

March 7, 2013

Ms. Elizabeth M. Murphy
Secretary, Securities and Exchange Commission
100 F. Street, Northeast
Washington, DC 20549
By email: rule-comments@sec.gov

Re: File No. 4-637, Petition to Require Public Companies to Disclose to Shareholders the Use of Corporate Resources for Political Activities

Dear Ms. Murphy,

The Campaign Legal Center (CLC) respectfully submits the following comments in support of the petition for rulemaking submitted by the Committee on Disclosure of Corporate Political Spending (File No. 4-637) (hereinafter “Petition”) and applauds the Commission’s placement of this item on its rulemaking agenda with a Notice of Proposed Rulemaking (NPRM) scheduled to be published in April 2013, as reflected by the Unified Agenda of Regulatory and Deregulatory Actions published by the Office of Management and Budget. We submit these comments to correct the record regarding legal and factual inaccuracies contained in both the comments submitted in September 2012 by the American Petroleum Institute (hereinafter “API” comments)¹ and the comments submitted in January 2013 by the U.S. Chamber of Commerce and other business organizations (hereinafter “Chamber” comments),² with hopes that the forthcoming NPRM will not reflect the inaccuracies contained in API’s and the Chamber’s comments.

The CLC is a nonpartisan, nonprofit organization that works in the areas of campaign finance and elections, as well as general government ethics and transparency, offering nonpartisan analyses of legal issues and representing the public interest in administrative, legislative and legal proceedings. Rooted in our campaign finance and constitutional law expertise, we comment here in response to three specific arguments made by API and the Chamber. First, contrary to the Chamber’s assertion, the Administrative Procedures Act does not preclude the Commission from issuing an NPRM in response to the Petition. Second, contrary to API’s assertion, existing campaign finance law disclosure requirements do not adequately provide shareholders (or others) with the information necessary to make informed investment and voting decisions. Finally, contrary to API’s and the Chamber’s assertions, petitioners’ proposed disclosure rule is supported by U.S. Supreme Court precedent and would advance—not erode—the First Amendment rights of free expression and association.

I. The Administrative Procedures Act Does Not Preclude Issuance of an NPRM in Response to the Petition.

The Chamber cites the Administrative Procedures Act (APA) requirement that “a rule promulgated by the Commission” not be “arbitrary, capricious, an abuse of discretion, or

¹ Available at <http://www.sec.gov/comments/4-637/4637-1095.pdf> (Sept. 4, 2012).

² Available at <http://www.sec.gov/comments/4-637/4637-1198.pdf> (Jan. 4, 2013).

otherwise not in accordance with law”³ as a reason the Commission cannot lawfully respond to the Petition by issuing an NPRM. While it is certainly true that a rule promulgated by the Commission may not be arbitrary, capricious or an abuse of discretion, this legal standard applies only to “final agency action”⁴ (e.g., promulgation of a final rule), not to the Commission’s NPRM planned for April.

The issuance of an NPRM does not constitute “final agency action.” Instead, publication of an NPRM is the first step in a process that may or may not lead to promulgation of a rule. The purpose of an NPRM—itself a requirement of the APA⁵ in a rulemaking proceeding—is to alert the public that new rules are being contemplated, and of the right of the public “to participate in the rule making through submission of written data, views, or arguments.”⁶ Only “[a]fter consideration of the relevant matter presented”⁷ may an agency proceed with promulgation of a final rule. If an agency decides to promulgate a final rule, it must be accompanied by “a concise general statement of [its] basis and purpose.”⁸ The Commission’s website makes clear that, when and if it adopts a rule, the “adopting release reflects the Commission’s consideration of the public comments.”⁹

The purposes of these APA-required rulemaking procedures are well-established. As the U.S. Court of Appeals for the Fourth Circuit has explained:

The purpose of the notice-and-comment procedure is both to allow the agency to benefit from the experience and input of the parties who file comments and to see to it that the agency maintains a flexible and open-minded attitude towards its own rules. The notice-and-comment procedure encourages public participation in the administrative process and educates the agency, thereby helping to ensure informed agency decisionmaking.¹⁰

The Chamber’s assertion that the initiation of a rulemaking proceeding in response to the Petition would violate the APA misstates the law and is an obvious attempt to deny the Commission the opportunity to “benefit from the experience and input of the parties who [would] file comments”¹¹ in response to the NPRM. Hundreds of thousands of comments have been filed with the Commission in support of the Petition. The notice-and-comment triggered by the NPRM scheduled for April will undoubtedly encourage further public participation in the administrative process—comments responding to specific questions and proposals contained in

³ Chamber Comments at 5 (emphasis added) (citing 5 U.S.C. § 706(2)(A)).

⁴ 5 U.S.C. § 704.

⁵ 5 U.S.C. § 553(b).

⁶ 5 U.S.C. § 553(c).

⁷ *Id.*

⁸ *Id.*

⁹ See SEC, *Rulemaking, How it Works* at <http://www.sec.gov/answers/rulemaking.htm>.

¹⁰ *Chocolate Manufacturers Ass’n of the U.S. v. Block*, 755 F.2d 1098, 1103 (4th Cir. 1985) (internal quotation marks and ellipsis omitted) (citing *National Tour Brokers Ass’n v. United States*, 591 F.2d 896, 902 (D.C. Cir. 1978); *Spartan Radiocasting Co. v. FCC*, 619 F.2d 314, 321 (4th Cir. 1980); *BASF Wyandotte Corp. v. Costle*, 598 F.2d 637, 642 (1st Cir.1979), *cert. denied*, 444 U.S. 1096 (1980)).

¹¹ *Id.*

the NPRM—and will “educate[] the agency, thereby helping to ensure informed agency decisionmaking.”¹²

For these reasons, the APA does not preclude the Commission’s issuance of the NPRM scheduled for April. The Commission will be educated and guided by the “written data, views, [and] arguments”¹³ submitted in response to the NPRM and, “[a]fter consideration of the relevant matter presented,”¹⁴ can decide what precise course of action is appropriate—a course of action in total compliance with the APA, not “arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law.”¹⁵

II. Existing Disclosure Requirements for Political Expenditures Are Inadequate.

Petitioners urge the Commission to “develop rules to require public companies to disclose to shareholders the use of corporate resources for political activities.”¹⁶ API, however, argues that the proposed disclosure rule would “effectively duplicate or excessively complicate existing regulatory requirements[.]”¹⁷ API goes on to mischaracterize the extent and effectiveness of disclosure required by federal and state campaign finance laws and repeatedly describes such disclosure as “adequate.”¹⁸

It is indeed true, as API states, that a corporation or any other “person” that makes an “independent expenditure”¹⁹ in excess of \$250 must report that expenditure to the Federal Election Commission (FEC). But such a spender is not required to report where it obtained the money to pay for such an expenditure unless the donor gave the money “for the purpose of furthering the reported independent expenditure.”²⁰

API misstates that a corporation or other “person” that spends more than \$10,000 on “electioneering communication” “must either disclose all donors to a segregated account used to pay for the electioneering communication or must disclose all its donors (including any corporate donors) dating back to the beginning of the year before the year in which the communication is made.”²¹ This is incorrect. While API’s reading of the relevant statute is a reasonable one, API is seemingly unaware that the FEC has promulgated a regulation incorporating into the “electioneering communication” donor disclosure requirement the same “for the purpose of furthering” test that applies in the “independent expenditure” context. Just as a corporation that makes “independent expenditures” need only disclose donors who gave “for the purpose of furthering” that expenditure, so too does a corporation that pays for “electioneering communication” need only disclose donors who gave “for the purpose of furthering” that

¹²

Id.

¹³

5 U.S.C. § 553(c).

¹⁴

Id.

¹⁵

Chamber Comments at 5 (emphasis added) (citing 5 U.S.C. § 706(2)(A)).

¹⁶

Petition at 1.

¹⁷

API Comments at 1.

¹⁸

Id. at 2-3.

¹⁹

The term “independent expenditure” is defined in federal campaign finance law to mean payment for a communication “expressly advocating the election or defeat of a clearly identified candidate . . . that is not made in concert or cooperation with or at the request or suggestion of such candidate” 2 U.S.C. § 431(17).

²⁰

11 C.F.R. § 109.10(e)(1)(vi) (emphasis added).

²¹

API Comments at 3.

communication. FEC regulations clearly state: “If the disbursements were made by a corporation or labor organization,” the spender must disclose “the name and address of each person who made a donation aggregating \$1,000 or more to the corporation or labor organization . . . for the purpose of furthering electioneering communications.”²² “For the purpose of furthering” means “specifically designated for [electioneering communications] by the donor.”²³

It is further worth noting that three members of the six-member FEC interpret this regulation in such a manner as to virtually guarantee that corporations that do not want to disclose their donors will not be required by the FEC to do so. Commissioners McGahn, Petersen and Hunter blocked an investigation into whether the 501(c)(4) corporation Freedom’s Watch violated the law by failing to disclose a major donor after making “electioneering communications.” These three Commissioners interpreted the regulation even more narrowly than its plain language requires, stating that donor disclosure is required “only if such donations are made for the purpose of furthering the [specific] electioneering communication that is the subject of the report.”²⁴ Because it requires a vote of at least four Commissioners to initiate FEC investigations and enforcement actions, the narrow interpretation given the regulation by McGahn, Petersen and Hunter effectively blocks any agency actions that would interpret the regulation more broadly.

This “purpose” element of the federal campaign finance disclosure regime has rendered the disclosure requirement wholly ineffective because spenders are not required to solicit information from their donors about the “purpose” of their contributions. Corporations wishing to hide their political activity from shareholders simply route their funds through an intermediary like the Chamber that, because of this ineffective donor disclosure regime, is allowed to spend the money on campaign ads without revealing to the FEC and the public where the money came from.

According to the Center for Responsive Politics, more than \$125 million was spent to influence the 2010 federal midterm elections, and more than \$300 million was spent to influence the 2012 federal elections, by entities that did not disclose their donors.²⁵ Business corporations not wanting shareholders to know about their political spending can simply contribute their funds to a non-disclosing tax-exempt entity.²⁶ Not surprisingly, the Chamber led the list of groups

²² 11 C.F.R. § 104.20(c)(9) (emphasis added).

²³ Electioneering Commc’ns, Supp. Explanation and Justification, 72 Fed. Reg. 72899, 72911 (Dec. 26, 2007).

²⁴ See Statement of Reasons of Comm’rs Caroline C. Hunter and Donald F. McGahn, Matthew S. Petersen, FEC Matter Under Review 6002, at 5 (Aug. 2010) (emphasis added), available at <http://eqs.nictusa.com/eqsdocsMUR/10044274536.pdf>.

²⁵ See 2012 Outside Spending, by Group, Ctr. for Responsive Politics, <http://www.opensecrets.org/outsidespending/summ.php?disp=O> (last visited Feb. 15, 2012) (select cycle “2012,” then select “By Disclosure of Group”); 2010 Outside Spending, by Group, Ctr. for Responsive Politics (last visited Feb. 15, 2012) <http://www.opensecrets.org/outsidespending/summ.php?cycle=2010&chrt=V&disp=O&type=A> (select cycle “2010,” then select “By Disclosure of Group”). The data presented on the Center for Responsive Politics’ website is updated regularly; consequently, the figures presented here were current as of February 15, 2013 but may change slightly over time.

²⁶ Federal tax law allows nonprofit corporations such as those organized under 26 U.S.C. § 501(c)(4) (civic leagues, social welfare organizations, etc.) and 26 U.S.C. § 501(c)(6) (business leagues, chambers of commerce,

spending money to influence the 2010 federal elections while not disclosing their donors—spending more than \$33 million; the Chamber spent even more to influence the 2012 federal elections—approximately \$34 million—without disclosing donors.²⁷ It is no wonder the Chamber opposes the Petition for increased shareholder disclosure of political spending.

API’s insinuation that state campaign finance laws result in adequate disclosure of corporate contributions and expenditures to influence state elections is likewise without merit.²⁸ In 2011–12, the National Institute on Money in State Politics (NIMSP) conducted a two-part study of all 50 states’ disclosure requirements for independent spending (both “independent expenditures” and “electioneering communications”).²⁹ Unfortunately, NIMSP’s report paints a bleak picture of disclosure in the states; state disclosure requirements are, for the most part, even less robust than their ineffective federal counterparts.

In most states, disclosure of independent spending is either significantly flawed or nonexistent. 43 states require disclosure of independent spending to some degree, but only 19 of them require the reporting of both types of independent spending: electioneering communications and independent expenditures. Not only is the disclosure of independent spending limited, many states do not require the disclosure of who funded these expenditures. Of the states studied, only nine require the disclosure of contributions to independent spenders, making it difficult to know who is actually behind these independent political advertisements.³⁰

The fact that federal and state campaign finance laws allow corporations to hide their political spending from shareholders is only compounded by the fact that many corporations lack internal mechanisms for transparency regarding political activity. According to two leading academic studies, the CPA-Zicklin Index of Corporate Political Accountability and Disclosure³¹ and the Baruch Index of Corporate Political Disclosure,³² some of API’s largest members—companies in the S&P 100—rated as having low political activity transparency, with political information that is hidden or difficult to find on their websites. The CPA-Zicklin Index, for example ranked API members Baker Hughes Inc., Devon Energy, Halliburton Co. and

etc.) to accept donations from for-profit corporations and make political expenditures so long as doing so is not the organizations primary activity. Federal tax law does not require these entities to disclose their donors to the public.

²⁷ See *2012 Outside Spending, by Group*, Ctr. for Responsive Politics, <http://www.opensecrets.org/outsidespending/summ.php?disp=O> (last visited Feb. 15, 2012) (select cycle “2012,” then select “By Disclosure of Group”); *2010 Outside Spending, by Group*, Ctr. for Responsive Politics (last visited Feb. 15, 2012) <http://www.opensecrets.org/outsidespending/summ.php?cycle=2010&chrt=V&disp=O&type=A> (select cycle “2010,” then select “By Disclosure of Group”). The data presented on the Center for Responsive Politics’ website is updated regularly; consequently, the figures presented here were current as of February 15, 2013 but may change slightly over time.

²⁸ See API Comments at 4.

²⁹ See Anne Bauer, *Best Practices for Independent Spending: Part One*, Nat’l Inst. on Money in State Politics, July 14, 2011, available at <http://www.followthemoney.org/press/ReportView.phtml?r=453>.

³⁰ Kevin McNellis, *Best Practices for Independent Spending: Part Two*, Nat’l Inst. on Money in State Politics (Mar. 15, 2012), available at <http://www.followthemoney.org/press/ReportView.phtml?r=480>.

³¹ Center for Political Accountability, *CPA-Zicklin Index of Corporate Political Accountability and Disclosure* (2011), available at <http://www.politicalaccountability.net/index.php?ht=a/GetDocumentAction/i/5800>.

³² Donald H. Schepers and Naomi A. Gardberg, *Baruch Index of Corporate Political Disclosure* (2011), available at <http://www.baruch.cuny.edu/baruchindex/BIResults.pdf>.

Occidental Petroleum Corp. in its bottom tier.³³ Similarly, the Baruch Index rated API members Devon Energy, Halliburton Co., National Oilwell Varco, Inc., Occidental Petroleum Corp., and Schlumberger Ltd. in its lowest tier as “opaque,” with political activity information hidden or difficult to find on the companies’ websites.³⁴

For all of these reasons, API’s claim that “to the degree a corporation makes such a [political] contribution, its identity will be disclosed”³⁵ is not true. API’s argument that existing “extensive disclosure requirements are adequate”³⁶ should be disregarded by the Commission.

III. Petitioners’ Proposed Disclosure Rule Is Supported By Supreme Court Precedent and Would Not Erode Established Rights of Expression and Association.

API argues that the disclosure rule urged by the Petition will “erode established rights of expression and association.”³⁷ Similarly, the Chamber argues that the disclosure rule sought by the Petition “would violate the First Amendment.”³⁸ Both API and the Chamber argue that the Supreme Court’s decision in *Citizens United* does not support the disclosure sought by the petition.³⁹ And both claim that the disclosure sought by the Petition would unconstitutionally subject corporations to threats, harassment and reprisals—with API outrageously going so far as to compare itself and its members to the NAACP in Alabama during the 1950s with respect to such threats.⁴⁰

These arguments have no merit. Fundamentally, the First Amendment embraces the principle that “debate on public issues should be uninhibited, robust, and wide-open.”⁴¹ The Supreme Court has repeatedly acknowledged that political disclosure laws both reflect and advance important First Amendment precepts. Furthermore, “compulsory publicity of political accounts has been the cornerstone of legal regulation.”⁴² As Justice Brandeis famously recognized nearly a century ago, “Sunlight is . . . the best . . . disinfectant,” and “electric light the most efficient policeman.”⁴³ Disclosure also secures broader access to the information that shareholders and citizens need to make investment and political choices, thereby enhancing the overall quality of public discourse.

³³ CPA-Zicklin Index at 11.

³⁴ Baruch Index at 5, 7.

³⁵ API Comments at 3.

³⁶ *Id.*

³⁷ *Id.* at 11.

³⁸ Chamber Comments at 22.

³⁹ See API Comments at 12; see also Chamber Comments at 19 n.63.

⁴⁰ See API Comments at 12 (discussing *NAACP v. Alabama ex Rel. Patterson*, 357 U.S. 449 (1958)); see also Chamber Comments at 23 (also citing, but not discussing, *NAACP v. Alabama*).

⁴¹ *N.Y. Times Co. v. Sullivan*, 376 U.S. 254, 270 (1964).

⁴² See *Buckley v. Am. Const. Law Found.*, 525 U.S. 182, 223 (1999) (O’Connor, J., dissenting).

⁴³ Louis Brandeis, *Other People’s Money* 62 (Nat’l Home Library Found. ed. 1933) (quoted in *Buckley v. Valeo*, 424 U.S. 1, 67 (1976)).

A. *Citizens United* Supports Broad Disclosure Measures Such as the Rule Proposed by the Petition.

The Court noted in *Citizens United* that disclosure requirements “do not prevent anyone from speaking.”⁴⁴ Working from this principle, the *Citizens United* Court by an 8 to 1 vote upheld a federal law disclosure requirement and explicitly called attention to the importance of effective disclosure to corporate shareholders, explaining:

Shareholder objections raised through the procedures of corporate democracy can be more effective today because modern technology makes disclosures rapid and informative. A campaign finance system that pairs corporate independent expenditures with effective disclosure has not existed before today. . . . With the advent of the Internet, prompt disclosure of expenditures can provide shareholders and citizens with the information needed to hold corporations and elected officials accountable for their positions and supporters. Shareholders can determine whether their corporation’s political speech advances the corporation’s interest in making profits, and citizens can see whether elected officials are ‘in the pocket’ of so-called moneyed interests. The First Amendment protects political speech; and disclosure permits citizens and shareholders to react to the speech of corporate entities in a proper way.⁴⁵

The Court’s encouragement that disclosure mechanisms be made more effective is unmistakable—*e.g.*, “procedures of corporate democracy can be more effective today”; “effective disclosure has not existed before today”; “prompt disclosure of expenditures can provide shareholders and citizens with the information needed.”⁴⁶ The Petition calls on the Commission to make real the *Citizens United* Court’s promise that effective disclosure would enable shareholders to hold corporations accountable for their political activity.

Importantly, with respect to this Petition, the *Citizens United* Court explicitly rejected the argument that disclosure requirements must be confined to campaign finance laws, noting, for example, that the “Court has upheld registration and disclosure requirements on lobbyists,” citing the 1954 Supreme Court decision in *U.S. v. Harriss*.⁴⁷ And in 2009, the U.S. Court of Appeals for the D.C. Circuit in *National Association of Manufacturers v. Taylor* upheld a federal lobbyist disclosure law, the Honest Leadership and Open Government Act (HLOGA), also citing the Supreme Court decision in *Harriss*.⁴⁸

B. The Supreme Court Has a Long History of Upholding Disclosure Laws.

The *Citizens United* decision is merely one of the most recent of a long line of Supreme Court decisions upholding a variety of disclosure laws. Since *Buckley*, the Supreme Court has consistently applied “exacting scrutiny” and has consistently upheld disclosure laws against

⁴⁴ 130 S. Ct. at 918 (internal citations omitted).

⁴⁵ *Id.* at 916 (internal citations and quotation marks omitted).

⁴⁶ *Id.*

⁴⁷ *Id.* at 915 (citing *U.S. v. Harriss*, 347 U.S. 612, 625 (1954)).

⁴⁸ 582 F.3d 1, 6 (D.C. Cir. 2009).

constitutional challenge. Indeed, the Court has upheld challenged disclosure laws three times by 8 to 1 votes in the past decade alone.

When evaluating the constitutionality of speech and association regulations, the Supreme Court applies varying standards of scrutiny depending on the nature of the regulation and the weight of the First Amendment burdens imposed. Although disclosure laws can implicate the First Amendment rights to speak and associate freely, they also advance the public’s interest in maintaining an informed investment community and electorate. Because disclosure is considered a “less restrictive alternative to more comprehensive regulations of speech” that advance these interests, the Court has traditionally reviewed disclosure laws under a more relaxed standard than other speech regulations.⁴⁹

More than 35 years ago the Court in *Buckley v. Valeo* upheld disclosure provisions contained in the Federal Election Campaign Act Amendments of 1974 (FECA),⁵⁰ even as it invalidated the Act’s expenditure limitations, because disclosure represented the “least restrictive means of curbing the evils of campaign ignorance.”⁵¹ Ultimately, the fact that disclosure laws can have an appreciable effect on individual rights does not end the constitutional inquiry, because “important First Amendment-related interests lie on both sides of the constitutional equation.”⁵² Although disclosure requirements may burden constitutionally protected rights, such requirements have reliably been upheld as constitutionally valid because they serve the First Amendment’s overall purpose of promoting open and responsive democratic governance.

In *McConnell v. FEC*, the Court by an 8 to 1 vote upheld the “electioneering communication” reporting and disclosure requirements of the Bipartisan Campaign Reform Act of 2002 (BCRA).⁵³ Quoting the district court, the Court held:

BCRA’s disclosure provisions require these [entities] to reveal their identities so that the public is able to identify the source of the funding behind broadcast advertisements influencing certain elections. Plaintiffs’ disdain for BCRA’s disclosure provisions is nothing short of surprising. . . . Curiously, Plaintiffs want to preserve the ability to run these advertisements while hiding behind dubious and misleading names like: ‘The Coalition-Americans Working for Real

⁴⁹ *Citizens United v. FEC*, 130 S. Ct. 876, 915 (2010); see also *Buckley*, 424 U.S. at 68. By comparison, limits on campaign contributions and expenditures are subject to more searching review because they are considered more “restrictive” of First Amendment rights. As the “most burdensome” campaign finance regulations, expenditure restrictions are subject to strict scrutiny and reviewed for whether they are “narrowly tailored” to “further a compelling interest.” *FEC v. Wis. Right to Life (WRTL)*, 551 U.S. 449, 476 (2007); see also *Buckley*, 424 U.S. at 44–45. Contribution limits are deemed less burdensome of speech, and are constitutionally “valid” if they “satisf[y] the lesser demand of being closely drawn to match a sufficiently important interest.” *McConnell*, 540 U.S. 93, 136 (2003) (quoting *FEC v. Beaumont*, 539 U.S. 146, 162 (2003)) (internal quotations omitted). Finally, disclosure requirements are the “least restrictive” campaign finance regulations and are subject only to “exacting scrutiny.” *Buckley*, 424 U.S. at 68.

⁵⁰ 88 Stat. 1263 (1974).

⁵¹ *Buckley*, 424 U.S. at 68.

⁵² See Justice Stephen Breyer, *Madison Lecture: Our Democratic Constitution*, 77 N.Y.U. L. Rev. 245, 253 (2002).

⁵³ *McConnell*, 540 U.S. at 194–99 (opinion of the Court); *id.* at 321–22 (Kennedy, J., concurring in the judgment in part and dissenting in part); see also 2 U.S.C. §§ 434(f)(2)(A), (B), and (D).

Change’ (funded by business organizations opposed to organized labor), ‘Citizens for Better Medicare’ (funded by the pharmaceutical industry), ‘Republicans for Clean Air’ (funded by brothers Charles and Sam Wyly). Given these tactics, Plaintiffs never satisfactorily answer the question of how ‘uninhibited, robust, and wide-open’ speech can occur when organizations hide themselves from the scrutiny of the voting public. Plaintiffs’ argument for striking down BCRA’s disclosure provisions does not reinforce the precious First Amendment values that Plaintiffs argue are trampled by BCRA, but ignores the competing First Amendment interests of individual citizens seeking to make informed choices in the political marketplace.⁵⁴

BCRA’s disclosure requirements, the Court found, vindicated rather than violated the truly relevant First Amendment interest: that of “individual citizens seeking to make informed choices in the political marketplace.”⁵⁵ As explained in Section II of our comments, above, funders of political advertising, enabled by inadequate existing disclosure requirements, continue to hide from the public. More than \$300 million was spent to influence the 2012 federal elections by groups with “dubious and misleading names”⁵⁶ that refused to disclose their donors. And as the Court recognized in *Citizens United*, at stake is not only the ability of voters to make informed choices in the political marketplace, but also the ability of shareholders to hold corporations accountable, determine whether their corporation’s political speech advances the corporation’s interest in making profits, and react to the speech of corporate entities in a proper way.⁵⁷

Most recently, several months after the *Citizens United* decision, the Supreme Court again voiced its strong support of disclosure laws in *Doe v. Reed*, where the Court by an 8 to 1 vote upheld a Washington State law providing disclosure of ballot measure petition signatories, reasoning that “[p]ublic disclosure . . . promotes transparency and accountability in the electoral process to an extent other measures cannot.”⁵⁸ The disclosure law at issue in *Doe* was not a campaign finance law but, rather, a state public records law—again demonstrating that, contrary to API and the Chamber’s claims, disclosure requirements need not be confined to the realm of campaign finance law. Justice Scalia explained in concurrence in *Doe*:

There are laws against threats and intimidation; and harsh criticism, short of unlawful action, is a price our people have traditionally been willing to pay for self-governance. Requiring people to stand up in public for their political acts fosters civic courage, without which democracy is doomed. For my part, I do not look forward to a society which, thanks to the Supreme Court, campaigns anonymously (*McIntyre*) and even exercises the direct democracy of initiative and referendum hidden from public scrutiny and protected from the accountability of criticism. This does not resemble the Home of the Brave.⁵⁹

⁵⁴ *Id.* at 196–97 (internal citations omitted and emphasis added).

⁵⁵ *Id.* at 197.

⁵⁶ *Id.*

⁵⁷ *Citizens United*, 130 S. Ct. at 916 (internal citations and quotation marks omitted).

⁵⁸ *Doe v. Reed*, 130 S. Ct. 2811, 2820 (2010).

⁵⁹ *Id.* at 2837 (Scalia, J., concurring).

C. The Claims of Harassment Asserted by the Chamber and API Are Not Credible.

Finally, with regard to threats and intimidation, the Chamber argues that “a disclosure rule is invalid if it subjects a speaker to a ‘reasonable probability’ of ‘threats, harassment, or reprisals’” and that the Petition would produce such a rule.⁶⁰ API similarly cites the Supreme Court’s 1958 decision in *NAACP v. Alabama ex rel. Patterson*⁶¹ to argue that the disclosure rule requested by the Petition would unconstitutionally chill its First Amendment rights of association. While the Supreme Court has opined that the First Amendment compels exemption from certain disclosure requirements for certain groups that can show a reasonable probability of threats harassment or reprisals—like the NAACP in 1950s Alabama—neither API, nor the Chamber, nor business corporations generally, constitute such exemption-eligible groups based solely on their corporate status.

In *NAACP*, the Supreme Court held that the State of Alabama could not, consistent with the Constitution, compel the NAACP in the mid-1950s to reveal to the state the names and addresses of all its Alabama members and agents.⁶² The Court concluded that the compelled disclosure of the NAACP’s membership list entailed “likelihood of a substantial restraint upon the exercise by [the NAACP’s] members of their right to freedom of association” given that the NAACP had “made an uncontroverted showing that on past occasions revelation of the identity of its rank-and-file members has exposed these members to economic reprisal, loss of employment, threat of physical coercion, and other manifestations of public hostility.”⁶³

The *NAACP* Court explicitly tied the group’s First Amendment associational harm to its public notoriety. In shielding the NAACP from the compelled disclosure of its rank-and-file membership lists in Alabama, the Court noted that group association enhances the “[e]ffective advocacy of both public and private points of view, particularly controversial ones.”⁶⁴ While privacy might be required in some instances to preserve freedom of association, disclosure poses a measurably greater threat to speech when “a group espouses dissident beliefs.”⁶⁵ The converse must also be true: compelled disclosure is less likely to chill associational rights when a group espouses mainstream beliefs.

Two decades later, the Supreme Court formulated an exemption from political contribution disclosure laws in *Buckley v. Valeo*, but the Court made clear that the legal standard for “threats, harassment or reprisals” exemption is exceedingly narrow. Groups that claim it must satisfy a high evidentiary burden to prevail. The degree of public opposition must create an actual—not speculative—burden on the group’s freedom to associate.⁶⁶ The 60-member Socialist Workers’ Party of Ohio (SWP) of the 1970s,⁶⁷ for example, supported its successful

⁶⁰ Chamber Comments at 23.

⁶¹ 357 U.S. 449 (1958).

⁶² *Id.* at 451.

⁶³ *Id.* at 462.

⁶⁴ *Id.* at 460 (emphasis added).

⁶⁵ *Id.* at 462.

⁶⁶ *See Buckley*, 424 U.S. at 70.

⁶⁷ *See Brown v. Socialist Workers ’74 Campaign Comm. (Ohio)*, 459 U.S. 87 (1982).

claim for exemption with evidence of pervasive and “ingrained” societal hostility.⁶⁸ In granting an exemption, the Supreme Court emphasized the extensive “past history of government harassment,” including “massive” surveillance efforts by the FBI and other government agencies.⁶⁹

The Chamber’s and API’s assertions that all corporations should be exempt from disclosure of the sort requested by the Petition are wildly inconsistent with court precedent. Under the formulation articulated in *Buckley*, the exemption is only available when the “threat to the exercise of First Amendment rights is so serious and the state interest furthered by disclosure so insubstantial that [the challenged disclosure requirements] cannot be constitutionally applied.”⁷⁰ Unsurprisingly, exemptions have been difficult to obtain from the courts under this demanding standard.⁷¹

The mere existence of some opposition to a group’s activity is not enough to warrant exemption from disclosure laws. As the district court noted *McConnell*, rejecting a claim for exemption:

Although these groups take stands that are controversial to segments of the public, and may believe that they are targeted because of the positions they take, none has provided the Court with a basis for finding that their organization . . . faces the hardships that the NAACP and SWP were found to suffer.⁷²

The Chamber and API, two of the largest, most powerful business associations on the planet, would have the Commission believe that they and their members are vulnerable, controversial dissidents incapable of surviving and amplifying their voices through group association if the Commission were to promulgate disclosure rules sought by the Petition. If that were so, the exemption for “threats, harassment or reprisals” would have no limiting principle. If the First Amendment demands that the Chamber and API be exempt from disclosure, the “exception” would be available to everyone and everything. Court precedent, however, makes clear that the exemption is a narrow one reserved for groups facing severe societal hostility, state-sanctioned animus, and the prospect of physical harm.

Fundamentally, the exemption carves out a protected space for viewpoints that would otherwise be forced to retreat from the “marketplace of ideas.” To qualify for the exemption, a group must show “specific evidence of past or present harassment of group members, harassment directed against the organization itself, or a pattern of threats or specific manifestations of public hostility.”⁷³ In short, the “threats, harassment, or reprisals” exemption was created for politically

⁶⁸ *Id.* at 99.

⁶⁹ *Id.*

⁷⁰ 424 U.S. at 71.

⁷¹ Compare *Brown*, 459 U.S. at 101–02 with *Citizens United*, 130 S. Ct. at 916 (rejecting claim for exemption and noting that *Citizens United* had been disclosing their donors for years without incident); *McConnell*, 540 U.S. at 199 (refusing to exempt parties from disclosure despite their “expressed concerns” of harassment); *Buckley*, 424 U.S. at 69–74 (concluding that the “substantial public interest in disclosure” “outweigh[ed] the harm generally alleged”).

⁷² *McConnell v. FEC*, 251 F. Supp. 2d 176, 247 (D.D.C. 2003), *aff’d* 540 U.S. 93 (2003).

⁷³ *Doe*, 130 S. Ct. at 2823 (internal citations and quotations omitted).

and socially marginalized groups like the NAACP in 1950s Alabama and the Socialist Workers' Party, not politically powerful and successful organizations like the Chamber and API.

IV. Conclusion

For all of the above-stated reasons, the CLC urges the Commission to disregard arguments by API and the Chamber (1) that the APA prohibits the rulemaking requested by the Petition, (2) that existing campaign finance law disclosure requirements are adequate for shareholder decisionmaking and (3) that the disclosure rule requested by the petition would violate the First Amendment. The CLC urges the Commission to issue a NPRM in response to the Petition, looks forward to participating in that rulemaking proceeding, and appreciates the opportunity to submit these comments.

Sincerely,

/s/ J. Gerald Hebert

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