CLC
ADVANCING DEMOCRACY THROUGH LAW

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Submitted electronically to bbraun@dls.virginia.gov

The Honorable Marcus B. Simon, Chair
Joint Subcommittee to Study Comprehensive Campaign Finance Reform
Virginia General Assembly

Dear Chair Simon and Members of the Joint Subcommittee:

Campaign Legal Center ("CLC") respectfully submits these comments to the Joint Subcommittee regarding the importance of strengthening transparency in Virginia's election campaigns.

CLC is nonpartisan, nonprofit organization that advances democracy through law at the federal, state, and local levels of government. Since its founding in 2002, CLC has participated in every major campaign finance case before the U.S. Supreme Court and in numerous other federal and state court cases. Our work promotes every American's right to a transparent and accountable democratic process.

CLC supports the Joint Subcommittee's study of Virginia's campaign finance laws and potential reforms to strengthen the law, including "the effectiveness of the Commonwealth's present disclosure laws."[1] The following comments are intended to aid the Joint Subcommittee in its evaluation of potential disclosure reforms for Virginia elections. Part I provides an overview of the Supreme Court's election disclosure jurisprudence, and Part II sets forth four policy recommendations for campaign finance disclosure that the Joint Subcommittee should incorporate as part of its final report.

[1] *See* H.J. Res. 526, 2021 Spec. Sess., https://lis.virginia.gov/cgi-bin/legp604.exe?ses=212&typ=bil&val=hj526.

I. Campaign finance disclosure laws promote the values of the First Amendment

As the U.S. Supreme Court has long recognized, "the First Amendment serves to ensure that the individual citizen can effectively participate in and contribute to our republican system of self-government."[2] Unsurprisingly then, in a line of cases spanning more than forty years, the Court has consistently affirmed the constitutionality of disclosure laws in the electoral context, recognizing that such laws "do not prevent anyone from speaking"[3] and promote the "First Amendment interests of individual citizens seeking to make informed choices in the political marketplace."[4] In other words, campaign finance disclosure is fully consistent with and supports the First Amendment's principles, as demonstrated by a substantial body of case law sustaining disclosure requirements in federal and state elections.[5]

The Court's modern campaign finance jurisprudence begins with *Buckley v. Valeo*, where the Court upheld disclosure provisions in the Federal Election Campaign Act ("FECA"), including its reporting requirements for expenditures made by persons and groups other than candidates and political committees.[6] The *Buckley* Court explained that disclosure requirements "impose no ceiling on campaign-related activities" and do not restrict the quantity of political speech.[7] Accordingly, the Court reviewed FECA's disclosure scheme using "exacting scrutiny," a less rigorous standard of judicial review than that applied to other provisions of FECA.[8]

In upholding FECA's disclosure provisions, *Buckley* enumerated three important government interests that are served by campaign finance disclosure. First, disclosure "provides the electorate with information as to where political campaign money comes from," and "allows voters to place each candidate in the political spectrum more precisely than is often possible solely on the basis of party labels and campaign speeches."[9] Second, disclosure requirements "deter actual corruption and avoid the appearance of corruption

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[2] *Globe Newspaper Co. v. Superior Court for Norfolk Cty.*, 457 U.S. 596, 604 (1982).
[3] *Citizens United v. FEC*, 558 U.S. 310, 366 (2010).
[4] *McConnell v. FEC*, 540 U.S. 93, 197 (2003).
[5] *See* AUSTIN GRAHAM, CAMPAIGN LEGAL CTR., TRANSPARENCY AND THE FIRST AMENDMENT at 15-19 (Nov. 29, 2018), https://campaignlegal.org/document/transparency-and-first-amendment-how-disclosure-laws-advance-constitutions-promise-self.
[6] 424 U.S. 1, 60-84 (1976) (per curiam).
[7] *Id.* at 64.
[8] *Id.* at 64. By contrast, the Court concluded FECA's expenditure limits imposed a direct restraint on speech and subjected them to strict scrutiny review, ultimately striking them down. *Id.* at 44-45.
[9] *Id.* at 66-67.

by exposing large contributions and expenditures to the light of publicity."[10] Finally, the Court recognized transparency aids the enforcement of other campaign finance laws, such as contributions limits, through the "gathering [of] data necessary to detect violations."[11]

Following *Buckley*, the Court has continued to affirm the constitutionality of election-related disclosure requirements.[12] In *McConnell v. FEC*, the Court upheld, by an eight-to-one vote of the Justices, the federal Bipartisan Campaign Reform Act's ("BCRA") disclosure system for "electioneering communications"—defined as broadcast, cable, or satellite communications that (1) refer to a clearly identified federal candidate; (2) are made within 30 days of a primary election or 60 days of a general election; and (3) target the relevant electorate for the office sought by the candidate.[13] Notably, *McConnell* held that the public's right to information about campaign spending is not limited only to communications that "expressly advocate" a candidate's election or defeat.[14]

Citizens United v. FEC also included another major ruling in favor of campaign finance transparency.[15] Although *Citizens United* held that corporations could not be barred from making independent expenditures in elections, eight of the Court's nine Justices joined a separate portion of decision upholding BCRA's disclosure regime as applied to the video on-demand documentary *Hillary: The Movie*, and to commercial advertising for the film.[16] In doing so, the Court extolled disclosure as a means to "insure that the voters are fully informed" about sources of election-related speech and to facilitate "informed decisions in the political marketplace."[17]

Importantly, the Supreme Court's recent decision in *Americans for Prosperity Foundation v. Bonta* did not overturn or call into question its longstanding

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[10] *Id.* at 67.
[11] *Id.* at 67-68.
[12] *See McConnell v. FEC*, 540 U.S. 93, 189-202 (2003); *Citizens United*, 558 U.S. at 366-71; *John Doe No. 1 v. Reed*, 561 U.S. 186 (2010). *See also First Nat'l Bank of Boston v. Bellotti*, 435 U.S. 765, 792 n.32 (1978) ("Identification of the source of advertising may be required as a means of disclosure, so that the people will be able to evaluate the arguments to which they are being subjected.").
[13] 540 U.S. 93, 189-202 (2003). *See also* 52 U.S.C. § 30104(f).
[14] *See* 540 U.S. at 193 ("Nor are we persuaded . . . that the First Amendment erects a rigid barrier between express advocacy and so-called issue advocacy. That notion cannot be squared with our longstanding recognition that the presence or absence of magic words cannot meaningfully distinguish electioneering speech from a true issue ad").
[15] 558 U.S. 310 (2010).
16 *Id.* at 371.
17 *Id.* at 368, 369 (quoting *Buckley*, 424 U.S. at 76).

precedent upholding disclosure laws in the electoral context.[18] In *Americans for Prosperity*, the Court invalidated a California rule that required tax-exempt charities operating in the state to confidentially reveal their major donors—those listed on the organizations' IRS Form 990 Schedule B—to California's attorney general.[19] The Court emphasized the "dramatic mismatch" between California's asserted interest in preventing charitable fraud and self-dealing and the rule's sweeping mandate for all in-state charities to turn over their Schedule B information, which the attorney general's office in practice seldomly used or needed to investigate charitable wrongdoing.[20]

While *Americans for Prosperity* does indicate that courts will closely examine the fit between disclosure requirements and the governmental interests they are meant to serve, election-related disclosure laws easily satisfy the exacting scrutiny employed by the Court in its recent decision.[21] In fact, *Americans for Prosperity* approvingly cited Court precedent upholding campaign finance disclosure requirements, including *Buckley* and *Citizens United*, in clarifying the application of the exacting scrutiny framework.[22] Moreover, the non-public, investigative purposes of California's rule for charities were entirely distinct from the public informational objectives that undergird campaign finance disclosure laws.

As the U.S. Court of Appeals for the First Circuit explained earlier this week in upholding Rhode Island's comprehensive campaign finance disclosure statute, "a well-informed electorate is as vital to the survival of a democracy as air is to the survival of human life."[23] Recognizing both the informational values advanced by robust campaign finance disclosure and the firm constitutional footing on which those laws stand, the Joint Subcommittee should explore and recommend reforms for Virginia's campaign finance system that will ensure Virginians know who is spending money to influence their vote.

II. Four Priority Reforms to Strengthen Election Transparency in Virginia

As part of its assessment of potential reforms for Virginia's campaign finance laws, CLC advises the Joint Subcommittee to include the following four

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[18] 141 S. Ct. 2373 (July 1, 2021).
[19] *Id.* at 2379-81.
[20] *Id.* at 2386.
[21] *See, e.g., id.* at 2384 ("Where exacting scrutiny applies, the challenged requirement must be narrowly tailored to the interest it promotes, even if it is not the least restrictive means of achieving that end.").
[22] *Id.* at 2383.
[23] *Gaspee Project v. Mederos*, 2021 WL 4167090 at *13 (1st Cir. Sept. 14, 2021).

disclosure reforms as part of the recommendations provided in its final report. Each of these reforms would serve to augment political transparency in Virginia by shining light on sources of big spending in state elections and by improving the electorate's access to information that is key to informed and meaningful participation in the Commonwealth's democratic system.

A. Require disclosure of the original sources of large donations used for independent expenditures.

First, the Joint Subcommittee should recommend original source disclosure requirements for organizations that spend large amounts of money to influence state elections.

Pursuant to the Campaign Finance Disclosure Act, any "person" that makes aggregate "independent expenditures" of $1,000 or more for a statewide election, or $200 or more for other races, in an election cycle must file a report within 24 hours that describes the amount, date, and recipient of their expenditures, along with the name of the candidate supported or opposed;[24] the independent expenditure report also must list the filer's full name, mailing address, and phone number.[25] However, independent expenditure reports need not disclose any information about contributions, donations, or other funding received by the filer.

While Virginia-registered political committees that make independent expenditures do have to separately disclose their sources of contributions in excess of $100 on their regular campaign finance reports,[26] such disclosure is limited to direct contributors to the political committees. In other words, if an organization not required to disclose its donors—such as a 501(c)(4) "social welfare" organization—contributes to a political committee, only the contributing organization is disclosed and not the true sources of the money being passed along by that organization.

As a direct consequence of Virginia's minimal reporting rules for independent expenditures, "dark money"—i.e., election-spending by organizations that do not have to reveal their sources of funding—is a significant and recurring problem in Virginia. In recent years, nonprofit entities aligned with both Democratic and Republican interests have directly and indirectly spent huge sums of money on independent expenditures, often for negative attack ads, to

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[24] Va. Code § 24.2-945.2; *see also* Independent Expenditure Report, Va. Dep't of Elections (revised Mar. 3, 2021), https://www.elections.virginia.gov/media/formswarehouse/campaign-finance/2021/2021IndependentExpenditureReport.pdf.

[25] *Id.*

[26] Va. Code § 24.2-949.5(B)(2).

influence Virginia's electoral outcomes.[27] This lack of transparency around independent spending has deprived Virginia voters of key information about political advertising in their state and the real sources of money behind it.

Therefore, we urge the Joint Subcommittee to help close the statutory loopholes that have enabled dark money to sway elections in the Commonwealth for too long. Specifically, the Joint Subcommittee's final report should recommend the adoption of requirements for organizations that make large independent expenditures in Virginia to disclose the original sources of funds that they spend in state elections, even if those funds were received and transferred by one or more intermediaries before being used for independent expenditures in Virginia. Requiring outside spenders to trace back their contributions and donations to the original sources of the funds prevents 501(c)(4)s and other entities from operating as conduits to hide the real sources of money spent in elections.

To facilitate the disclosure of original sources even when money is transferred among multiple intermediaries before an independent expenditure is made, state law should require direct donors to the ultimate spender of the funds to inform the spender of the original sources of the money, along with any intermediaries who previously transferred those funds before they reached the spender. A number of other states have enacted laws that require multi-level reporting of donors to independent expenditure groups in their elections, and these existing laws offer a starting point for adopting similar disclosure requirements in Virginia.[28]

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[27] *See, e.g.*, Graham Moomaw, *Mystery groups spend thousands trashing GOP candidates for governor*, VIRGINIA MERCURY (Apr. 15, 2021), https://www.virginiamercury.com/2021/04/15/mystery-groups-spend-thousands-trashing-gop-candidates-for-governor/; Graham Moomaw, *How a shadowy nonprofit spent $184k in Virginia's governor's race with almost total anonymity*, RICHMOND TIMES-DISPATCH (July 8, 2017), https://richmond.com/news/local/government-politics/how-a-shadowy-nonprofit-spent-184k-in-virginias-governors-race-with-almost-total-anonymity/article_555f00d2-a3ca-57b2-9bf2-3b50e4803598.html; Alan Suderman, *In Virginia races, 'dark money' comes with ironic twist*, ASSOC. PRESS (May 23, 2017), https://www.chicagotribune.com/dp-nws-ap-evg-dark-money-20170523-story.html.

[28] *See* Alaska Stat. § 15.13.040(j); Md. Code, Elec. Law § 13-309.2 (requiring a 501(c)(4), 501(c)(6), or 527 organization that gives disbursements in excess of $10,000 to a political committee or independent expenditure group to file report disclosing any source that gave more than $10,000 in donations); Minn. Stat. Ann. § 10.27A Subd.15(b) (requiring an "association" that contributes more than $5,000 to an independent expenditure group to prepare a disclosure statement listing each person that gave the association donations, dues, or fees totaling more than $5,000); R.I. Gen. Laws § 17-25.3-1 (requiring a person that makes "covered transfer" exceeding $1,000 to file a report itemizing donors of more than $1,000).

Original source disclosure would largely bring an end to dark money in state elections, promote accountability in Virginia politics, and ensure Virginians have access to the information necessary for full and effective participation in the Commonwealth's democracy.

B. Expand the kinds of independent spending subject to disclosure rules.

Next, the Joint Subcommittee should consider broadening the range of outside spending subject to disclosure requirements under Virginia law.

The Campaign Finance Disclosure Act currently requires reporting of an independent expenditure if it is made "for the purpose of *expressly advocating* the election or defeat of a clearly identified candidate."[29] By regulation, the State Board of Elections has clarified that "expressly advocating" means "phrases such as 'vote for,' 'elect,' 'support,' 'cast your ballot for,' 'Smith for Congress,' 'vote against,' 'defeat,' 'reject,' or any variation thereof," or communications that "when taken as a whole and with limited reference to external events . . . that could only be interpreted by a reasonable person as containing advocacy of the election or defeat of one or more clearly identified candidates because (i) the electoral portion of the communication is unmistakable, unambiguous, and suggestive of only one meaning and (ii) reasonable minds could not differ as to whether it encourages actions to elect or defeat one or more clearly identified candidates."[30]

By only requiring reporting of independent expenditures that "expressly advocate" for or against a Virginia candidate, the current law effectively permits outside spenders to pay for advertisements "designed to influence [] elections . . . while concealing their identities from the public," simply by avoiding "magic words" of express advocacy in their ads.[31] To ensure more comprehensive disclosure of independent expenditures in Virginia elections, the Joint Study Committee should recommend broadening the types of spending covered by disclosure requirements to include "electioneering

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[29] Va. Code § 24.2-945.2 (emphasis added). Separately, "independent expenditure" is defined as "an expenditure made by any person, candidate campaign committee, or political committee that is not made to, controlled by, coordinated with, or made with the authorization of a candidate, his campaign committee, or an agent of the candidate or his campaign committee." *Id.* § 24.2-945.1. An "expenditure," in relevant, means a payment or other thing of value disbursed "for the purpose of *expressly advocating* the election or defeat of a clearly identified candidate." *Id.* (emphasis added).

[30] 1 Va. Admin. Code 20-90-30.

[31] *McConnell*, 540 U.S. at 196.

communications," a campaign finance term of art that generally covers pre-election advertisements that name or feature a candidate without explicitly urging the election or defeat of that candidate. Similarly, the definition of "independent expenditure" should cover advertisements that "promote, attack, support, or oppose" ("PASO") candidates as a catch-all provision to ensure the disclosure of election-related advertisements that do not qualify as express advocacy and that are made outside the pre-election windows for electioneering communications. Importantly, the Supreme Court has upheld both electioneering communication disclosure and the PASO standard, [32] and various state election statutes, and federal law, mandate disclosure of these kinds of communications. [33] Finally, Virginia's independent expenditure reporting provisions should explicitly apply to non-communication expenditures intended to influence state elections, such as disbursements for partisan get-out-the-vote and similar activities.

C. Introduce top donor identification on political advertising.

Thirdly, the Joint Subcommittee should recommend the adoption of top donor identification statements for political ads in Virginia.

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[32] *See McConnell v. FEC*, 540 U.S. 93, 169 (2003) ("Public communications" that promote or attack a candidate for federal office . . . also undoubtedly have a dramatic effect on federal elections."); *id*. at 194 ("The term "electioneering communication" applies only (1) to a broadcast (2) clearly identifying a candidate for federal office, (3) aired within a specific time period, and (4) targeted to an identified audience of at least 50,000 viewers or listeners. These components are both easily understood and objectively determinable."). *See also Yamada v. Snipes*, 786 F.3d 1182, 1192-94 (9th Cir. 2015) (holding that "advocates," "supports," "opposition," and "advocates" are not vague); *Vt. Right to Life Comm., Inc. v. Sorrell*, 758 F.3d 118, 128-29 (2d Cir. 2014) (holding PASO standard is not vague); *Ctr. for Individual Freedom, Inc. v. Tennant*, 706 F.3d 270, 285-87 (4th Cir. 2013) (holding "promoting" and "opposing" are not vague); *Ctr. for Individual Freedom v. Madigan*, 697 F.3d 464, 485–86 (7th Cir. 2012) (holding "support" and "opposition" are not vague); *Nat'l Org. for Marriage v. McKee*, 649 F.3d 34, 62-64 (1st Cir. 2011) (holding that "promoting," "support," and "opposition" are not vague). And the First, Second, Fourth, and Ninth Circuits rejected arguments that *McConnell*'s vagueness holding was limited to application of the PASO standard to political parties. *Yamada*, 786 F.3d at 1192 n.4; *Vt. Right to Life Comm.*, 758 F.3d at 128-29; *Ctr. for Individual Freedom v. Tennant*, 706 F.3d at 287; *Nat'l Org. for Marriage*, 649 F.3d at 63 (rejecting plaintiff's argument that *McConnell*'s upholding of the PASO standard did not apply to "other speakers").

[33] *See supra* note 13 and accompanying text*; see also States Expand Definition of Electioneering Communications to Guard Against Corruption*, BRENNAN CTR. FOR JUSTICE (Feb. 7, 2013), https://www.brennancenter.org/our-work/research-reports/states-expand-definition-electioneering-communications-guard-against.

Virginia law currently requires political advertisements to include a paid-for-by statement with the name of the ad's sponsor;[34] a print media advertisement also must include a statement indicating whether the ad is authorized by any candidate.[35]

Although public identification of the sponsor of a political ad is important, it does not tell voters the whole story, especially when political ads are sponsored by PACs and obscure nonprofit organizations that have received significant funding from special interest groups. When Virginians are targeted with political advertising, they deserve to know who is really funding that messaging. The Joint Subcommittee thus should include in its final report a recommendation that, in addition to including paid-for-by statements, political advertisements paid for by entities other than candidates identify the ad sponsor's three largest donors in excess of a threshold amount (e.g., $5,000) on the face of the advertising.[36]

For voters, the informational value of immediately knowing the biggest sources of funding behind paid political messages, at the time they receive the messaging, is especially high, particularly when ads are paid for by obscure outside groups "hiding behind dubious and misleading names.[37] In recognition of this, a growing number of states have implemented top donor identification requirements for political ads, and the Joint Subcommittee should recommend introducing similar requirements in Virginia.[38]

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[34] *See* Va. Code §§ 24.2-955. Television and television ads sponsored by an entity other than a candidate campaign committee must also include a spoken paid-for-by statement from the sponsor's chief executive officer. *Id.* §§ 24.2-957.3, -958.3.
[35] *Id.* § 24.2-956.1(2). *See also* Mechelle Hankerson, *Virginia's Board of Elections struggling with 'Stand by Your Ad' law*, VIRGINIA MERCURY (Aug. 3, 2018), https://www.virginiamercury.com/2018/08/03/virginias-board-of-elections-struggling-with-parts-of-stand-by-your-ad-law/.
[36] The three largest donors could include the three largest original sources of funds given to a political ad sponsor. *See supra* pp. 5-7.
[37] *McConnell*, 540 U.S. at 197.
[38] *See* Conn. Stat. Ann. § 9-621 (requiring any person making or incurring an independent expenditure "during the ninety-day period immediately prior to the primary or election for which the independent expenditure is made, such communication shall also bear upon its face the names of the five persons who made the five largest aggregate covered transfers to the person making such communication during the twelve-month period immediately prior to such primary or election, as applicable."); D.C. Code § 1-1163.15(a)(2) (requiring independent expenditure political advertising to include "written or oral statement of the words "Top Five Contributors", followed by a list of the 5 largest contributors over the amount of $5,000, whose contributions were made for the purpose of making an independent expenditure, to the independent expenditure committee or person making the independent expenditure, if applicable, during the 12-month period

D. Expand public access to campaign finance information.

Finally, the Joint Subcommittee should recommend enhancing the informational tools available on the State Board of Elections' website for the public to access campaign finance information in Virginia elections.

Currently, the State Board's website provides access to copies of campaign finance reports filed with the Department of Elections, along with top-level summaries of specific committees' campaign fundraising and spending activities, but the information is not presented in a format that is easily digestible for the public.[39] The Virginia Public Access Project ("VPAP"), a nonprofit organization, has done a commendable job of filling in this informational void with its easy-to-use database of campaign contribution and expenditure information,[40] but relying on a nongovernmental organization as the primary resource for comprehensive campaign finance information is not an advisable practice, as VPAP's database is not funded by or affiliated with state government, and, if VPAP dissolves in the future, the public will lose access to its database.

Accordingly, the Joint Subcommittee's final report include recommendations for the creation of a comprehensive online portal of campaign finance information hosted by the Department of Elections. VPAP's database, along with the transparency portals of other state election agencies, provide strong examples on which Virginia could model a better public disclosure platform.

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before the date of the political advertising."); Haw. Rev. Stat. § 11-393 (requiring any advertisements paid for by a noncandidate committee that makes only independent expenditures to contain an additional notice starting with the words "The three top contributors for this advertisement are", followed by the names of the three top contributors who made the highest aggregate contributions, of $10,000 or more within a 12-month period to the noncandidate committee for the purpose of funding the advertisement); Mass. Gen. Laws ch. 55, § 18G ("An independent expenditure or electioneering communication made by an individual, corporation, group, association, labor union or other entity which is transmitted through paid television, internet advertising or print advertising appearing larger than 15 square inches or direct mail or billboard shall include a written statement at the bottom of the advertisement or mailing that contains the words "Top Contributors" and a written statement that lists the 5 persons or entities or if fewer than 5 persons or entities, all persons or entities that made the largest contributions to that entity, regardless of the purpose for which the funds were given.").

[39] *See* Campaign Finance Reports, Va. Dep't of Elections, https://cfreports.elections.virginia.gov/.

[40] *See* Virginia Public Access Project, https://www.vpap.org/money/.

Conclusion

We sincerely thank the Joint Subcommittee for its consideration of these written comments and recommendations. CLC would be happy to provide additional information or answer any follow-up questions as the Joint Subcommittee continues to review potential reforms for Virginia's campaign finance system.

Respectfully submitted,

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