



Richard L. Hasen
Chancellor's Professor of Law and Political Science
UC Irvine School of Law
401 E. Peltason Drive
Irvine, CA 92697-8000
Tel 949 824 3072
rhasen@law.uci.edu

April 19, 2012

VIA E-MAIL

The Honorable Charles E. Schumer, Chairman
Attention: Lyndon Armstrong, Committee Clerk
United States Senate Committee on Rules and Administration
305 Russell Senate Office Building
Washington, D.C. 20510

Re: Written Questions Submitted by Senators Schumer and Leahy

Dear Senator Schumer:

Thank you again for giving me the opportunity to testify before the United State Senate Committee on Rules and Administration regarding S.2219, The DISCLOSE Act of 2012. On April 16, 2012, I received a letter from the committee asking me to respond to questions from you and Senator Leahy.

My responses appear on the attached pages. Please do not hesitate to contact me if I may be of further assistance to the committee. It is an honor to help the committee with the very important task of fixing our Nation's broken campaign finance system.

Very Truly Yours,

A handwritten signature in cursive script that reads "Richard L. Hasen".

Richard L. Hasen

Enclosure

Answers of Professor Richard L. Hasen to Questions from Senator Schumer

1. As was mentioned during the hearing, in 2010 Pacific Gas & Electric Co. (PG&E) spearheaded a self-interested ballot measure in California, Proposition 16, and outspent its opponents 500 to 1. Despite the huge discrepancy in spending, Proposition 16 was rejected. The California disclaimer laws were credited in revealing to voters the identity and the amount of money spent by PG&E.
 - Given your knowledge of the California disclosure law, can you discuss the disclaimer provisions contained in S. 2219 and whether you think they would effectively provide similar access to information for the American public?

Answer: As noted in my written testimony (and other articles of mine referenced in that testimony), I credit the defeat of the California ballot measure supported heavily by PG&E to California's requirement that the names of the top spenders for or against ballot measures be included in all television and radio advertising. This requirement ensures that voters have the tools to evaluate the credibility of the arguments they hear at the same time that they hear those arguments.

The DISCLOSE Act's requirements mirror the successful California requirements. Top contributors' names will appear in most television and radio campaign ads. If the DISCLOSE Act is implemented, large contributors to political committees, 501c4s, and other organizations running political advertising will not be able to hide behind the names of anodyne sounding groups such as "Restore Our Future" or "Priorities USA." Instead, voters will learn who the major players are behind these groups. Voters would benefit greatly from this enhanced disclosure.

2. Mr. Keating argues that increased disclosure chills legitimate speech, although the Supreme Court's previous rulings, specifically in *Citizens United* and *McConnell v. FEC*, seem to indicate general disclosure requirements are permissible under the Constitution's First Amendment and at times *extremely necessary* for a fair political system.
 - How do you respond to the allegation that increased disclosure chills legitimate political speech?

Answer: As noted in my written testimony and my forthcoming article in the *Journal of Law and Politics* (and other articles of mine referenced in that testimony), the Supreme Court has long recognized that, under the First Amendment, groups which can show a realistic threat of harassment are entitled to an exemption from campaign finance disclosure laws. Fortunately, our experience in the last few decades is that people are almost never unconstitutionally harassed for making political contributions. In two recent cases surrounding gay marriage-related ballot measures, federal courts looked closely at the evidence of potential harassment of donors and signature gatherers and rejected the claims of harassment. If the evidence

shows no convincing record of harassment in these hot-button contexts, it is extremely unlikely we would see harassment in run-of-the-mill federal election campaigns.

I believe many opponents of the DISCLOSE Act and other disclosure laws and bills raise the issue of harassment disingenuously. These individuals believe the wealthy should have a right to spend unlimited sums to influence policy and politicians without any public accountability, hiding behind false analogies to the harassment suffered by NAACP supporters in the South during the Jim Crow era.

Even though harassment concerns are unsupported, concerns about informational privacy merit raising the reporting threshold: the public probably does not learn much through disclosure of a single \$100 contribution to a candidate. By using a large, \$10,000 reporting threshold, the DISCLOSE Act would provide important information to voters on the sources of major campaign money, deter corruption, and aid in enforcing other campaign finance rules—all without chilling the informational privacy concerns of small donors.

3. Prof. Hasen, you made a great point in your testimony—that enhanced disclosure helps ensure that other important campaign finance laws are being followed.
 - If there is money coming in from overseas—or money that is being illegally reimbursed by employers, can you expand on the notion that increased disclosure helps to identify those violations?
 - How else would we become aware of illegal donations—and how do federal authorities generally uncover criminal campaign finance violations?

Answer: Campaign finance laws—such as a ban on money from foreign individuals, governments and entities—are of limited value if they cannot be enforced. Disclosure is a key means by which other campaign finance violations are discovered. When information is disclosed publicly, the public, the press, and rival campaigns can comb the data looking for discrepancies and patterns which can reveal illegal conduct. For example, discovering numerous people from the same address donating the maximum amount to the same federal candidate around the same time could lead investigators to determine whether some of those people are acting illegally as conduits for others' contributions.

Without disclosure of the information to the public, government investigators would be overwhelmed with the sheer amount of data to comb through across all campaigns looking for problems or unusual patterns. Further, when the information is not even revealed or shared with the relevant government agency (for example, 501(c)(4), contributions to fund political activity are revealed in nonpublic reports filed with the IRS, not the FEC), it becomes very difficult for investigators to discover such illegal activity.

Answers of Professor Richard L. Hasen to Questions from Senator Leahy

1. Professor Hasen, you have testified that the DISCLOSE Act would promote First Amendment free speech values by helping all Americans speak, be heard, and participate meaningfully in elections. Like all Vermonters, I cherish the voters' role in the democratic process and am a staunch believer in the First Amendment.

A. **Do you have any concern that the provisions of the DISCLOSE Act intended to ensure that all Americans know who is paying for campaign ads pose a problem for the First Amendment rights of any American?**

Answer: In my view, the DISCLOSE Act poses no First Amendment problem for any American. For an explanation, please see my answer to Chairman Schumer's second question above. As noted in that answer, I believe many opponents of disclosure raise the issue of "harassment" disingenuously.

B. **In what ways to you believe the provisions of the DISCLOSE Act requiring the disclosure of the source of large donations for campaign ads empowers participants in our Democracy, rather than restricts them?**

Answer: Disclosure enhances American democracy. It gives voters valuable information about how to vote, it deters corruption, and it aids in the enforcement of other campaign finance laws, such as the ban on contributions by foreign governments to candidates. A strong disclosure regime is vital to the democratic process.

2. In your testimony, you raise a concern that undisclosed spending can lead to corruption in the election process both directly and indirectly. Directly, you believe that undisclosed spending can pose a threat to legislators, pushing them to concede certain points or face a major campaign against them. Indirectly, this spending can increase fundraising pressures on candidates.

How would the DISCLOSE Act help alleviate this fundraising pressure and fight corruption?

Answer: As I wrote in a recent *Politico* op-ed, which I have submitted to this committee, the best way to deal with the potential for corruption coming from Super PACs and political 501c organizations is for the Supreme Court to make it permissible once again to enforce Congress's contribution limitations applicable to political committees (and to apply such limitations to political c4s). Disclosure is a second-best solution. Nonetheless, disclosure can help to deter corruption. By allowing voters, the press, and opposing campaigns to "follow the money," some unscrupulous donors and politicians will be deterred from corrupt activities.

3. I strongly disagreed with the Supreme Court's decision in *Citizens United*. However, in that decision eight of the nine Justices appeared to believe that requirements that campaign donations be disclosed posed no problems under the First Amendment.

If passed, do you believe the Supreme Court would uphold the DISCLOSE Act as constitutional if it were to be challenged?

Answer: I am very confident that the Supreme Court would uphold the Senate's version of the DISCLOSE Act as constitutional if it were challenged as a violation of the First Amendment. The Supreme Court has consistently and almost unanimously upheld generally applicable campaign finance disclosure laws. The Court even did so in the *Citizens United* opinion itself. Eight Justices upheld the constitutionality of challenged disclosure provisions in the Bipartisan Campaign Reform Act. The DISCLOSE Act, with its high threshold for disclosure of money funding "electioneering communications," comfortably fits within the type of disclosure laws which both the Supreme Court and lower courts have repeatedly upheld. Further, any individual or entity who could demonstrate a realistic threat of harassment from disclosure compelled by the DISCLOSE Act would be entitled to an exemption from the requirements.