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FOR JUSTICE

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April 24, 2013

Sen. Lou Correa, Chair
Sen. Joel Anderson, Vice Chair
Standing Committee on Elections and Constitutional Amendments
California Senate
State Capitol, Room 2203
Sacramento, CA 95814

*Re: The California DISCLOSE Act, SB 52*

Dear Senators Correa and Anderson:

On behalf of the Brennan Center for Justice at N.Y.U. School of Law, we write to convey our support for the California DISCLOSE Act, SB 52, and to emphasize that it stands on unquestionably firm constitutional ground. We commend Senators Mark Leno and Jerry Hill for their leadership, and urge support for their effort to increase transparency and accountability in California elections.

**Citizens United *unambiguously affirmed the constitutionality of disclosure requirements of the kind proposed in SB 52.***

In two recent cases, the United States Supreme Court has upheld disclosure requirements similar to those proposed in SB 52. In *Citizens United v. FEC,* the Court struck down a longstanding prohibition on corporate and union spending in federal elections by a 5-4 vote — but, in a near-unanimous, 8-1 vote, the Court strongly affirmed the constitutionality of the federal Bipartisan Campaign Reform Act's (BCRA) disclosure requirements. "[D]isclosure," Justice Kennedy wrote, "is a less restrictive alternative" to other campaign finance regulations and "provides shareholders and citizens with the information needed to hold corporations and elected officials accountable for their positions and supporters."[1] He added that "Disclaimer and disclosure requirements . . . impose no ceiling on campaign-

[1] *Citizens United v. FEC,* 130 S. Ct. 876, 915-16 (2010).

related activities and do not prevent anyone from speaking."[2] Indeed, it cannot be emphasized enough that SB 52 creates only greater transparency; it is in no way a ban on speech.

Shortly after *Citizens United*, the Supreme Court again embraced disclosure in *Doe v. Reed*. In that case, the Court upheld a Washington State law permitting the disclosure of signers of referendum petitions.[3] The Court made clear that the law in question not only protects the integrity of the electoral process, but also "promotes transparency and accountability in the electoral process to an extent other measures cannot."[4] Justice Scalia in a concurring opinion observed that disclosure requires people to stand behind their political speech and thus "fosters civic courage, without which democracy is doomed."[5]

In light of this clear guidance, any suggestion that SB 52 runs afoul of the First Amendment is misguided. Reporting the names of individuals who contribute thousands of dollars to support political spending furthers the important government interests of combating corruption and the appearance of corruption, as well as providing voters with important information to help make educated decisions at the ballot box.

### *Arguments that SB 52 is unconstitutional based on other court decisions are wrong.*

Opponents of SB 52 invoke *Talley v. California, McIntyre v. Ohio Elections Comm'n*, and *ACLU v. Heller* in an attempt to raise questions about the bills constitutionality, but their arguments are fundamentally misguided. *Citizens United* and *Doe v. Reed*, as the U.S. Supreme Court's most recent statements on disclosure, are the law of the land.

The statutes discussed in the cases relied upon by opponents are easily distinguishable from the proposed legislation. *Talley* involved the distribution of handbills by a single individual and did not involve any large expenditure of money.[6] Similarly, *McIntyre* involved the distribution of homemade leaflets at a public meeting by a woman and her son.[7] The high disclosure thresholds in SB 52 are designed purposely to exempt small spenders like Mr. Talley and Ms. McIntyre from disclosure requirements. Instead, they apply to large spenders whose activity carries particular risk of corrupting influence and are of particular interest to voters trying to understand the bases of support for candidates and ballot measures. The publications discussed in *Talley* and *McIntyre* would not be regulated by the disclosure regime proposed in SB 52.

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[2] *Id.* at 914 (internal citations and quotation marks omitted).

[3] *Doe v. Reed*, 130 S. Ct. 2811, 2837 (2010)

[4] *Id.* at 2820.

[5] *Id.* at 2837 (Scalia, J., concurring).

[6] *Talley v. California*, 362 U.S. 60, 60 (1960).

[7] *McIntyre v. Ohio Elections Comm'n*, 514 U.S. 334, 337 (1995).

As to *Heller*,[8] not only is the case older than *Citizens United*, it is also a decision by the Ninth Circuit Court of Appeals rather than the U.S. Supreme Court. It is a matter of black letter law that opinions issued by the lower courts must yield in the face of a contradictory decision by the Supreme Court. To the extent *Heller* conflicts with *Citizens United*, it cannot be relied upon.

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The California DISCLOSE Act, SB 52, stands on a firm constitutional bedrock and is worthy of support.

Sincerely,

J. Adam Skaggs
Senior Counsel

David Earley
Counsel

Cc: Senator Loni Hancock
Senator Jerry Hill
Senator Mark Leno
Senator Alex Padilla
Senator Leland Y. Yee

[8] *ACLU v. Heller*, 378 F.3d 979 (9th Cir. 2004).