April 23, 2013

The Honorable Paul Fong
P.O. Box 942849
Room 5016
Sacramento, CA 94249-0028

The Honorable Tim Donnelly
P.O. Box 942849
Room 2002
Sacramento, CA 94249-0033

Re: Constitutional Issues with Assembly Bill 45

Dear Chairman Fong, Vice Chair Donnelly, and Members of the Committee:

On behalf of the Center for Competitive Politics, I respectfully submit the following comments to explain our opposition to Assembly Bill 45, currently being considered before the Assembly Elections and Redistricting Committee. Specifically, I write to note several significant legal concerns raised by the bill. In addition to raising issues of public policy, these weaknesses could subject the state to costly litigation.

The Center for Competitive Politics is a nonpartisan, nonprofit 501(c)(3) organization focused on promoting and protecting the First Amendment political rights of speech, assembly, and petition. It was founded in 2005 by Bradley A. Smith, a former Chairman of the Federal Election Commission. In addition to scholarly and educational work, the Center is actively involved in targeted litigation against unconstitutional laws at both the state and federal levels. For instance, we presently represent a nonprofit, incorporated educational association in a challenge to Colorado's campaign finance laws. We are also involved in litigation currently before the U.S. Supreme Court.

I would like to draw your attention to several significant constitutional concerns presented by Assembly Bill 45, which requires the disclosure of donors giving $250 or more to newly defined "multipurpose organizations" under specified circumstances. Our concerns arise out of Supreme Court precedent and the overly broad disclosure required by this bill.

This legislation proposes new and burdensome reporting requirements for nonprofit organizations, federal or out-of-state political action committees, and local clubs focusing on education or social activities and would cover many activities that have no relation to express advocacy concerning a candidate. Consequently, the new reporting requirements proposed by A.B. 45 mandate constitutionally questionable disclosure that mistakenly extends the logic of recent court rulings, could violate the privacy rights of donors to multipurpose organizations, may perversely generate less informative disclosure than a more narrowly tailored measure, and potentially subject individuals to harassment based on their political beliefs. For the above reasons, we oppose A.B. 45.

Accordingly, if A.B. 45 is signed into law as written, many of its provisions will likely be challenged. Any potential legal action will cost the state a great deal of money defending the case, and will distract the Attorney General's office from meritorious legal work. Additionally, it is probable that the state will be forced by the courts to pay legal fees to any potential plaintiffs. Legal fee awards can cost governments well over one hundred thousand dollars.

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As such, it is in the best interest of the Legislature to reject A.B. 45 entirely in accordance with the four issues set forth below.

I. Recent federal jurisprudence likely renders the type of disclosure mandated by A.B. 45 unconstitutional in many of its applications.

While the Supreme Court upheld certain disclosure in *Citizens United v. Federal Election Commission*, it addressed only a narrow and far less burdensome form of disclosure to that contemplated by A.B. 45. The Court merely upheld the disclosure of an electioneering communication report, which discloses the *entity making the expenditure* and the purpose of the expenditure. Such a report only discloses contributors giving over $1,000 *for the purpose of furthering the expenditure*.[1] This has been interpreted by the Federal Election Commission to mean contributions earmarked for these communications, an interpretation recently supported by the U.S. Court of Appeals for the D.C. Circuit in a case involving analogous electioneering communication reporting requirements.[2]

By contrast, this legislation proposes, in many cases, an extremely broad disclosure regime. Depending on an organization's structure, the names, mailing addresses, occupations, and employers of its donors who have given $250 or more must be disclosed, if that entity happens to make aggregate contributions or independent expenditures of $2,000 or more during the calendar year in which the donation is made or during any of the four preceding calendar years. The fact this requirement is phrased as "presumed knowledge" on the part of the contributor, who is unlikely to truly be on notice in many circumstances, does not change the central analysis. Importantly, the *Citizens United* Court specifically held that the limited disclosure of an electioneering communication report is a "less restrictive alternative to more comprehensive regulations of speech," such as those proposed in A.B. 45.[3]

The *Citizens United* Court specifically invoked *Massachusetts Citizens for Life v. FEC* (*MCFL*), where both the plurality and the concurrence were troubled by the burdens placed upon nonprofit corporations by certain disclosure requirements.[4] The plurality was concerned with the detailed record keeping, reporting schedules, and limitations on solicitation of funds to only "members" rather than the general public.[5] Likewise, Justice O'Connor was concerned with the "organizational restraints" including "a more formalized organizational form" and a significant loss of funding availability.[6]

If this bill becomes law, it will create conditions that raise the very concerns addressed by the Supreme Court in *MCFL*. A.B. 45 would mandate detailed record keeping and force groups to create multiple bank accounts and solicitations. The bill would require the collection and reporting of information that is commonly gathered by political parties and candidates in an election, but not by nonprofit organizations or charities, which might incidentally speak on a topic before the voters. Thus, the bill would likely place a heavy burden of accounting and record-keeping on any multipurpose organization that makes a contribution or independent expenditure, including charities.

[1] 2 U.S.C. § 434 (2013); *Citizens United v. Federal Election Commission*, 130 S. Ct. 876, 913-914 (2010).
[2] *Ctr. for Individual Freedom v. Van Hollen*, 694 F.3d 108 (D.C. Cir. 2012).
[3] *Citizens United*, 130 S. Ct. at 915 (contrasting independent expenditure reports with the burdens discussed in *MCFL*).
[4] *Massachusetts Citizens For Life v. Federal Election Commission*, 479 U.S. 238 (1986).
[5] *MCFL*, 479 U.S. at 253 (plurality opinion).
[6] *Id.* at 266 (O'Connor, J. concurring).

Essentially, the proposed bill would force nonprofit groups to face disclosure to the government of their donors who have given $250 or more, if the organization has made aggregate contributions or independent expenditures of $2,000 or more during any of the four preceding calendar years, or instead avoid all political speech entirely. *MCFL* noted that these sorts of "incentives" serve to "necessarily produce a result which the State [can]...not command directly. It only result[s] in a deterrence of speech which the Constitution ma[de] free."[7]

Additionally, in *Sampson v. Buescher*, the Tenth Circuit examined burdensome disclosure requirements for small ballot issue organizations under Colorado's campaign finance disclosure scheme.[8] In holding that Colorado's requirements "substantial[ly]" burdened the organization's First Amendment rights, the court balanced the "substantial" burden of reporting and disclosure against the informational interest at stake, which it considered "minimal."[9] If A.B. 45 is signed into law and challenged, it is possible that the Ninth Circuit will view the burdens imposed on small ballot issue committees by this bill with similar skepticism.

II. The provisions set forth in this bill severely violate the privacy rights of contributors to nonprofit organizations.

In addition to the constitutional issues described, above, another significant concern surrounding A.B. 45 relates to how contributors are disclosed. In the bill's current form, a "multipurpose organization" must disclose "a payment made to a multipurpose organization if the donor knows or has reason to know that the payment, or part of the payment, will be used to make a contribution or an independent expenditure."[10] A "multipurpose organization" is further defined as a "nonprofit organization, a federal or out-of-state political action committee, or a local club focusing on educational or social activities."[11] This provision's regulation of these entities is unconstitutionally overbroad and threatens issue speech – speech that lies at the heart of the First Amendment.

This provision's *mens rea* requirement is also completely amorphous – given that nonprofit organizations, federal or out-of-state political committees, and local educational and social clubs are constitutionally entitled to make political expenditures, any contributor to any of these entities "knows" that the recipient organization "may" use that money to make expenditures.

As a result, nonprofit organizations wishing to protect the anonymity of their membership lists would also be forced to silence themselves from ever making any public comment that might be perceived as an independent expenditure – or else every contributor would be on notice that the organization may make expenditures. This has severe civil rights implications.[12] This is why even anonymous political activity has been protected in certain contexts.[13]

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[7] *MCFL*, 479 U.S. at 256 (plurality opinion).
[8] *Sampson v. Buescher*, 625 F.3d 1247 (10th Cir. 2010).
[9] *Id.* at 1260.
[10] Assembly Bill 45, California Legislature 2013-14 Regular Session, p. 10 at lines 18-21.
[11] *Id.* p. 11 at lines 11-13.
[12] *See NAACP ex. rel Patterson v. Alabama*, 357 U.S. 449 (1958); *Bates v. City of Little Rock*, 361 U.S. 516 (1960).
[13] *See McIntyre v. Ohio Elections Commission*, 514 U.S. 334, 337-338 (1995).

The *Buckley* Court put this danger into perspective:

> "No speaker, in such circumstances, safely could assume that anything he might say upon the general subject would not be understood by some as an invitation. In short, the supposedly clear-cut distinction between discussion, laudation, general advocacy, and solicitation puts the speaker in these circumstances wholly at the mercy of the varied understanding of his hearers and consequently of whatever inference may be drawn as to his intent and meaning. ... Such a distinction offers no security for free discussion. In these conditions it blankets with uncertainty whatever may be said. It compels the speaker to hedge and trim."[14]

Those who will be hurt the most by the chilling effects of this provision will be those who advocate for unpopular causes. Indeed, there would be little reason to have a constitutional protection for freedom of speech if the Founders were not acutely aware that majorities seek to suppress those who speak against the crowd.

III. The proposed reporting thresholds for multipurpose organizations are burdensome and would result in "junk disclosure," by associating a donor with a communication they have no knowledge of or may not even support.

Furthermore, the proposed reporting regime for multipurpose organizations in A.B. 45 may well confuse rather than enlighten voters.

When we speak of political committees and political parties, we can be reasonably assured that all donors to such organizations intend for their contributions to be used for political purposes. The same is not true of donors to 501(c) membership organizations and other forms of incorporated advocacy groups, which are likely to fall under the snare of multipurpose organizations, according to the provisions of this bill. As a result, if a group decides to engage in independent expenditures – even incidentally, or as a small part of the organization's "multiple" activities – many of its relatively minor donors could potentially be made public, regardless of whether their donations were earmarked for the purpose of making a contribution or furthering an independent expenditure.

This is problematic, as many of these donors will have given for very different reasons. Imagine, then, the Fresno cattle rancher, who is a proud Democrat, contributing to the California Cattleman's Association as his professional association. Then, suddenly a bill is introduced for additional regulation of ranching in California, and this cattle rancher finds himself listed as contributing to ads mentioning Democrat elected officials that were run by the group. People give to trade associations and nonprofits not because they agree with everything the organization does, or particular political positions it takes, but because on balance they think it provides a valuable service. To publicly identify contributing individuals with expenditures that are not, in fact, express advocacy is both unfair to members and donors and will often be misleading to the public. Our cattle rancher in the above hypothetical does not take issue with those Democratic candidates and may actually support the candidates; this is "junk disclosure."

In any event, by mandating disclosure at such a low threshold, it is actually more difficult for voters to discern the major supporters of an organization. If disclosure information is to tip voters as to specific sources of financial support, muddying up the report's contents with the names, addresses,

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[14] *Buckley v. Valeo*, 424 U.S. 1, 43 (1976) (quoting *Thomas v. Collins*, 323 U.S. 516, 535 (1945)).

occupations, and employers of donors that may disagree with the organization's expenditure and have given for another purpose runs counter to this aim. In effect, this amounts to "junk disclosure" – disclosure that is primarily used by other parties to look for potential donors and by prying neighbors to search their fellow citizens' political activity and affiliations.

A simple test is this: in all of the stories about disclosure in the past two elections, did any express alarm about persons donating $250? We suggest that the answer is no.

Ultimately, it is difficult to argue that public reporting on contributions to organizations speaking on issues, which do not advocate for or against a candidate, advances the legitimate purposes of informing the public or preventing corruption.

IV. Disclosure information can result in the harassment of individuals by their political opponents and should be carefully balanced with the public's "right to know."

The desire to preserve privacy stems from a growing awareness by individuals and the Supreme Court that threats and intimidation of individuals because of their political views is a very serious issue. Much of the Supreme Court's concern over compulsory disclosure lies in its consideration of the potential for harassment. This is seen particularly in the Court's decision in *NAACP v. Alabama*, in which the Court recognized that the government may not compel disclosure of a private organization's general membership or donor list.[15] In recognizing the sanctity of anonymous free speech and association, the Court asserted that "it is hardly a novel perception that compelled disclosure of affiliation with groups engaged in advocacy may constitute as effective a restraint on freedom of association as [other] forms of governmental action."[16]

Much as the Supreme Court sought to protect those citizens who financially supported the cause of civil rights from retribution, donors and members of groups supporting unpopular candidates and causes still need protection today. California is no stranger to this phenomenon, as many supporters of Proposition 8 faced harassment from gay-rights activists, simply because these donors' information was made publicly available through government-mandated disclosure. Indeed, in Justice Thomas' opinion in *Citizens United*, he dissented in part, noting harassment issues stemming from the disclosure of political information. In his dissent, Justice Thomas made specific reference to the experience of Proposition 8 supporters: "Some opponents of Proposition 8 compiled this [disclosure] information and created Web sites with maps showing the locations of homes or businesses of Proposition 8 supporters. Many supporters (or their customers) suffered property damage, or threats of physical violence or death, as a result."[17] Similarly, it is hardly impossible to imagine a scenario in 2014 in which donors to controversial candidates and causes that make independent expenditures – for or against another same-sex marriage initiative; for or against abortion rights; or even persons associated with others who have been publicly vilified, such as the Koch family or George Soros, might be subjected to similar threats.

Worse still, little can be done once individual contributor information – a donor's full name, street address, occupation, and employer – is made public under government compulsion. It can immediately be used by non-governmental entities and individuals to harass, threaten, or financially

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[15] *NAACP v. Alabama*, 357 U.S. 449 (1958).
[16] *NAACP v. Ala. ex rel. Patterson*, 357 U.S. at 462.
[17] *Citizens United*, 130 S. Ct. 876, 980-981 (Thomas, J., concurring in part and dissenting in part).

harm a speaker or contributor to an unpopular cause. We believe, therefore, that the problem of harassment is best addressed by limiting the opportunities for harassment, and that this is best done by crafting reporting thresholds that capture just those donors who are truly contributing large sums to *political candidates,* and those who give to organizations whose *major purpose* is political advocacy – and not to organizations engaging in issue advocacy about a particular topic relevant to the voters of California, especially when that advocacy is but a part of the organization's overall mission.

Ultimately, the Court has made clear that this concern over harassment exists, whether the threats or intimidation come from the government or from private citizens,[18] who receive their information because of the forced disclosure. In short, mandatory disclosure of political activity should require a strong justification and must be carefully tailored to address issues of public corruption and provide information of particular importance to voters. It is questionable that the $250 monetary disclosure threshold mandated by A.B. 45 about an individual who donates to an organization speaking about a particular issue is sufficient to meet this standard.

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As written, A.B. 45 runs counter to existing Supreme Court precedent in several cases and would violate the privacy rights of donors to many organizations. Furthermore, A.B. 45 would make disclosure information less meaningful overall by broadly associating contributors with political communications they may not support while simultaneously subjecting many of these donors to potential harassment or financial harm. Thus, we oppose A.B. 45 and recommend that the Committee reject this bill.

Thank you for allowing me to submit comments on Assembly Bill 45. I hope you will find this information helpful. Should you have any further questions regarding these issues or any other campaign finance proposals, please do not hesitate to contact me at (703) 894-6835 or by e-mail at mnese@campaignfreedom.org.

Respectfully yours,

Matt Nese
Director of External Relations
Center for Competitive Politics

[18] *Brown v. Socialist Workers' '74 Campaign Comm.*, 458 U.S. 87 (1982).