February 10, 2022

The Honorable Michael Nelson
Chair, House Committee on State Government Finance and Elections
Minnesota State Legislature

The Honorable Andrew Carlson
Vice Chair, House Committee on State Government Finance and Elections
Minnesota State Legislature

Re: Statement in Support of HF 3190

Dear Chair Nelson, Vice Chair Carlson, and Members of the Committee on State Government Finance and Elections,

Campaign Legal Center (CLC) respectfully submits this statement to the Committee in support of HF 3190, a bill to expand transparency for political advertising in Minnesota elections and ensure that voters know who is spending money to influence their vote. CLC is a nonpartisan, nonprofit organization dedicated to protecting and strengthening democracy across all levels of government. Since the organization's founding in 2002, CLC has participated in every major campaign finance case before the U.S. Supreme Court, as well as in numerous other federal and state court cases. Our work promotes every American's right to participate in the democratic process.

Since the Supreme Court's 2010 decision in *Citizens United v. FEC*, outside spending in elections has skyrocketed, increasing from $205 million in 2010 to $2.9 billion in 2020.[1] Outside spending in Minnesota has followed the same trend.[2] Some independent spenders have used methods designed to evade disclosure laws, allowing wealthy special interests to hide the true source of money used to influence elections.[3] As independent

[1] OpenSecrets, *Outside Spending*, https://www.opensecrets.org/outsidespending (accessed Feb. 8, 2022).
[2] MN Campaign Finance and Public Disclosure Board, *Overview of Expenditures and Sources of Funding for the 2020 Election* 8 (2021) ("…total spending on independent expenditures has steadily increased over time…").
[3] *See, e.g.*, BRENDAN FISCHER & MAGGIE CHRIST, CAMPAIGN LEGAL CTR., DIGITAL DECEPTION: HOW A MAJOR DEMOCRATIC DARK MONEY GROUP EXPLOITED DIGITAL AD LOOPHOLES IN THE 2018 ELECTION, (2019) https://campaignlegal.org/sites/default/files/2019-03/FINAL%20Majority%20Forward%20Issue%20Brief.pdf; *see also* Anna Massoglia & Karl Evers-Hillstrom, 'Dark Money' Topped $1 Billion in 2020, Largely Boosting Democrats, CTR. FOR

spending increasingly reaches voters and impacts elections, our campaign finance laws must be updated to provide voters information about who is trying to influence their votes.

HF 3190 would strengthen Minnesota's campaign finance law through three key changes that provide voters with more information about who is paying for election ads and trying to influence their vote. Specifically, the bill: (1) closes loopholes that allow some political advertising to evade transparency rules; (2) requires election ads to include enhanced disclaimers; and (3) provides specific standards and guidance for disclaimers required on small electronic election ads.

The dramatic increase in independent spending and increasingly sophisticated ways outside spenders evade disclosure provide compelling reasons for these updates to ensure election-related ads are subject to basic levels of transparency. By requiring increased transparency for more election-related ads, HF 3190 would give voters, journalists, watchdog groups, and law enforcement the tools to protect and enhance the integrity of Minnesota's elections.

CLC has carefully reviewed HF 3190, and we believe it is a well-crafted and constitutional piece of legislation. The bill is consistent with well-established U.S. Supreme Court precedent affirming the importance of the disclosure of campaign spending to "insure that the voters are fully informed about the person or group who is speaking."[4]

In this statement, we first explain how the transparency requirements in HF 3190 advance First Amendment interests and are grounded in long-standing Supreme Court precedent upholding the constitutionality of disclosure requirements for political advertising. Then, we discuss how HF 3190's provisions would implement good public policy that will strengthen Minnesota's campaign finance disclosure regime, using tools that have been shown to be effective at the federal level and in other states.

I. Electoral transparency laws promote First Amendment interests.

The changes proposed by HF 3190 are supported by long-established U.S. Supreme Court precedent upholding the constitutionality of transparency in election spending. The Court has long recognized that transparency in election spending improves the functioning of government and its responsiveness to the public. 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"[5] and promote the "First Amendment interests of individual citizens seeking to make informed choices in the political marketplace."[6] In other words, campaign finance disclosure is fully consistent with and supports these First Amendment principles, as demonstrated by

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RESPONSIVE POLITICS (Mar. 17, 2021), https://www.opensecrets.org/news/2021/03/one-billion-dark-money-2020-electioncycle/. The effects of dark money spending can be even more pronounced at the state level. *See* CHISUN LEE, ET AL., BRENNAN CTR. FOR JUSTICE, SECRET SPENDING IN THE STATES 3, 10-11 (2016), https://www.brennancenter.org/publication/secret-spending-states.

[4] *Citizens United v. FEC*, 558 U.S. 310, 348 (2010) (internal citations and quotation marks omitted).

[5] *Id.* at 366.

[6] *McConnell v. FEC*, 540 U.S. 93, 197 (2003).

a substantial body of case law sustaining disclosure requirements in federal and state elections.[7]

In its foundational campaign finance decision, *Buckley v. Valeo*, the Court upheld disclosure laws enacted following the Watergate scandal and identified three important interests advanced by campaign finance disclosure: (1) providing voters with information necessary to evaluate candidates and make informed decisions; (2) deterring corruption and the appearance of corruption by shining a light on campaign finances; and (3) aiding enforcement of other campaign finance laws, like contribution limits.[8] The *Buckley* Court explained that disclosure requirements "impose no ceiling on campaign-related activities" and do not restrict the quantity of political speech.[9]

Since *Buckley*, the Court has consistently reaffirmed the constitutionality of campaign finance disclosure laws.[10] In *McConnell v. FEC*, the Court upheld the federal Bipartisan Campaign Reform Act's (BCRA) expanded disclosure system, which ensured additional election communications beyond those that "expressly advocate" a candidate's election or defeat were subject to federal reporting and disclaimer requirements.[11]

More recently, in *Citizens United v. FEC*, the Court again upheld—by an 8-to-1 vote—the constitutionality of federal election disclosure law, stating that "transparency enables the electorate to make informed decisions and give proper weight to different speakers and messages."[12] The federal courts of appeals similarly have affirmed the constitutionality and importance of state election disclosure laws.[13]

Importantly, the Supreme Court's recent decision in *Americans for Prosperity Foundation v. Bonta* did not overturn or call into question the Court's longstanding precedent upholding disclosure laws in the electoral context.[14] That case concerned a California rule that required tax-exempt charities operating in the state to confidentially

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[7] *See* AUSTIN GRAHAM, CAMPAIGN LEGAL CTR., TRANSPARENCY AND THE FIRST AMENDMENT 15-19 (Nov. 29, 2018), https://campaignlegal.org/document/transparency-and-first-amendment-how-disclosure-laws-advance-constitutions-promise-self.

[8] *Buckley v. Valeo*, 424 U.S. 1, 66-68 (1976) (per curiam).

[9] *Id.* at 64.

[10] *See McConnell v. FEC*, 540 U.S. 93, 189-202 (2003) (approving disclosure rules for "electioneering communications," a type of political ad that evaded disclosure requirements under *Buckley*'s narrow interpretation of "express advocacy."); *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.").

[11] *McConnell*, 540 U.S. at 193.

[12] *Citizens United*, 558 U.S. at 369.

[13] *See, e.g.*, *Gaspee Project v. Mederos*, 13 F.4th 79 (1st Cir. 2021); *Indep. Inst. v. Williams*, 812 F.3d 787 (10th Cir. 2016); *Yamada v. Snipes*, 786 F.3d 1182 (9th Cir. 2015); *Del. Strong Families v. Attorney Gen. of Del.*, 793 F.3d 304 (3d Cir. 2015); *Vt. Right to Life Comm., Inc. v. Sorrell*, 758 F.3d 118 (2d Cir. 2014); *Justice v. Hosemann*, 771 F.3d 285 (5th Cir. 2014); *Worley v. Fla. Sec'y of State*, 717 F.3d 1244 (11th Cir. 2013); *Real Truth About Abortion Inc. v. FEC*, 681 F.3d 544 (4th Cir. 2012); *Ctr. for Individual Freedom v. Madigan*, 697 F.3d 464 (7th Cir. 2012); *Nat'l Org. for Marriage v. McKee*, 649 F.3d 34 (1st Cir. 2011); *Human Life of Wash. v. Brumsickle*, 624 F.3d 990 (9th Cir. 2010); *SpeechNow.org v. FEC*, 599 F.3d 686 (D.C. Cir. 2010) (en banc).

[14] 141 S. Ct. 2373 (July 1, 2021).

disclose their major donors to the state attorney general.[15] The Court found that the broad rule was "dramatic[ally] mismatch[ed]" to California's interest in preventing charitable fraud and self-dealing, and was seldomly used or needed to investigate charitable wrongdoing.[16]

Americans for Prosperity Foundation did not address, let alone question, the Court's long history of affirming the constitutionality of electoral transparency laws. The decision indicated that courts will closely examine the fit between disclosure requirements and the governmental interests they are meant to serve, but unlike the government interest at issue in *Americans for Prosperity Foundation*, the Supreme Court and lower courts have long recognized the important interest of enabling voters to "'make informed choices in the political marketplace.'"[17] As the U.S. Court of Appeals for the First Circuit aptly explained in recently 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."[18]

II. House File 3190 Would Strengthen Election Transparency in Minnesota.

HF 3190 updates Minnesota's disclosure rules to cover the full scope of election-related ads used to influence Minnesota elections and to require on-ad disclaimers that make information about political spending more accessible to voters. These important changes will strengthen Minnesota campaign finance law and provide Minnesota voters with more information about the wealthy special interests who are trying to influence their vote.

a. House File 3190 Would Ensure Transparency for More Election-Related Ads.

HF 3190 would address a significant loophole that allows political advertisers to evade transparency just by avoiding the use of specific words of express advocacy, like "vote for," "elect," "vote against," and similar words. Current law requires reporting of an independent expenditure that is "expressly advocating the election or defeat of a clearly identified candidate."[19] Current law also provides that "expressly advocating" means "that a communication clearly identifies a candidate or a local candidate and uses words or phrases of express advocacy."[20]

By only requiring reporting of independent expenditures that "expressly advocate" for or against a Minnesota candidate, current law effectively permits outside spenders to pay for advertisements "designed to influence [] elections . . . while concealing their

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[15] *Id.* at 2379-81.
[16] *Id.* at 2386.
[17] *Citizens United*, 558 U.S. at 367 (quoting *McConnell*, 540 U.S. at 197). Indeed, *Americans for Prosperity* approvingly cited Supreme Court precedent upholding campaign finance disclosure requirements, including *Buckley* and *Citizens United*, in clarifying the application of the exacting scrutiny framework. *Americans for Prosperity,* 141 S. Ct. at 2383.
[18] *Gaspee Project*, 13 F.4th at 95.
[19] Minn. Stat. § 10A.01 subd. 18.
[20] Minn. Stat. § 10A.01 subd. 16a.

identities from the public," simply by avoiding "magic words" of express advocacy in their ads.[21] As the Supreme Court has noted, "[p]ublic communications" that promote or attack a candidate for federal office . . . also undoubtedly have a dramatic effect on federal elections."[22]

The bill would close this loophole by extending disclosure requirements to two additional categories of campaign advertisements: ads that are the "functional equivalent of express advocacy" because they are "susceptible of no reasonable interpretation other than as an appeal advocating the election or defeat of […] clearly identified candidates," and advertisements that promote, support, criticize, or oppose ("PASO") a candidate, "regardless of whether the communication expressly advocates the election or defeat of a candidate."

Filling this gap and applying transparency requirements to ads that are the functional equivalent of express advocacy or that PASO a candidate would ensure that voters are informed about the financing behind advertisements that do not use the "magic words" of express advocacy but are nevertheless intended to influence an election. Importantly, the Supreme Court upheld a similar standard in BCRA, explaining communications that "promote, support, attack, or oppose" a candidate "directly affect[] the election in which [the candidate] is participating" and finding such standard provides "explicit standards" for their application.[23] Federal courts also have upheld state election laws requiring disclosure for these kinds of communications.[24] These strengthened disclosure requirements would ensure that Minnesota voters have more transparency about the election ads they receive.

b. House File 3190 Would Provide Important Information to Voters About Who is Trying to Influence Their Vote Through Top-Contributor Disclaimers on Political Ads.

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 receive significant funding from special interest groups. When Minnesotans are targeted with political advertising, they deserve to know who is really funding that messaging. HF 3190 would provide more transparency for voters by requiring on-ad disclaimers to identify, in addition to the sponsor of the ad, the top three contributors to the sponsor.

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[21] *McConnell*, 540 U.S. at 196.
[22] *Id.* at 169.
[23] *Id.* at 170.
[24] *See Yamada v. Snipes*, 786 F.3d 1182, 1192-94 (9th Cir. 2015) (holding that "advocates," "supports," and "opposition," are sufficiently precise for the purpose of requiring disclosure for political ads); *Vt. Right to Life Comm., Inc. v. Sorrell*, 758 F.3d 118, 128-29 (2d Cir. 2014) (holding PASO standard is not vague for purpose of requiring disclosure forpolitical ads); *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 for requiring disclosure for ballot measure campaigns); *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 for required disclosures of independent expenditures).

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."[25] For example, in West Virginia's 2018 Republican U.S. Senate primary, a group called the "Mountain Families PAC" spent $1.3 million, but manipulated FEC reporting schedules to avoid disclosing until after the election that it was mostly bankrolled by the Senate Leadership Fund, a group affiliated with then-Senate Majority Leader Mitch McConnell.[26] In fact, *none* of the group's funding came from West Virginia.[27] A group called the "Duty and Country PAC" spent around $1.8 million in the same Republican primary, similarly not reporting until after the election the fact that it was funded by a handful of major Democratic donors.[28]

In recognition of this problem, a growing number of states have implemented top-contributor identification requirements for political ads.[29] Most recently, the First Circuit upheld a similar top-contributor identification requirement in Rhode Island, stating that these types of on-ad disclaimers, "serve the salutary purpose of helping the public to understand where 'money comes from.'"[30] By requiring on-ad top-contributor identification, HF 3190 would ensure that political ads are more transparent, providing more information to Minnesota voters about who is trying to influence their vote.

c. House File 3190 Would Provide a Flexible Standard for Disclaimers on Small Electronic Advertisements that Helps Voters Know Who is Trying to Influence Their Vote.

Advancements in technology have made it possible for many digital ads to include on-ad disclaimers similar to those on other types of ads. Nonetheless, some digital ads may be technologically incapable of including a complete disclaimer in the ad itself, such as small ads appearing on mobile phones. To account for instances when inclusion of a full disclaimer is genuinely not technologically possible, digital ad requirements should incorporate a limited exemption that permits a modified disclaimer for those ads. Effective standards for modified disclaimers balance technological limits with ensuring voters can still get the same information about an ad with minimal effort.

HF 3190 improves on current law by removing the complete exemption from disclaimer requirements for "online banner ads and similar electronic communications" that provide a link to the required disclaimer. Instead, HF 3190 requires the Minnesota Campaign Finance Board to adopt rules to specify how small electronic advertisements may

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[25] *See McConnell*, 540 U.S. at 197.
[26] BRENDAN FISCHER & MAGGIE CHRIST, CAMPAIGN LEGAL CTR., DODGING DISCLOSURE: HOW SUPER PACS USED REPORTING LOOPHOLES AND DISCLAIMER GAPS TO KEEP VOTERS IN THE DARK 3 (2018), https://campaignlegal.org/sites/default/files/2018-11/11-29-18%20Post-Election%20Report%20%281045%20am%29.pdf.
[27] *Id.* at 3-4.
[28] *Id.* at 7.
[29] Alaska Stat. § 15-13-090(a)(2)(C); Ariz. Rev. Stat. § 16-925(B)(1); Cal. Gov't Code § 84503; Conn. Gen. Stat. § 9-621; D.C. Code § 1-1163.15(a); Haw. Rev. Stat. § 11-393; Me. Stat. tit. 21-A, § 1014(2-B); Mass. Gen. Laws ch. 55, § 18G; R.I. Gen. Laws § 17-25.3-3; S.D. Codified Laws § 12-27-16.1(2); Vt. Stat. Ann. tit. 17, § 2972; Wash. Rev. Code § 42.17A.320(2)(b).
[30] *Gaspee Project*, 13 F.4th at 95 (citing *Buckley v. Valeo*, 424 U.S. at 66).

comply with disclaimer requirements if including a full disclaimer is "technologically impossible." This standard more flexibly allows for a modified disclaimer only where one is necessary, as opposed to applying to particular types of digital ads.

Other states apply similar standards for when a political ad may use a modified disclaimer. The Wisconsin Ethics Commission, by regulation, requires that any advertiser using a modified disclaimer must be able to establish "that including the attribution on the ad or communication was not possible due to size or technological constraints."[31] California's Political Reform Act permits the sponsor of an "electronic media advertisement" to substitute a complete disclaimer statement on the face of an ad with a hyperlink to the required information when including a complete disclaimer would be "impracticable or would severely interfere with the [sponsor's] ability to convey the intended message due to the nature of the technology used to make the communication."[32] Applying this statutory provision, California's Fair Political Practices Commission requires that a sponsor of an electronic media advertisement who claims inclusion of a full disclaimer on the ad is "impracticable" be able to show why it was not possible to include a complete disclaimer on the advertisement.[33] Along these same lines, at the federal level, the Freedom to Vote Act of 2021 would allow for a modified disclaimer requirement for online communications where a full disclaimer "is not possible."[34]

Importantly, adopting a flexible standard that requires disclaimers on digital ads and allows for modified disclaimers only in cases of technological impossibility ensures that the law will remain effective in light of evolving technologies and campaign advertising practices.

III. Conclusion

In the light of the important changes this bill would make to strengthen transparency in Minnesota elections, CLC respectfully urges the Committee to support HF 3190. Thank you for the opportunity to submit this statement in support of this important legislation. If you have further questions, please do not hesitate to contact us.

Respectfully submitted,

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[31] *See, e.g.*, Wis. Admin. Code Eth. § 1.96(5)(h).
[32] Cal. Gov't Code §§ 84501(a)(2)(G), 84504.3(b).
[33] Cal. Code Regs. tit. 2, § 18450.1(b); *see also* Cal. Fair Political Practices Comm'n, Op. No. I17-017 (Mar. 1, 2017), at 4 ("Where character limit constraints render it impracticable to include the full disclosure information specified, the committee may provide abbreviated advertisement disclosure on the social media page. . . . If abbreviated disclaimers are used a committee must be able to show why it was not possible to include the full disclaimer.").
[34] S. 2747, 117th Congress, § 6107(b)(1) (2021).