1285 the entire election year. That is half a House term and one-sixth of a Senate term, and
1286 the one-sixth of the Senate term you are running for election.

1287

1288 Mr. Keating. There is--

1289

1290 Senator Blunt. All right. I think I am out of time, Mr. Chairman.

1291

1292 Chairman Schumer. Thank you, Senator—

1293

1294 Mr. Keating. Senator, if I might add one other observation, there is no limiting
1295 principle to this. I mean, why could it not be both years? Why could it not be at all
1296 times? I do not see any limiting principle here.

1297

1298 Chairman Schumer. Senator Udall.

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Senator Udall. Mr. Wertheimer, under existing law, have primaries been held where super PACs ran ads and their donors were not disclosed until after the primary? And if that is so, is this not a problem and how does the bill deal with it?

Mr. Wertheimer. Well, I think it was a big problem in this election. The Iowa caucuses and the New Hampshire, South Carolina, and Florida primaries were all run and over with before we had the first disclosures of the super PACs of who their funders were, and that was because the way the law currently functions, in an off-election year, a PAC only discloses semi-annually and at the end of the year. So all of the money raised in the six months--the last six months of 2011, there was no disclosure of the donors until January 31.

The bill fixes that by basically requiring disclosure to be made when the expenditures are made. Then you have to disclose the contributors, as well. So it does solve the problem of that serious disclosure problem for super PACs that existed in this election.

Senator Udall. Now, the 2010 elections, and I did not look at all of these, but I notice, and I think Senator Schumer, Chairman Schumer will remember this, I believe Senator Bennet, our friend out in Colorado, told us that the combined expenditures, total independent expenditures, far overwhelmed both--the totals for both candidates, both Democrat and Republican.

Do you see, when we are moving down the road, as we get into 2012 and 2014, where we have elections where the combined spending of super PACs and independent expenditures are well beyond what the candidates are spending? Is this a good trend? Is this something that better informs the voters about what the candidates' positions are? Do you think this is good for democracy? Mr. Wertheimer.

Mr. Wertheimer. No, nor do I think the solution to it, as I said before, is to remove the contribution limits. You know, the studies have shown that almost all of the super PAC ads are negative ads, negative attack ads, and that leads me to believe that even if you did remove the contribution limits, you would still have super PACs raising large amounts of money and running negative ads and also potentially (c)(4) organizations.

But we believe that one of the steps that should be taken and can be taken is to end the candidate-specific super PACs of the type we have seen in the Presidential election. Those super PACs can be eliminated. When the Supreme Court ruled in Citizens United that corporate independent expenditures took place, they also said that they had to be independent of the candidate and they left to Congress to define what is independent, what is coordination. Once again, we have very weak and problematic coordination rules. Even under those rules, we believe a number of the

1343 candidate-specific super PACs are operating illegally.

1344

1345 But we clearly feel that you could define super PACs in a way that they are not
1346 going to be run by close associates of the candidate and they are not going to be having
1347 their money raised by the candidate's campaign. These super PACs are not
1348 independent PACs. They are arms of the campaign and I think most people recognize
1349 that. And they are hiding behind their own views of what constitutes coordination
1350 under the law and also under a realization that the law is not going to be enforced
1351 against them by the FEC.

1352

1353 The Supreme Court, when it talked about independent expenditures in the past,
1354 was very clear. It had to be wholly independent, fully independent, truly independent.
1355 These super PACs are anything but those concepts.

1356

1357 Senator Udall. And I know I only have a couple of seconds here, but it seems to
1358 me that in reading about the super PACs in the Presidential campaign, these are
1359 individuals who worked very closely with the candidate in many cases. They may have
1360 left the campaign recently, or left official officer recently, or were the chief of staff
1361 within the last year. These are the kind of people that are running the super PACs and
1362 amassing the money and putting them together, are they not?

1363

1364 Mr. Wertheimer. That is correct.

1365

1366 Senator Udall. Most of the cases—

1367

1368 Chairman Schumer. If my colleague would yield—

1369

1370 Senator Udall. --most of the cases--yes, please—

1371

1372 Chairman Schumer. --in one case, it was the candidate's father who ran the
1373 super PAC, as I understand it, is that correct?

1374

1375 Mr. Wertheimer. Well, he was the major--overwhelmingly major funder of it.

1376

1377 Chairman Schumer. Yes. Sorry. Go ahead.

1378

1379 Mr. Keating. Well, I think this is a strange concept, that somehow a father can
1380 corrupt the son through a donation. There is another provision we have in the law
1381 that a husband can run but could not take a contribution from his wife because,
1382 presumably, his wife might corrupt him by giving him a contribution that is too large.

1383

1384 As I said earlier, the election law has some very strange provisions in it. There
1385 are things that are incredibly vague. I think we have heard the call for tax code
1386 simplification. One of the things we need to have is election law simplification. Even

1387 though Fred Wertheimer is a student of this area for many years, he is saying some
1388 things that are, I think, misleading.

1389

1390 For example, the idea that a campaign manager can go to a super PAC -- there is
1391 a restriction in the regulations on the definition of an independent expenditure. In
1392 that regulation it says you cannot have someone who is going from a campaign to a PAC
1393 and then working on that independent expenditure for a period of days, I forget the
1394 number, I think 90 or 120. So there are restrictions. There is no evidence that these
1395 super PACs are illegally coordinating.

1396

1397 Of course, people who know, understand or maybe support strongly these
1398 candidates may feel strongly about starting up such a group, so that is not a surprise.

1399

1400 The final thing that I would like to observe is money is not everything. You look
1401 at the Republican primary for President this time and you look at candidates who soared
1402 during this primary, and it was often on the strength of their performance in the
1403 debates, and a lot of people were watching these debates. So there are other ways to
1404 get information out other than just money, but money is very important. It is part of
1405 speech, and I think the increased money that we have in this primary that we are seeing
1406 going on today has been a good thing. Turnout is up. There is more information for
1407 voters. There have been more front runners. It has been a very competitive race.

1408

1409 Senator Udall. Mr. Wertheimer, would you like to respond to that, just briefly?

1410

1411 Mr. Wertheimer. Well, I think there is one example where a major fundraiser
1412 for the Romney campaign left the campaign and a few days later went to work for the
1413 Romney super PAC. Now, if you think that is illegal, I would be interested, and maybe
1414 you would do something about it.

1415

1416 But the way this has worked is that former close political associates of the
1417 candidates, whether it is Mitt Romney or President Obama, have left or have set up
1418 these super PACs. In the case of President Obama, two former White House staff
1419 people left the White House and a few months later set up Priorities USA Action. And
1420 this has happened over and over again, where the people who are running them are
1421 closely tied to the candidates.

1422

1423 You also have--I mean, in the case of President Obama and Mitt Romney, they
1424 are sending their top aides to these fundraising events. Now, they are claiming that,
1425 well, we are not there to solicit unlimited money for the super PACs. We are only here
1426 to ask for \$5,000. But the reality of what is going on here is that they are coordinating
1427 with the expenditures of those fundraising events. I mean, I think that happens to be
1428 blatant.

1429

1430 So this is happening all over the place. Everyone is doing it. That is not good.

1431 That does not make it right. And in the end, I think the highest priority here is to
1432 protect the interests of the American people, not the Democratic party or Democratic
1433 candidates or the Republican party or Republican candidates. The American people
1434 have the bottom-line stake here and they have a right to know who is putting up the
1435 money and who is spending it to influence their votes.

1436

1437 Chairman Schumer. Well, I had hoped we could have a second round here of
1438 questions, but they moved up the vote. It started at 11:15, so we are going to have to
1439 vote. So I hope people will submit questions in writing. There are a lot more
1440 questions that I had.

1441

1442 I also hope we can move this bill to the floor in a relatively short period of time.
1443 I think it is a really important issue. My worry--this is me speaking--I think that what
1444 has happened after Citizens United is corroding the very essence of our democracy.
1445 And when a handful of people--free speech is not an absolute. You cannot scream
1446 "Fire!" in a crowded theater falsely. We have libel laws. We have anti-pornography
1447 laws. And when in the name of free speech a handful of individuals can have such a
1448 hugely disproportionate effect on the election, undisclosed, I think that corrodes the
1449 very roots of our democracy. I worry about the future of this country in terms of
1450 accountability. So in at least my view, and I take the liberty as Chairman of making a
1451 closing statement, is that we have to move forward.

1452

1453 With that, without objection, the hearing record will remain open for ten
1454 business days for additional statements and documents submitted for the record. We
1455 also request that our witnesses respond in writing to additional written questions from
1456 committee members.

1457

1458 I want to thank my colleagues for participating, Senator Alexander, Senator
1459 Udall. And I want to thank our witnesses for a very illuminating discussion.

1460

1461 And with that, the committee is adjourned.

1462

1463 [Whereupon, at 11:33 a.m., the committee was adjourned.]