

**Testimony of
CIARA TORRES-SPELLISCY
and MARK LADOV¹**

**Submitted to the
NEW YORK CITY
CAMPAIGN FINANCE BOARD**

**For the hearing on
PROMULGATING RULES FOR THE
DISCLOSURE OF INDEPENDENT EXPENDITURES**

March 10, 2011

Mr. Chairman and members of the Committee:

As attorneys with the Brennan Center for Justice—and proud New York City residents and voters—we are here to express our strong and enthusiastic support for enhancing transparency in New York City elections.

As detailed below, robust disclosure of money in politics is crucial to ensure the accountability of our elected officials to their constituencies. In November 2010, New York City voters amended our City's Charter to ensure the disclosure of independent expenditures. In doing so, we stand with an ever-increasing number of states and localities that are improving the transparency of money in politics.² This movement is an important response to the growing amount of independent spending that has been unleashed by the Supreme Court's decision in *Citizens United*. In addition, this effort is on firm constitutional ground, as evidenced by the Supreme

¹ Ciara Torres-Spelliscy and Mark Ladov serve as counsel for the Brennan Center's Democracy Program where their work focuses on money in politics.

² As of January 2011, ten states—Alaska, Arizona, Colorado, Connecticut, Iowa, Massachusetts, Minnesota, North Carolina, South Dakota and West Virginia—had enacted new campaign finance disclosure laws to replace the expenditure bans rendered unconstitutional by *Citizens United*. See National Conference of State Legislatures, *Citizens United and the States* (updated Jan. 4, 2011), <http://www.ncsl.org/default.aspx?tabid=19607>

Court's reaffirmation of the importance of disclosure in *Citizens United* and other decisions.³

Disclosure of Money in Politics is a Necessary Component of the Electoral Process

There is no doubt that disclosure of money in politics is a necessary component of a well-functioning democracy. In *Buckley v. Valeo*, the U.S. Supreme Court's 1976 seminal case on this topic, the Court explained that campaign finance disclosure serves three vital governmental interests:

(1) "disclosure provides the electorate with information as to where political campaign money comes from and how it is spent;" (2) "disclosure requirements deter actual corruption and avoid the appearance of corruption by exposing large contributions and expenditures to the light of publicity;" and (3) "disclosure requirements are an essential means of gathering the data necessary to detect violations" of other campaign finance regulations.⁴

In the decades following *Buckley*, the Court has repeatedly affirmed that, in our First Amendment tradition, secrecy is the exception and transparency the constitutional rule. Or, in the Court's words, "debate on public issues should be uninhibited, robust, and wide-open."⁵ Thus, the Court has affirmed federal laws requiring disclosure of independent expenditures – *i.e.*, political communications that are produced independently of any candidate and expressly urge voters to either elect or reject a federal candidate.⁶ The Court has also upheld disclosure of federal "electioneering communications," broadcast communications that refer to a clearly identified candidate and are widely disseminated to the candidate's electorate right before a federal election.⁷

³ Attached to this testimony is a copy of the Brennan Center's March 2011 white paper on "Transparent Elections after *Citizens United*." This publication by Ciara Torres-Spelliscy provides a lengthier legal analysis, and more detailed policy recommendations for the disclosure of money in politics. This white paper is available at the Brennan Center's website at: http://www.brennancenter.org/content/resource/transparent_elections_after_citizens_united/

⁴ *Buckley v. Valeo*, 424 U.S. 1, 66-68 (1976) (citations and internal quotation marks omitted).

⁵ *Id.* at 14 (quoting *NY Times Co. v. Sullivan*, 376 U.S. 254, 270 (1964)).

⁶ *See id.* at 76.

⁷ *See Citizens United v. FEC*, 130 S. Ct. 876, 914-16 (2010); *McConnell v. FEC*, 540 U.S. 93, 194-96 (2003). Under federal law, an electioneering communication is "any broadcast, cable, or satellite communication that (1) Refers to a clearly identified candidate for Federal office; (2) Is publicly distributed within 60 days before a general election for the office sought by the candidate; or within 30 days before a primary or preference election, or a convention or caucus of a political party that has authority to nominate a candidate, for the office sought by the candidate, and the candidate referenced is seeking the nomination of that political party; and (3) Is targeted to the relevant electorate" Electioneering Communication, 11 C.F.R. § 100.29(a) (2011). *See also* 2 U.S.C. § 434(f)(3).

In fact, while invalidating longstanding restrictions on corporate political spending, the Court's recent *Citizens United* decision reaffirmed that disclosure and disclaimer requirements for political advertisements are presumptively valid. In doing so, eight Justices agreed that "[d]isclaimer and disclosure requirements . . . impose no ceiling on campaign-related activities, and do not prevent anyone from speaking."⁸ And, the Court went on to praise transparency of money in politics, explaining:

The First Amendment protects political speech; and disclosure permits citizens and shareholders to react to the speech of corporate entities in a proper way. This transparency enables the electorate to make informed decisions and give proper weight to different speakers and messages.⁹

This holding in *Citizens United* echoes the holding in the earlier *McConnell* decision where eight of nine Justices also embraced robust disclosure for electioneering communications.¹⁰

New York City Should Require Disclosure of Electioneering Communications that Refer to a Clearly Identified Candidate or Ballot Measure Prior to an Election.

The New York City Charter defines "independent expenditures" to include expenditures made "in support of or in opposition to a candidate in a covered election or municipal ballot proposal or referendum," so long as the expenditure is not coordinated with a candidate. When promulgating rules to administer the Charter, the Board should not limit its rules to "express advocacy," but should be sure to apply disclosure requirements to electioneering communications that refer to a clearly identified candidate or ballot measure prior to an election.

Citizens United reaffirmed that state and local governments have authority to apply disclosure requirements to what many call "sham issue ads" or "electioneering communications." These ads lack *Buckley*'s "magic words" of express advocacy – such as "vote for," "elect," and "support," or "vote against," "defeat," and "reject."¹¹ Instead, these ads mention a candidate by name in an attempt to influence the outcome of an upcoming election. Such ads are clearly understood by voters as efforts to encourage them to vote for or against a specific candidate. For instance, one study of a sham issue ad run against George W. Bush in 2000 found that 89

⁸ *Citizens United*, 130 S. Ct. at 914 (citations and internal quotation marks omitted).

⁹ *Id.* at 916.

¹⁰ *See McConnell*, 540 U.S. at 194-96.

¹¹ The Supreme Court in *Buckley* established these guideposts. *See* 424 U.S. at 44 n.52.

percent of viewers thought it urged them to vote for or against a candidate, while only 6 percent thought it was meant to promote an issue.¹²

Sham issue ads have been widespread at the federal level and in many states for years. Typically, they are driven by a desire to avoid disclosure under narrow definitions of independent expenditure. Accordingly, federal law and the laws of seventeen states have created a new category of independent expenditures – electioneering communications.¹³ Generally speaking, electioneering communications are mass-media communications that refer to a clearly identified candidate and are targeted to the relevant electorate shortly before an election.

Critically, in *Citizens United* the Supreme Court rejected the claim that disclosure laws could be limited to express advocacy or its functional equivalent.¹⁴ Accordingly, there is no need for New York City to include a cumbersome definition of “functional equivalence of express advocacy” when defining electioneering communications in its disclosure rules. Instead, we would recommend that the Board adopt a bright line electioneering communications definition similar in structure to the federal Bipartisan Campaign Reform Act (“BCRA”).

Moreover, *Citizens United* indicates that federal rules should be viewed as a floor and not a ceiling. Therefore, the Board may adopt rules that expand on BCRA’s requirements as necessary in order to meet the particular needs of New York City elections. For example, the Board should require disclosure for the forms of communications that are most common in City elections. In addition, when setting appropriate timeframes, the Board may wish to expand on BCRA’s definition (of 30 days before a primary election, and 60 days before a general election) given that many City elections take place in party-dominant districts and are effectively determined by the primary vote.

Disclosure of independent spending must include disclosure of electioneering communications in order to keep voters apprised of who has been attempting to influence their vote. Otherwise, it may be impossible for the electorate to exercise an informed vote on Election Day. Voters have a right to know who is attempting to influence their elections.

¹² See Campaign Finance Institute Task Force on Disclosure, *Issue Ad Disclosure: Recommendations for a New Approach* (February 2001), at A2 (citing David B. Magelby, *Dictum Without Data: the Myth of Issue Advocacy and Party Building* (2000)).

¹³ Alaska Stat. § 15.13.400 (5); Ariz. Stat. 16-901.01(A) & Ariz. Amend. Code R2-20-101 (10) Cal. Gov’t Code § 85310; Colo. Const. Art . 28 sec. 2 (7)(a); Conn. Gen. Stat. Ann. § 9-601b(a)(2); Fla. Stat. Ann. § 106.011(18)(a); Haw. Rev. Stat. § 11-207.6(c); Idaho Code Ann. § 67-6602(f); 10 Ill. Comp. Stat. Ann. 5/9-1.14(a); Ohio Stat. 3517.1011; Me. Rev. Stat. Ann. tit. 21-A, § 1014(2-A); N.C. Session Law 2010-170; Okla. Stat. tit. 74, § 257:1-1-2; S.C. Code Ann. § 8-13-1300(31); Vt. Stat. Ann. tit. 17, § 2891; Wash. Rev. Code Ann. § 42.17.020; W. Va. Code Ann. § 3-8-1a(11)(A).

¹⁴ See *Citizens United*, 130 S. Ct. at 915.

New York City Should Ensure that Disclosure and Disclaimer Laws Provide Voters with Adequate Information about Underlying Contributors.

The Charter amendment requires that entities making independent expenditures of \$5,000 or more in the 12 months preceding a covered election disclose certain of their underlying contributors. *See* N.Y.C. Charter §1052(a)(15)(b). Such disclosure is necessary to inform voters fully about political spending, because too often, political spending is made by entities with uninformative (or even misleading) names.

The Charter amendment also requires that political spenders disclose their identity within any electioneering “literature, advertisement or other communication.” In promulgating rules for this provision, the Board should again remember that such disclaimers are an important (and constitutionally favored) way to instantly provide voters with key information. Indeed, in *Citizens United*, the Supreme Court explained that federal disclaimer requirements are necessary to “insure that . . . voters are fully informed about the person or group who is speaking,” and “avoid confusion by making clear that the ads are not funded by a candidate or political party.”¹⁵ Disclaimer requirements are thus a critical component of any comprehensive disclosure regime.

In a recent Colorado ballot measure election, for example, a group called “Littleton Neighbors Voting No” spent \$170,000 to defeat a zoning restriction that would have prevented a new Wal-Mart. When the disclosure reports for these groups were filed, it was revealed that “Littleton Neighbors” was exclusively funded by Wal-Mart, and not a grassroots organization.¹⁶ Adequate disclosure and disclaimer laws are needed to make this type of participation evident during an election, and to empower voters with the information necessary to make an informed decision.

The need for adequate disclosure is even greater after *Citizens United*. Previously, political spending was often made by non-profit entities organized under Section 527 of the tax code. These entities – such as MoveOn.org or Swift Boat Veterans for Truth – were required to disclose their contributors in publicly-available tax filings (albeit generally not until after an election had ended). After *Citizens United*, any corporation may make unlimited independent expenditures. This includes 501(c)(4) non-profit corporations, as well as 501(c)(6) trade associations such as the Chamber of Commerce, which have no obligation to disclose their contributors publicly at all, even if those underlying contributors include for-profit corporations.

¹⁵ *Citizens United*, 130 S. Ct. at 915 (citation and internal quotation marks omitted).

¹⁶ Testimony of Monica Youn Before the Committee on the Judiciary, U.S. House of Representatives, February 3, 2010 (citing Def.’s Response Br. to Pls.’s Mot. for Summary Judgment, *Sampson v. Coffman*, 06-cv-01858 at 43-44 (D. Co. 2007) (Dkt. #34)).

Public Citizen's study of independent spending in the 2010 election found a rising tide of hidden spending, with almost half of outside spending going undisclosed.¹⁷ To give one example: the Des Moines, Iowa-based American Future Fund was a 501(c)(4) non-profit corporation that spent over \$9.6 million in the 2010 election cycle.¹⁸ According to Public Citizen it ranked fifth among independent spenders.¹⁹ The American Future Fund paid for a variety of ads targeting candidates around the country with an agenda based on conservative social issues (such as the so-called "Ground Zero Mosque"). However, reporting suggests that the organization was funded by ethanol interests, and that its true agenda was to target Democratic members sitting on energy and agricultural policy committees.²⁰ Because the American Future Fund was organized as a 501(c)(4), it has no obligation to disclose its funders publicly, and the interests and identities of its funders may never be known for certain.

To paint a full and accurate picture of electoral spending, disclosure requirements must identify both the independent spender *and* the people or entities providing the underlying funding (over a reasonable threshold amount). Otherwise, corporate or other political actors seeking to veil their involvement in partisan politics may seek to funnel their funds through another organization, evading meaningful disclosure and thus any public accountability. This has been a substantial problem nationwide.²¹

In today's elections, it is not unusual for expensive media blitzes by independent organizations to overwhelm candidate spending.²² Yet, without laws requiring these

¹⁷ See Public Citizen, *12 Months After: The Effects of Citizens United on Elections and the Integrity of the Legislative Process* (January 2011), at 9-10.

¹⁸ *Id.* at 10.

¹⁹ *Id.*

²⁰ See *Secret Money in Iowa*, N.Y. Times (Oct. 27, 2010), available at <http://www.nytimes.com/2010/10/27/opinion/27wed1.html>; Jim Rutenberg, Don Van Natta Jr. and Mike McIntire, *Offering Donors Secrecy, and Going On Attack*, N.Y. Times (Oct. 12, 2010), available at <http://www.nytimes.com/2010/10/12/us/politics/12donate.htm>.

²¹ See Megan R. Wilson, *Who's Buying This Election? Close to Half the Money Fueling Outside Ads Comes from Undisclosed Donors*, OpenSecrets Blog (Nov. 2, 2010, 6:09 PM), <http://www.opensecrets.org/news/2010/11/whos-buying-this-election.html> (indicating that as of Election Day 2010, 42% of outside spending in election cycle was made by organizations with anonymous funders).

²² See Center for Responsive Politics, *2010 Outside Spending by Races* (last visited Feb. 14, 2011), [http://www.opensecrets.org/outsidespending/summ.php?disp=R.](http://www.opensecrets.org/outsidespending/summ.php?disp=R;); Public Citizen, *Outside Job: Winning Candidate Enjoyed Advantage in Unregulated Third-Party Spending in 58 out of 74 Party-Shifting Contests* (2010), available at <http://www.citizen.org/documents/Outside-Job-Report-20101103.pdf>; Gail Russell Chaddock, *Outside Spending Fuels Negative Ads in Tight Colorado Senate Race*, Christian Sci. Monitor (Nov. 1, 2010), available at <http://www.csmonitor.com/USA/Election-2010/Senate/2010/1101/Outside-spending-fuels-negative-ads-in-tight-Colorado-Senate-race>. See also David Harrison, *Big Money Invades Small Legislature Districts*, Stateline (Oct. 28, 2010), available at

groups to promptly disclose their political spending, New Yorkers cannot know who is funding these advertisements, or even begin to understand why.

For these reasons, we urge the Board to promulgate rules that fully enforce both the letter and the spirit of New York City's newly-amended Charter. We appreciate the opportunity to participate in this process, and look forward to reviewing the Board's proposed rules shortly, and to working with the Board to ensure that New York City voters receive complete and accurate information about political spending in their elections.

Please do not hesitate to contact Mark Ladov for further information at mark.ladov@nyu.edu or (646) 292-8310.

<http://www.stateline.org/live/details/story?contentId=523939> (noting that in Ohio state legislative elections, candidates raised approximately \$134,000 compared to estimated \$1 million spent by anonymous, outside sources in just two races).