



Analysis of the “DISCLOSE Act of 2017” (S. 1585): New Bill, Same Plan to Crack Down on Speech

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Introduction and Executive Summary

Ever since the Supreme Court issued its *Citizens United* ruling in 2010,² opponents of the decision in Congress have been trying to counteract it with the “DISCLOSE Act” (“Democracy Is Strengthened by Casting Light on Spending in Elections Act”). Sen. Charles Schumer freely acknowledged the bill’s intent was to create a “deterrent effect” on political speech.³ Having failed to pass the bill initially in the 111th Congress,⁴ its supporters have introduced variants of the bill in each of the four successive Congresses.⁵

In this analysis, we focus on the latest iteration of the “DISCLOSE Act” recently introduced and sponsored by Sen. Sheldon Whitehouse.⁶ All references to the “DISCLOSE Act” hereinafter will refer to that version of bill. In short:

- The DISCLOSE Act would unconstitutionally burden issue speech by expanding the existing “electioneering communications” time windows to regulate speech during more than 10 months of any election year.
- Groups would have to comply with burdensome reporting and disclaimer requirements if, during the regulated time windows, they sponsor ads that so much as mention the president or members of Congress in an attempt to persuade those officials on legislative issues or executive branch actions.
- Groups would be forced to declare on these reports that their ads are either “in support of or in opposition” to the elected official mentioned, even if their ads do neither. This form of compulsory speech and forcing organizations to declare their allegiance to or against public officials is unconscionable and unconstitutional.
- Certain donors to groups also would have to be publicly identified on these reports for issue ads. Faced with this prospect of being inaccurately associated with campaign ads on FEC reports, many donors will choose simply not to give to nonprofit groups.
- The bill’s expansion of the “electioneering communications” time windows would subject far more issue ads to burdensome disclaimer requirements, which force groups to truncate their substantive message or make some advertising practically impossible.
- The bill’s expansion of the “electioneering communications” time windows increases the regulatory risk that organizations engaging in issue speech will become political committees (“PACs”) subject to even more burdensome and intrusive ongoing campaign finance reporting requirements.

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² *Citizens United v. FEC*, 558 U.S. 310 (2010).

³ T.W. Farnam, *Disclose Act could deter involvement in elections*, WASH. POST (May 13, 2010); see also Institute for Free Speech, *Senator Schumer Doubles Down on Lauding “Deterrent Effect” of Bill on Speech* (Jul. 24, 2014), at https://www.youtube.com/watch?v=NHX_EGH0qbM.

⁴ See H.R. 5175 and S. 3295 (111th Cong.).

⁵ See H.R. 4010 (112th Cong.), S. 2219 (112th Cong.), S. 3369 (112th Cong.), H.R. 148 (113th Cong.), S. 2516 (113th Cong.), H.R. 430 (114th Cong.), S. 229 (114th Cong.), H.R. 1134 (115th Cong.).

⁶ S. 1585 (115th Cong.). Another version of the 2017 “DISCLOSE Act,” H.R. 1134 (*supra* note 5), also was introduced earlier this year in the House of Representatives. While there is some overlap, there are also substantial differences between the two bills. This analysis focuses exclusively on the Senate version.

- States and the IRS likely would increase their time windows for regulating speech to match the DISCLOSE Act's time windows, thereby resulting in more regulation of issue speech at the state level and endangering nonprofit groups' tax status.
- Organizations that make grants also will be required to file their own reports and publicly identify their own donors if an organization is deemed to have "reason to know" that a donee entity has made or will make "campaign-related disbursements" within the previous two years or in the next two years. This vague and subjective standard will greatly increase the legal costs of vetting grants and many groups will simply end grant programs.
- The DISCLOSE Act's sponsor purports the legislation will prevent foreign money from influencing our elections, but the bill has little if anything to do with foreign money. Rather, it is a thinly veiled artifice to overturn *Citizens United* and to shut down political speech by corporations (whether domestic or foreign) altogether. This attempt to accomplish by legislation what the bill's sponsor and co-sponsors failed to do by constitutional amendment in 2014 is unconstitutional.
- The DISCLOSE Act would effectively prohibit most corporations from contributing to candidates for state and local office, thus usurping the laws in more than half of the states that allow such contributions.
- While the DISCLOSE Act, at a superficial level, purports to treat corporations and labor unions equally, its restrictions and burdens on political speech would fall disproportionately on corporations, thereby ending the long-standing parity in campaign finance law between corporations and unions.

Analysis

I. The DISCLOSE Act would unconstitutionally broaden and worsen already burdensome reporting and disclaimer requirements for grassroots issue advocacy.

Under existing law, a television or radio ad that so much as mentions a federal candidate or elected official who is up for election or re-election is regulated as a so-called “electioneering communication” (“EC”) if the ad is disseminated within the jurisdiction the official or candidate represents or seeks to represent within certain pre-election time windows.⁷ Sponsors of electioneering communications that cost more than \$10,000 are required to report their spending to the FEC within 24 hours of exceeding this threshold and include certain information about their donors.⁸

Electioneering communications also must include lengthy disclaimers.⁹ These disclaimers often force speakers to truncate their substantive message or render the advertising impracticable.¹⁰ The Supreme Court specifically has recognized that these electioneering communication reporting and disclaimer requirements “burden the ability to speak,” and therefore are subject to “‘exacting scrutiny,’ which requires a ‘substantial relation’ between the disclosure requirement and a ‘sufficiently important’ governmental interest.”¹¹

The DISCLOSE Act would substantially expand the EC time windows, thereby treating issue speech as election speech during a far larger portion of the year. Specifically, for speech mentioning members of Congress and congressional candidates, the bill would lengthen the EC time window to cover every day beginning on January 1 of an election year all the way up to the date of the general or runoff election – more than 10 months of the year.¹² For speech mentioning the president, vice-president, or candidates for those positions, the EC time window would begin:

120 days before the first primary election, caucus, or preference election held for the selection of delegates to a national nominating convention of a political party is held in any State (or, if no such election or caucus is held in any State, the first convention or caucus of a political party which has the authority to nominate a candidate for the office of President or Vice President) and ending on the date of the general election.¹³

This draconian expansion of the EC time windows fails to bear a “substantial relation” to the DISCLOSE Act’s purported interest in requiring disclosure of election-related speech under the “exacting scrutiny” standard for judicial review. Instead, the bill would burden and deter speech on issues of public importance. One needs only to look at some recent examples of high-profile issue advocacy campaigns highlighting elected officials’ positions on Obamacare repeal or entitlement reform to recognize the vital role that issue ads play in a participatory democracy.¹⁴ To the extent these remain live legislative issues in 2018 and 2020, groups such as Save My Care, One Nation, and AARP would have to either modify their ads or comply with the electioneering communication laws beginning on January 1 or even earlier (in states with early presidential primaries or caucuses) under the DISCLOSE Act – even while Congress and the administration are likely to be debating these issues.

As much as it makes little sense to regulate these types of issue advocacy communications as “electioneering communications,” things could get even worse if such communications were to cause an organization to become a political committee (“PAC”). Some FEC commissioners and agency staff, as well as outside groups that lobby for more speech regulations, have urged a *per se* rule that any and all spending on ECs should be considered when determining whether an organization is required to register and report as a PAC, despite there being no legal basis for this position.¹⁵ A slim one-vote margin on the

⁷ 52 U.S.C. § 30104(f).

⁸ *Id.*

⁹ *Id.* § 30120(a).

¹⁰ See FEC Adv. Op. No. 2007-33 (Club for Growth) (although this advisory opinion addressed specifically disclaimers for express advocacy independent expenditures, the disclaimer requirements for electioneering communications are the same; see 52 U.S.C. § 30120(a)).

¹¹ *Citizens United*, 558 U.S. at 366.

¹² S. 1585 § 201(a)(2) (to be codified at 52 U.S.C. § 30104(f)(3)(A)(i)).

¹³ *Id.*

¹⁴ See, e.g., Kyle Cheney, *Left launching blitz against Republicans who backed Obamacare repeal*, POLITICO (May 8, 2017); Kevin Robillard, *GOP Senate nonprofit launches Obamacare repeal radio ads*, POLITICO (Mar. 7, 2017); Jessie Hellman, *AARP launches ad campaign urging Republicans to ‘protect’ Medicare*, THE HILL (Jan. 30, 2017).

¹⁵ See, e.g., FEC Matter Under Review (“MUR”) 6538/6589, Statement of Reasons of Vice Chair Ann M. Ravel and Commissioners Steven T. Walther and Ellen L. Weintraub at 3-4; FEC MUR 6391/6471, Second General Counsel’s Report at 10. Compare *id.* with 52 U.S.C. §§ 30101(4) (defining “political committee”), 30104(f)(3)(B)(ii) (specifying that electioneering communications are not “expenditures”); Fed. Election Comm’n, Supplemental Explanation and Justification on Political Committee Status, 72 Fed. Reg. 5595, 5597 (Feb. 7, 2007) (explaining that “electioneering communications” are not expenditures under the Act, and “[a]bsent future Congressional action altering the definition of ‘expenditure,’ the Supreme Court’s limitation of expenditures, on communications made independently of a candidate, to ‘express advocacy’ continues to apply. Therefore, determining political committee status under FECA, as modified by the Supreme Court, requires an analysis of both an organization’s specific conduct— whether it received \$1,000 in contributions or made \$1,000 in expenditures—as well as its overall conduct—whether its major purpose is Federal campaign activity (i.e., the nomination or election of a Federal candidate).” See also *Citizens for Responsibility and Ethics in Wash. v. FEC*, 209 F. Supp. 3d 77, 93 (D. D.C.) (2016) (rejecting

Commission so far has prevented this unlawful position from taking root,¹⁶ but it is nonetheless a looming regulatory risk, and one that could greatly compound the DISCLOSE Act's regulatory costs. To wit, the vastly larger universe of issue speech that the DISCLOSE Act would regulate as ECs may commensurately increase the risk of speakers becoming PACs if the FEC were to go rogue. The Supreme Court has described at length how PACs are “expensive to administer and subject to extensive regulations,” including ongoing reporting, organizational, and administrative burdens.¹⁷ Accordingly, the Court has said that requirements to form PACs as a condition of speaking are “onerous restrictions” on speech that are no substitute for an organization being permitted to speak directly.¹⁸

The DISCLOSE Act's vast expansion of the EC time window also is likely to reverberate well beyond the already far-reaching expanses of federal campaign finance law. Many states emulate the existing federal electioneering communication time windows in their own campaign finance laws regulating speech concerning elected state officials and candidates for state office.¹⁹ The Internal Revenue Service also appears to follow the current EC time windows in determining when issue speech (with respect to both federal and state elected officials and candidates) may be considered political campaign activity that is restricted or prohibited for nonprofit groups.²⁰ Thus, if the DISCLOSE Act were to pass, the IRS and states likely would follow suit in greatly broadening their regulation of issue speech to the detriment of civic organizations, advocacy groups, and public debate.

Another way in which the DISCLOSE Act expands and worsens the existing electioneering communication law is by imposing a binary choice on sponsors of ECs to declare on “campaign-related disbursement” reports whether a communication “is in support of or in opposition” to the candidate discussed in the communication²¹ – a declaration that is not required under the current law for EC reports.²² The point of issue ads is not to support or oppose candidates. For example, the AARP's recent television ads touting President Trump's campaign stance on Medicare are clearly intended to garner political support for that program, and not to support or oppose the president's reelection.²³ If the AARP were to air this ad nationally in January 2020 amidst a congressional debate on legislative changes to Medicare, the organization should not be forced by the DISCLOSE Act to pledge either its allegiance or opposition to President Trump on an FEC filing – a form of compelled speech that is obnoxious to its core and goes beyond “mere disclosure,” thereby making it especially likely to be held unconstitutional.²⁴

Congress took a wrong turn in 2002 with the “Bipartisan Campaign Reform Act” by labeling a broad swath of issue ads as “electioneering communications,” but the DISCLOSE Act just keeps going²⁵ – to the point of driving the law over a constitutional cliff.

II. The DISCLOSE Act would subject organizations' donors to excessive and irrelevant reporting requirements, thereby inviting retaliation and harassment and deterring financial support.

The DISCLOSE Act also would impose intrusive donor reporting requirements on any organization – including any 501(c) advocacy group, labor union, or trade association (but not 501(c)(3) charities) – that sponsors “electioneering communications” or express advocacy “independent expenditures” (both of which the bill regulates as “campaign-related disbursements”). An organization that makes “campaign-related disbursements” totaling more than \$10,000 during an “election reporting cycle”²⁶ would be required to publicly report all of its donors who have given \$10,000 or more during that same

CREW's position that the FEC should “assess political committee status by considering all electioneering communications as indicative of a ‘purpose’ to ‘nominat[e]’ or ‘elect[.]’ . . . a candidate”) (emphasis in the original).

The Institute for Free Speech nonetheless contends that the District Court's supposition in the *CREW* case that “most electioneering communications indicate a campaign-related purpose” for the purposes of regulating organizations as PACs, *id.* (emphasis in the original) also was unsupported and erroneous. *Compare id.* with 52 U.S.C. §§ 30101(4), 30104(f)(3)(B)(ii); Fed. Election Comm'n, Supplemental Explanation and Justification on Political Committee Status, 72 Fed. Reg. at 5597; *Buckley v. Valeo*, 424 U.S. 1, 79-80 (1976); *FEC v. Wisc. Right to Life, Inc.*, 551 U.S. 449, 469-470 (2007).

¹⁶ See FEC MUR 6589, Statement of Reasons of Chairman Lee E. Goodman and Commissioners Caroline C. Hunter and Matthew S. Petersen at 21-24; FEC MUR 6589R, Statement of Reasons of Chairman Matthew S. Petersen and Commissioners Caroline C. Hunter and Lee E. Goodman at 5.

¹⁷ *Citizens United*, 558 U.S. at 337-339.

¹⁸ *Id.* at 339.

¹⁹ See, e.g., Colo. Const., art. XXVIII, § 2(7)(a); 15 Del. Code § 8002(10); Fla. Stat. § 106.011(8)(a)(2); Haw. Rev. Stat. § 11-341(d); Idaho Code § 67-6602(f)(1)(ii), *etc.*

²⁰ Internal Revenue Svc., Letter 5228 (Jun. 2013) at 5.

²¹ S. 1585 § 201(b)(1) (to be codified at 52 U.S.C. 30126(a)(2)(C)).

²² *Compare id.* with 52 U.S.C. § 30104(f)(2)(D).

²³ See AARP Advocates, Protect Medicare, at <https://www.youtube.com/watch?v=hV0DueXoKFA>.

²⁴ See, e.g., *Wooley v. Maynard*, 430 U.S. 705 (1977); *West Va. Bd. of Educ. v. Barnette*, 319 U.S. 624 (1943).

²⁵ Apologies to Bruce Springsteen. See Bruce Springsteen, “Hungry Heart” Lyrics, Metrolyrics.com, at <http://www.metrolyrics.com/hungry-heart-lyrics-bruce-springsteen.html>.

²⁶ An “election reporting cycle” is defined as being coterminous with the two-year congressional election cycle. S. 1585 § 201(b)(1) (to be codified at 52 U.S.C. 30126(a)(4)(C)).

period, unless such communications are paid for using a segregated account (the donors to which must be reported), or if donors affirmatively restrict their donations from being used for such purposes (in which case the other donors still must be reported).²⁷ Both of these so-called options are impractical, would significantly impede fundraising (particularly for most donors who do not wish to be reported), and would still leave many donors hanging out to dry on campaign finance reports. Moreover, while sources of business revenues are exempt from reporting, dues-paying members are not.²⁸

The right to associate oneself with a nonprofit group's mission and to support the group financially in private is a bedrock principle of the First Amendment that the government may not abridge casually.²⁹ This is particularly true when the cause is controversial, such as abortion, gun control, gay marriage, or civil rights, and association with either side on any of these issues may subject a member or donor to retaliation, harassment, threats, and even physical attack, as recent events have tragically reminded us. The potential divisiveness of these issues, however, does not diminish their social importance and the need to hash out these debates in public while preserving donors' privacy. Even when a group's cause is not controversial, there are still many important and legitimate reasons for why donors may wish to remain anonymous, such as altruism and a desire to remain out of the public spotlight.³⁰

It is wholly inappropriate, for example, for donors who support a retiree organization's general activities to have to be publicly identified on campaign finance reports as "supporting" the president if the organization sponsors a television ad about entitlement reform mentioning the president.³¹ Similarly, donors to an environmental organization, for example, should not have to be identified on campaign finance reports as "opposing" the president if the organization were to sponsor a radio ad criticizing the president's environmental policies. As discussed above, both of these disclosure scenarios would result from the passage and enactment of the DISCLOSE Act. Faced with the prospect of these public reporting consequences, many donors will simply choose not to give,³² to the detriment of our private civic sector and our public debate.

The DISCLOSE Act's gratuitous disclosure requirements also are not limited to organizations that sponsor public communications. An organization that makes payments or grants to other organizations also would be deemed to be making "campaign-related disbursements," and would have to make the same filings and report its own donors, if the organization "knew or had reason to know" that the recipient has made "campaign-related disbursements" totaling \$50,000 or more in the previous two years, or will make "campaign-related disbursements" of that amount in the two years from the date of the payment or grant.³³

Grant-making institutions that wish to protect their donors' privacy therefore would need to research a recipient group's past activities to determine if the group has engaged in any "campaign-related disbursements." It is unclear under the DISCLOSE Act whether it is sufficient to rely on any FEC reports that a recipient group has filed within the previous two years. For example, if a group made "campaign-related disbursements" but inadvertently did not report them, would the provider of a grant to that group still be on the hook for having to file its own "campaign-related disbursement" reports and to publicly report its own donors? The types of investigations donor organizations would have to conduct on donees may go far beyond the standard due diligence that is currently performed in the grant-making community. While attorneys will certainly benefit from the thousands of dollars in additional fees that it will cost to vet any donation or grant to a nonprofit organization, there is little other apparent upside to this disclosure burden in the DISCLOSE Act.

The bill's vague and subjective "had reason to know" standard is even worse when applied prospectively. Grant-making organizations effectively will need to consult a crystal ball in order to know whether a group they are giving to will, within the next two years, make "campaign-related disbursements" that would require the donor organization to report its own donors.

27 *Id.* (to be codified at 52 U.S.C. § 30126(a)(1)-(3), (d), (e)).

28 *Id.* (to be codified at 52 U.S.C. § 30126(a)(3)(A)).

29 *NAACP v. Ala., ex rel. Patterson*, 357 U.S. 449 (1958).

30 See Sean Parnell, *Protecting Donor Privacy: Philanthropic Freedom, Anonymity and the First Amendment*, Philanthropy Roundtable, available at http://www.philanthropyroundtable.org/file_uploads/Protecting_Donor_Privacy.pdf.

31 See note 23, *supra*.

32 *Buckley*, 424 U.S. at 68 (noting that disclosure "will deter some individuals who otherwise might contribute. In some instances, disclosure may even expose contributors to harassment or retaliation. These are not insignificant burdens on individual rights . . .").

33 S. 1585 § 201(b) (to be codified at 52 U.S.C. § 30126(a)(1)-(2), (d), (f)). Donor organizations must affirmatively restrict their payments or grants in writing from being used by donees for "campaign-related disbursements" in order to avoid having to file reports on the donor side. *Id.* (to be codified at 52 U.S.C. 30126(f)(2)(B)). This typically will function as a trap for the unwary for organizations that do not retain one of the select few campaign finance attorneys steeped in the nuances of this law. As the Supreme Court has noted, "The First Amendment does not permit laws that force speakers to retain a campaign finance attorney . . . before discussing the most salient political issues of the day," *Citizens United*, 558 U.S. at 324, and the same should hold true for groups providing grants to enable other groups to speak about political issues.

III. The DISCLOSE Act seeks to indirectly and legislatively overturn *Citizens United* by effectively prohibiting corporations from engaging in issue and political speech.

A) The DISCLOSE Act's foreign national provisions would make it practically impossible for any corporation, whether foreign or domestic, to speak.

Sen. Sheldon Whitehouse, the sponsor of the DISCLOSE Act, purports that the bill's foreign corporation provisions are intended to prevent "foreign adversaries [from] meddl[ing] in our elections and buy[ing] influence in our democracy."³⁴ Upon closer inspection, however, the bill has little to do with foreign money and everything to do with achieving by artifice the sponsor's and cosponsors' previously expressed goal of overturning *Citizens United* and prohibiting corporations from engaging in political speech altogether.

At first blush, the bill sets a 20 percent limit for foreign ownership of a corporation, above which a corporation may not make any political contributions or expenditures in the U.S.³⁵ This, in and itself, is an unwarranted departure from the FEC's existing policy, which allows domestic subsidiaries of foreign corporations, regardless of percentage foreign ownership, to make contributions and expenditures as long as: (1) the funds used are generated exclusively from the subsidiary's U.S. operations; and (2) all decisions on contributions and expenditures are made by U.S. citizens or permanent residents.³⁶ Even the DISCLOSE Act itself would continue to follow the FEC's current approach by permitting all corporate PACs, regardless of whether they are administered by domestic or foreign corporations, to make contributions and expenditures in the U.S., as long as the PACs' spending is not directed or controlled by foreign nationals.³⁷

There is no principled reason why the domestic subsidiary of a foreign corporation should be prohibited altogether from political activity in the U.S., while that same domestic subsidiary's PAC may continue to make contributions and expenditures. This is a distinction that the Supreme Court held to be unconstitutional in *Citizens United*.³⁸ Millions of Americans work at foreign-owned corporations such as Anheuser-Busch, Bayer, BMW, Honda, Siemens, etc.³⁹ We can have a debate about whether this level of foreign investment and ownership in our economy is good for the country. But the campaign finance law is not the proper arena for weighing in on this debate, and millions of Americans who work at foreign-owned domestic subsidiaries should not have their voices shut out of the political arena.

The 20 percent ownership limit in the DISCLOSE Act likely is superfluous, however, as the bill also would more broadly prohibit any corporation from making political contributions or expenditures if any foreign national "has the power to direct, dictate, or control the decisionmaking process of the corporation with respect to its interests in the United States."⁴⁰ The owner of even one share of a publicly traded company technically "has the power to direct, dictate, or control the decisionmaking process of the corporation" by means of a shareholders' meeting or a proxy vote,⁴¹ and it is likely that every publicly traded American company has at least one foreign national shareholder. The Act provides no guidance on this point, and leaves subjective enforcement decisions to unelected officials. Thus, few rational corporations would run the risk of an overly-aggressive interpretation of this provision, and the DISCLOSE Act thus effectively prohibits corporations altogether from making political contributions and expenditures in the U.S. Because the foreign national provision of federal law the bill would amend applies to elections not only for federal office, but also for state and local office,⁴² the bill also would usurp the laws in more than half of the states which permit corporations to make direct contributions to state and local candidates.⁴³

This extreme outcome likely is not the result of inadvertent or sloppy legislative drafting. Rather, it is exactly the audacious doctrinal approach FEC Commissioner Ellen L. Weintraub has suggested. As Commissioner Weintraub wrote in a *New York Times* op-ed on countering *Citizens United*, "Arguably . . . for a corporation to make political contributions or expenditures

34 Sen. Sheldon Whitehouse, Press Release: DPCC Holds Hearing on Protecting American Elections From Foreign Interference by Strengthening Campaign Finance Laws (Jul. 19, 2017), at <https://www.whitehouse.senate.gov/news/release/dpcc-holds-hearing-on-protecting-american-elections-from-foreign-interference-by-strengthening-campaign-finance-laws>.

35 S. 1585 § 101(a) (to be codified at 52 U.S.C. § 30121(b)). For corporations in which a foreign country or foreign government official holds ownership, the cutoff for foreign ownership would be five percent. *Id.*

36 See, e.g., FEC Adv. Op. No. 2006-15 (TransCanada).

37 S. 1585 § 102(b) (to be codified at 52 U.S.C. § 30118(b)).

38 See note 17, *supra*.

39 See, e.g., Brookings Institution, FDI in U.S. Metro Areas: The Geography of Jobs in Foreign-Owned Establishments, at <https://www.brookings.edu/research/fdi-in-u-s-metro-areas-the-geography-of-jobs-in-foreign-owned-establishments/> ("Foreign-owned U.S. affiliates directly employ some 5.6 million workers spread across every sector of the economy.")

40 S. 1585 § 101(a) (to be codified at 52 U.S.C. § 30121(b)).

41 See, e.g., U.S. Securities and Exchange Comm'n, Spotlight on Proxy Matters, at <https://www.sec.gov/spotlight/proxymatters.shtml>.

42 See 52 U.S.C. § 30121(a). Under federal law, corporations may contribute to super PACs in connection with elections for federal office, but may not make contributions to candidates for federal office. See *id.* and FEC Adv. Op. No. 2010-11 (Commonsense Ten). However, under existing law, state laws otherwise govern state and local elections (although some municipalities may have their own campaign finance laws).

43 See Nat'l Conference of State Legislatures, Contribution Limits Overview, at <http://www.ncsl.org/research/elections-and-campaigns/campaign-contribution-limits-overview.aspx> (noting that 28 states permit corporate contributions).

legally, it may not have *any* shareholders who are foreigners or federal contractors.”⁴⁴

Consider also that 37 of the 38 sponsors and co-sponsors of the DISCLOSE Act who were in the Senate in 2014 voted to amend the First Amendment to override *Citizens United*.⁴⁵ Albeit constitutionally proper,⁴⁶ their 2014 effort to amend the First Amendment failed,⁴⁷ and it has been the black-letter law of this land for more than two centuries that these Senators may not now attempt to accomplish the same result by mere legislation.⁴⁸

B) The DISCLOSE Act’s “beneficial owners” disclosure requirement would make it practically impossible for *any* corporation, whether foreign or domestic, to speak.

Even if corporations could overcome the bill’s foreign shareholder prohibition, the DISCLOSE Act ensures that corporations will be sufficiently deterred from engaging in political activity by requiring *all* business corporations (regardless of whether they have any foreign owners whatsoever) making any “campaign-related disbursements” (as discussed above) to report the names and addresses of all of their “beneficial owners.”⁴⁹ A “beneficial owner” is defined vaguely and broadly to include anyone who “has a substantial interest in or receives substantial economic benefits from the assets of an entity,”⁵⁰ and likely would include most if not all of a corporation’s shareholders. For corporations that have tens of thousands of shareholders, including many who own shares through mutual funds or whose shares are held by an intermediary and thus are unknown to the corporation, this requirement too will be so impractical as to effectively and completely shut down corporate issue and political speech. Again, this extreme backdoor result has nothing to do with preventing foreign money in U.S. elections, and appears to be intentional given the bill sponsor’s and co-sponsors’ prior attempt to overturn *Citizens United*.

This covert assault on corporations’ political speech also is unwarranted and contrary to the public interest. The vast majority of Americans work at a corporation, whether it is a Fortune 500 company or a local pizza joint.⁵¹ More than half of Americans, including 56 percent of middle-income Americans, have ownership in corporations, whether through stocks or mutual funds.⁵² Not surprisingly, then, most Americans believe that it is sensible for corporations to take political action, whether it is in the form of lobbying or making political contributions.⁵³ Based on the largely positive public reaction to the unmistakable political messaging by many corporate advertisers during this year’s Super Bowl,⁵⁴ it appears that most Americans also would welcome corporations weighing in more on political issues. Even many progressives who initially opposed *Citizens United* may be coming around to the idea that corporations have a lot to contribute to the nation’s political discourse.⁵⁵

Moreover, notwithstanding that the DISCLOSE Act, on its surface, treats unions as “covered organizations” subject to the same requirements as corporations,⁵⁶ the bill also would disproportionately restrict the speech of corporations, thereby ending the campaign finance law’s longstanding equal treatment of corporations and unions.⁵⁷ For example, while the Service Employees International Union (“SEIU”) describes itself as “a large international labor organization”⁵⁸ that receives income from foreign sources⁵⁹ and maintains foreign bank accounts,⁶⁰ it is unlikely to have owners that would subject the union to the bill’s foreign ownership limit, or to have “beneficial owners” subject to the bill’s disclosure requirement.

44 Ellen L. Weintraub, *Taking On Citizens United*, N.Y. TIMES (Mar. 30, 2016) (emphasis added); see also Allen Dickerson, *No, Commissioner Weintraub, the FEC Can’t Circumvent Citizens United*, HUFFINGTON POST (Mar. 31, 2016).

45 S.J. Res. 19 (113th Cong., 2nd Sess.), Roll Call Vote No. 261 (Sep. 11, 2014). Sen. Gillibrand, who is a DISCLOSE Act co-sponsor, did not vote. *Id.* The other DISCLOSE Act co-sponsors – Senators Gary Peters, Chris Van Hollen, Tammy Duckworth, Maggie Hassan, Kamala Harris, and Catherine Cortez Masto – were not in the Senate at the time.

46 See U.S. Const., Art. V.

47 See note 45, *supra*.

48 *Marbury v. Madison*, 5 U.S. 137, 1 Cranch 137, 178 (1803) (“Those then who controvert the principle that the constitution is to be considered, in court, as a paramount law, are reduced to the necessity of maintaining that courts must close their eyes on the constitution, and see only the law. This doctrine would subvert the very foundation of all written constitutions.”).

49 S. 1585 § 201(b)(1) (to be codified at 52 U.S.C. § 30126(a)(2)(A)(i)).

50 *Id.* (to be codified at 52 U.S.C. § 30126(a)(4)(A)(i)(II)).

51 See U.S. Census Bureau, *Statistics of U.S. Businesses Employment and Payroll Summary: 2012* (Feb. 2015), at <https://www.census.gov/content/dam/Census/library/publications/2015/econ/g12-susb.pdf>.

52 Justin McCarthy, *Little Change in Percentage of Americans Who Own Stocks*, Gallup.com, at <http://www.gallup.com/poll/182816/little-change-percentage-americans-invested-market.aspx>.

53 Press Release: 2015 Public Affairs Pulse Survey: Most Americans Say it’s Smart for Big Companies to Get Political, Public Affairs Council (Sep. 10, 2015), at <https://pac.org/news/general/most-americans-say-its-smart-for-big-companies-to-get-political>.

54 See, e.g., Sapna Maheshwari, *During Breaks in Super Bowl, Advertisers Enter Political Debate*, N.Y. TIMES (Feb. 6, 2017), at <https://www.nytimes.com/2017/02/06/business/super-bowl-ads-politics.html>.

55 See, e.g., Garrett Epps, *When Corporations Are Good Citizens*, THE ATLANTIC (Aug. 17, 2017), at <https://www.theatlantic.com/politics/archive/2017/08/when-corporations-display-good-citizenship/537231/>.

56 S. 1585 § 201(b) (to be codified at 52 U.S.C. § 30126(e)).

57 See 52 U.S.C. § 30118.

58 SEIU, IRS Form 990 (2015), Part III Line 1, available at <http://www.guidestar.org/FinDocuments/2015/360/852/2015-360852885-0d82783f-90.pdf>.

59 *Id.* Part IV Line 14b.

60 *Id.* Part V, Line 4a.

Conclusion

Notwithstanding its name, the 2017 DISCLOSE Act would not implement any meaningful disclosure requirements. Rather, the bill uses the language of “disclosure” to disguise its true effect of shutting down political and issue speech by for-profit and nonprofit corporations alike. The bill would do so by drastically expanding the existing time windows during which speech is regulated, and by imposing conditions for speaking that are practically impossible to comply with. While the bill purports to address foreign spending in American elections, its actual provisions are not targeted at foreign nationals, but instead would cover all domestic public corporations as well.

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