COMMENTS ON S-2569,
THE CAMPAIGN FINANCE DISCLOSURE BILL

Before addressing some of the specifics of the bill, I would like to make some general points. First, the RI ACLU fully recognizes and appreciates the interests in transparency that motivate this legislation. Campaign finance disclosure laws serve important interests in promoting an informed electorate and increasing transparency in the democratic process. These are strong civil liberties values. But such laws also have the potential to impose significant burdens on, and chill, the exercise of First Amendment rights to speech and association. The ACLU has long believed that campaign disclosure laws must balance these important but competing interests.

Second, experience over the last 40 years has taught us that new laws intended to address campaign finance issues often have unintended consequences and fail to achieve their intended goals. Although aimed at Super PAC's, legislation of this sort can often trap unwary individuals and small organizations that were never the main target. We have seen that happen over and over again with campaign finance legislation. For example, at the national level, it is worth noting that the very first lawsuit that was brought in 1972 under the Federal Election Campaign Act was not against a major corporation or shady individuals engaging in shady campaign activities. It was against a handful of left-wing dissenters who had sponsored an advertisement in the *New York Times* condemning the secret bombing of Cambodia and calling for Richard Nixon's impeachment. Soon after that, the ACLU found itself unable to purchase space in the *Times* to publish an open letter to President Nixon, criticizing his position on school desegregation.

We have seen this phenomenon in Rhode Island as well. When the General Assembly passed comprehensive campaign finance legislation in 1992, the ACLU filed suit and successfully challenged various aspects of the law. The suit was not on behalf of big corporations. The plaintiffs were a local pro-choice organization, a local gun owner's PAC, two individuals who wanted to make modest contributions to those organizations but were chilled from doing so, and the ACLU itself which was barred from expending money in a ballot campaign. In 2006, we were forced to file another lawsuit in the context of state laws dealing with ballot issues. Who were the other concerned organizations contesting the impact of that law? Groups like the Family Life Center, the Rhode Island Foundation and the United Way. I bring these examples up only to show the complexity involved in crafting campaign finance laws, and the unintended and inappropriate, but serious, consequences that can follow.

That leads to my last point before discussing the specifics of this legislation. This is an extraordinarily complicated area of the law. Precisely because it deals with sensitive issues that have an impact on free speech, and in light of the critical need to ensure the necessary breathing room for such speech in the political sphere, the law is very complex. I realize that a good deal of the language in this bill is taken from federal law, but that law also includes hundreds of pages of regulations designed to parse out some of the complexities. The dozens of lawsuits that continue to be filed over this issue show how difficult it can be. We raise this merely as a cautionary comment.

1. One major concern we have about the bill is that it covers not only candidate elections, but also referenda campaigns. Only six years ago, in response to the ACLU lawsuit I mentioned above, the General Assembly passed comprehensive legislation addressing reporting for ballot advocacy campaigns. It was done in recognition that, unlike the law at the time, which this bill seeks to replicate, referenda and candidate campaigns should not be treated the same. There are different constitutional standards at stake, which the Supreme Court has recognized for many decades, since referenda campaigns do not create the same concern about corruption that motivates, and constitutionally authorizes, regulation of campaign finance in candidate elections. This statute was the result of work by numerous individuals, organizations and legislators sitting down and working out language that would address the speech, privacy and transparency issues involved. However, without even acknowledging the existence of this other detailed and recently-enacted statute, this bill creates an entirely new scheme to cover referenda campaigns. We believe this bill should focus solely on candidate elections.

2. Another significant problem from our perspective is the definition of "electioneering communication," which throughout is treated the same as an "independent expenditure." An independent expenditure is an uncoordinated expenditure expressly advocating the election or defeat of a clearly identified candidate. However, the precision and narrow scope of this definition is swallowed up by the definition of "electioneering communication," which is defined as *any* communication that, within 60 days of a general election, or 30 days before a primary election, "unambiguously identifies" – that is, names – a candidate, and does so in a manner that can be received by 2,000 or more people represented by the candidate. The potential reach is extraordinary. A non-profit organization that, within the stated timeframe, prepares a report

highlighting General Assembly activities or releases a report card to its members of votes by state officials on issues, has issued an "electioneering communication."

The consequences of this are, depending on the communication, potentially two-fold: First, if the printing of the report or the mailing of the newsletter costs more than $250, the person will be required to file a campaign finance report within seven days, or if the costs were more expensive, possibly 24 hours. Second, the organization must disclose the identity of all donors who have given $1,000 or more to the group in the past 12 months. Whether it's a civil liberties organization, a gay rights group, or the Rifle and Revolver Association, this could have a significant chilling impact on donations to non-profits. Many people contribute to non-profit organizations, especially controversial ones, not wanting or expecting their donations to be made public. They may legitimately fear retaliation, consequences at their workplace or other adverse effects if their donation were publicized. It is important to keep in mind that these are donations that have not been made for campaign purposes, and that often have been made to organizations whose mission remains strictly non-partisan. (The bill contains a process to allow organizations to specifically classify individual donations as "non-campaign," but in light of the extremely broad definition of "electioneering" and the fungibility of funds in small organizations, this seems to us to be largely unworkable.) Yet they would be tagged as somehow contributing to a political campaign as this bill is set up. Indeed, some organizations, such as the Rhode Island Foundation, would essentially be barred from any mentioning any candidate or office-holder's name before an election, since many of their donors specifically give anonymously.

We fully understand the concerns about Super PAC's, but individuals making a $1,000 donation to the ACLU or the Cancer Society or other organizations are not the problem.

Section §17-25.3-3 of the bill goes even further. It appears that any person writing on the Internet to support a candidate would have to state it was "made independent of any candidate or political party." If an organization posts on its web site a statement commending Governor Chafee for, say, finally issuing medical marijuana licenses and does so within 60 days of an election, one could easily argue that it is "promoting the success" of a candidate, and therefore is further obligated to list its "Top 5" contributors, again erasing potentially important anonymity for some donors. These requirements and impositions would be taking place in the context of what one should consider to be an exercise of pure political speech by an organization.

3. Finally, we wish to note the severity of the penalties associated with any violation of this new statute. Violations are classified as a felony, and also include the imposition of up to a $10,000 fine, or 2% of the organization's total expenditures, although it is unclear to us what figure that term refers to. Compare that to the penalties contained in 17-25, which largely involve candidates and office-holders and their campaigns. There, violations of the law, including reporting requirements, constitute a misdemeanor with a maximum $1,000 fine. From the ACLU's perspective, there is no legitimate basis for such a distinction.

In closing, the ACLU wishes to be absolutely clear. Our critique of this bill is not a critique of the need for some transparency in the way so-called Super PAC's may be seeking to skirt disclosure laws. But a scalpel, not a hammer, is needed in addressing that issue, and we are deeply concerned that this legislation operates with the latter, not the former, instrument.