March 17, 2015

The Honorable Tom Berry
Montana House
P.O. Box 200400
Helena, MT 59620-0400

The Honorable Daniel Salomon
Montana House
P.O. Box 200400
Helena, MT 59620-0400

The Honorable Ryan Lynch
Montana House
P.O. Box 200400
Helena, MT 59620-0400

Re: Constitutional and Practical Issues with Senate Bill 289

Dear Chair Berry, Vice Chairs Salomon and Lynch, and members of the House Business and Labor Committee:

On behalf of the Center for Competitive Politics, I am writing you today to respectfully submit the following comments regarding the constitutional and practical impact of the provisions contained in Senate Bill 289, which proposes amendments to Montana's campaign finance laws.

The Center for Competitive Politics is a nonpartisan, nonprofit 501(c)(3) organization that promotes and protects 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 nonprofit, incorporated educational associations in challenges to state campaign finance laws in Colorado, Delaware, and Nevada. We are also involved in litigation against the state of California.

If Senate Bill 289 becomes law as written, there is a high likelihood that certain provisions of the law will be found unconstitutional if challenged in court. 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 award legal fees to successful plaintiffs. Legal fee awards are often expensive, and can cost governments well over one hundred thousand dollars.

Senate Bill 289 regulates an expansive amount of speech, and various sections of this measure are unconstitutionally vague. Legislators considering this measure should tread carefully when legislating in an area that directly impacts First Amendment rights.

I. The definition of "support or oppose" (and its variations) is vague.

The U.S. Supreme Court's decision in the seminal campaign finance case of *Buckley v. Valeo*[1] famously limited the speech that could trigger political committee status under federal law to "express words of advocacy of election or defeat, such as 'vote for,' 'elect,' 'support,' 'cast your ballot for,' 'Smith for Congress,' 'vote against,' 'defeat,' [and] 'reject.'"[2] These would become known as "magic words" of express advocacy. In the case of *McConnell v. FEC*,[3] which reviewed the constitutionality of the Bipartisan Campaign Reform Act of 2002 (BCRA), the Court recognized that speech not containing these magic words might still be the equivalent of express advocacy, but nevertheless reaffirmed the central rule that statutes regulating speech may not be vague.

As the Supreme Court said in *Buckley*, vague laws that regulate speech "put 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."[4]

The first portion of the proposed "support or oppose" definition in S.B. 289 defines such activity with the same precision employed by the Supreme Court in *Buckley*: it requires actual "express words, including but not limited to "vote", "oppose", "support", "elect", "defeat", or "reject."[5] The second portion of the definition proposed in S.B. 289 would greatly expand the definition. Thus, rather than clarifying the law, it would confuse speakers and spawn litigation about the proper scope of campaign finance regulation. Instead of ensuring that political speech is uniformly and constitutionally regulated, this addition will muddy the waters, replacing a crisp rule with a more amorphous standard. Moreover, by eliminating a bright-line test for regulated speech, it invites political gamesmanship and partisan polarization concerning messages that should be judged on their merits by voters, not by lawyers and public officials. This will inevitably require speakers to hire expert attorneys in this highly specialized area of law, or, for the smaller organizations that cannot afford such help, risk enforcement actions that could drive their voices from the public debate.

If the Legislature wishes to add a definition of "support or oppose," it should tread carefully and write as precise a provision as possible.

II. The legislation's "electioneering communication" definition is stunningly broad and highly susceptible to legal challenge.

The bill's over-inclusive definition of "electioneering communication" causes S.B. 289 to sweep far more broadly than is constitutionally appropriate. Section 2 defines an "electioneering communication" as "a communication made within 60 days of the initiation of voting in an election that does not support or oppose a candidate or ballot issue, that can be received by more than 100 recipients in the district voting on the candidate or ballot issue."[6]

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[1] 424 U.S. 1 (1976).
[2] *Id*. at 80 n. 108, incorporating by reference *id*. at 44 n. 52.
[3] 540 U.S. 93 (2003).
[4] *Buckley v. Valeo*, 424 U.S. 1, 43 (1976) (quoting *Thomas v. Collins*, 323 U.S. 516, 535 (1945)).
[5] Section 2, 13-1-101(47)(a).
[6] Section 2, 13-1-101(15)(a).

The legislation explicitly does not require that such a communication include an appeal to vote before it can be subject to regulation and disclosure rules. Electioneering communication provisions, such as those at the federal level, have been upheld in some circumstances, but generally only as applies to broadcast communications, such as television and radio ads. The *McConnell* ruling also upheld such a provision only after an enormous volume of fact finding by Congress.

This stunningly broad definition would appear to cover nonpartisan voter guides and listings of votes cast by lawmakers if distributed to the public by covered organizations during periods that would be regulated by the bill. This broad coverage will silence many speakers during the electioneering communication period and deprive voters of vitally important nonpartisan information.

Also, unlike the federal electioneering communications provisions, there is no objective way for a speaker to determine whether a communication "can be received by more than 100 recipients" in a district. The federal electioneering communications statute required the Federal Communications Commission to establish and maintain an online electioneering communications database,[7] so that speakers can know whether the communication can be heard by 50,000 or more persons in a state or district. This proposal provides no such directive to any state agency. This is to say nothing of the fact that 100 individuals is an extremely low threshold for subjecting a communication to the burdens of electioneering communication reporting.

One of the reasons why the federal electioneering communications statute has survived constitutional review is because it narrowly regulates a specific type of ad: broadcast communications. The same analysis would not necessarily extend to a statute that seeks to regulate communications in such a broad manner.

III. The electioneering communications exemption for rulings by the Commissioner of Political Practices implicitly acknowledges the considerable overbreadth posed by this proposed law.

Under S.B. 289 Section 2, 13-1-101(15)(b)(iii), an "[e]lectioneering communication…does not mean: a communication that the commissioner determines by rule is not an electioneering communication." This blanket grant of authority at least implicitly recognizes that the new rules governing electioneering communications proposed in this legislation impose a not-insignificant burden on speakers; otherwise, allowing the rules to be relaxed without legislative action would be unnecessary. Indeed, such preemptive recognition of the law's potential unintended consequences counsels in favor of a narrower law, rather than a provision for administrative authority to amend it. It is possible that the Montana Commissioner of Political Practices will feel that his hands are tied by the broad language in this bill, and not permit any additional substantive exemptions.

IV. In order to avoid a legal challenge, any disclosure requirements for "incidental committees" that make "electioneering communications" should respect longstanding Supreme Court First Amendment precedent.

[7] "The Electioneering Communications Database," Federal Communications Commission. Retrieved on March 17, 2015. Available at: http://apps.fcc.gov/ecd/ (February 28, 2014).

While the Supreme Court upheld certain disclosure in *Citizens United v. Federal Election Commission*,[8] it addressed only a narrow and far less burdensome form of disclosure. The Court merely upheld the disclosure of an electioneering communication report, which disclosed the *entity* making the expenditure and the purpose of the expenditure. Such a report only disclosed contributors giving over $1,000 *for the purpose of furthering the expenditure*.[9]

In contrasting the disclosure burdens dealt with by the Court in the 1986 case of *Massachusetts Citizens For Life, Inc. v. Federal Election Commission* ("*MCFL*"),[10] the *Citizens United* Court specifically held that the limited disclosure of an independent expenditure report is a "less restrictive alternative to more comprehensive regulations of speech."[11]

In *MCFL*, both the plurality and the concurrence were troubled by the burdens placed upon nonprofit corporations by certain disclosure requirements. 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.[12] Likewise, Justice O'Connor was concerned with the "organizational restraints," including "a more formalized organizational form" and a significant loss of funding availability.[13]

Accordingly, any disclosure requirements imposed on "incidental committees" that compel generalized donor disclosure would likely be unconstitutional. Conversely, language that only requires the disclosure of those contributions *specifically intended* for electioneering communications or independent expenditures would be constitutional, pursuant to a nearly forty-year-old unbroken chain of U.S. Supreme Court litigation.[14]

Such an earmarking provision would also remedy another potential problem with the bill – the fact that it could compel the generalized disclosure of donors to Section 501(c)(3) organizations engaged in legitimate nonpartisan voter information activity. Section 501(c)(3) organizations are prohibited under federal tax laws from engaging in *any* electoral advocacy, and as such, the state has no interest in the donors to such groups. But such groups are permitted to educate the public through neutral, nonpartisan voter guides and similar materials.

This is a reason why many states have enacted electioneering communications statutes that exempt neutral communications, or prevent § 501(c)(3) organizations from being regulated under such statutes.[15] Presently, the Center for Competitive Politics represents a § 501(c)(3) organization in a suit against Delaware's[16] electioneering communications regime – which compels generalized donor disclosure from organizations engaged in neutral, nonpartisan issue speech.

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[8] *Citizens United v. FEC*, 558 U.S. 310 (2010).
[9] 52 U.S.C. § 30104(f); *Citizens United*, 558 U.S. 366-67.
[10] *Massachusetts Citizens For Life, Inc. v. Federal Election Commission*, 479 U.S. 238 (1986).
[11] *Citizens United*, 130 S. Ct. at 915 (contrasting independent expenditure reports with the burdens discussed in *MCFL*).
[12] *MCFL*, 479 U.S. at 253 (Brennan, J., plurality opinion).
[13] *Id*. at 266 (O'Connor, J., concurring).
[14] *Buckley v. Valeo*, 424 U.S. 1, 80 (1976).
[15] *See, e.g.* Conn. Gen. Stat. § 9-601b(b)(13) (excluding "[a] lawful communication by any charitable organization which is a tax-exempt organization under Section 501(c)(3) of the Internal Revenue Code of 1986, or any subsequent corresponding internal revenue code of the United States"); 10 Ill. Comp. Stat. Ann. 5/9-1.14(b)(4) (excluding "[a] communication by an organization operating and remaining in good standing under Section 501(c)(3) of the Internal Revenue Code of 1986"); Iowa Code § 68A.401A (limiting reporting for communications merely mentioning a candidate to § 527 organizations).
[16] *See Delaware Strong Families v. Biden*, 13-01746 (D. Del. 2014).

V. Pending a rulemaking by the Montana Commissioner of Political Practices, the bill's proposed analogous treatment of "incidental committees" and "political committees" is inappropriate under *MCFL* given the clear distinction in purpose between the two entities.

S.B. 289 defines an "incidental committee" as "a political committee that is *not specifically organized or operating for the primary purpose* of supporting or opposing candidates or ballot issues but that may incidentally become a political committee by receiving a contribution or making an expenditure."[17] In contrast, S.B. 289 defines a "political committee" as "a combination of two or more individuals or a person other than an individual who receives a contribution or makes an expenditure: to support or oppose a candidate or a committee organized to support or oppose a candidate or a petition for nomination; to support or oppose a ballot issue or a committee organized to support or oppose a ballot issue; or to prepare or disseminate an election communication, an electioneering communication, or an independent expenditure."[18] The bill further notes that "[p]olitical committees include ballot issue committees, incidental committees, independent committees, and political party committees."[19]

As proposed in this bill, if an incidental committee – which *does not* have a primary purpose of supporting or opposing candidates (or ballot issues) – makes an expenditure of an amount subject to the Montana Commissioner of Political Practice's rulemaking authority, it becomes subjected to the same reporting requirements as a political committee – which *does* have a primary purpose of supporting or opposing candidates (or ballot issues). Essentially, the bill suggests that by spending a yet-to-be-determined amount, an incidental committee becomes a political committee, as both will be treated identically under the law. The mere fact that the legislation fails to specify a threshold on "incidental committee" expenditures that would trigger regulation under the law is an abdication of legislative responsibility and will leave organizations that may ultimately be forced by the state to register as "incidental committees" in the dark as to how this proposal will affect their activities.

Under current law, an "incidental committee" must simply report contributor information *only* for the earmarked contributions its received over $35[20] while a "political committee" must report *all* individual contributions its received over $35 – regardless of whether or not the contributions were earmarked – as well as *all* contributions of any amount from a PAC, political party, incidental committee, and other political committee.[21]

By blurring the distinction between the two types of committees, which are organized with entirely different purposes, the state runs afoul of constitutional requirements to adhere to a major purpose test for non-political committee reporting. At best, the bill is treating an "incidental committee" as a "political committee" for registration and reporting matters without clarifying a distinction between the two entities, and, at worst, S.B. 289 treats the two distinct entities identically – ignorant of the fact that each is organized with very different purposes; political committees to support or oppose candidates (or ballot issues), incidental committees to not.

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[17] Section 2, 13-1-101(22)(a).
[18] Section 2, 13-101(30)(a)(i)-(iii).
[19] Section 2, 13-1-101(30)(b).
[20] "Accounting and Reporting Manual for Political Committees," Montana Commissioner of Political Practices. Available at: http://politicalpractices.mt.gov/content/5campaignfinance/2014UpdatedPinkBook (December 2013), p. 31.
[21] *Ibid.*, at p. 33-34.

VI. S.B. 289 delegates significant rulemaking power to the Montana Commissioner of Political Practices to determine the primary purpose of "incidental committees," thereby subjecting citizen groups in Big Sky Country to the whims of the Commissioner, creating what amounts to a "Political Speech Czar."

S.B. 289 bestows a substantial amount of regulatory power upon the unelected Montana Commissioner of Political Practices. The powers granted to this Commissioner and the nature of the powers may chill speech and are ripe for abuse, as there appears to be little to stop the Commissioner from acting on a personal whim or for political reasons.

In particular, this legislation confers upon the Commissioner the power to adopt rules, "includ[ing] the criteria and process used to determine the primary purpose of an incidental committee; and define what constitutes de minimis acts, contributions, or expenditures."[22] At a minimum, something as serious as the power to determine what constitutes the primary purpose of an "incidental committee," which, by definition, "is not specifically organized or operating for the primary purpose of supporting or opposing candidates or ballot issues"[23] should be undertaken by a bipartisan Commission or with judicial review, and not by an unelected Commissioner acting alone.

Worse still, S.B. 289 makes no mention of the amount of notice the Commissioner must give on such a rulemaking nor provides any security that nonprofits likely to be regulated by the rulemaking will have the ability to weigh in on the proposal via a public comment period. The fact that the regulated community and interested parties may lack an ability to comment on the Commissioner's proposal should give great pause to those who favor the rule of law.

Pending the Commissioner's rulemaking, S.B. 289 could grossly expand the reporting requirements of incidental committees by subjecting them to the reporting requirements of political committees. Depending on the nature of the Commissioner's ruling, any analogous and burdensome reporting required of "incidental committees" would likely not be sufficient to withstand judicial scrutiny according to the constitutional concerns of the Court under *MCFL*.

The duty to determine the method for calculating the primary purpose of an "incidental committee" is an extraordinary power that will have a tremendous impact on many nonprofit groups advocating on behalf of issues of public importance across the state. Lawmakers should be wary of placing this power into the hands of a singular unelected individual without any guidance from the Legislature or any ability by those regulated entities to offer their recommendations to the Commissioner.

VII. 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."

In considering this bill, it's worth noting that disclosure laws implicate both citizen privacy rights and touch on Supreme Court precedent. Indeed, 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

[22] Section 6, 13-37-114(2)(a)-(b).
[23] Section 2, 13-1-101(22)(a).

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.[24] 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."[25]

Much as the Supreme Court sought to protect African Americans in the Jim Crow South and those citizens who financially supported the cause of civil rights from retribution, donors and members of groups supporting unpopular causes still need protection today. It is hardly impossible to imagine a scenario in 2016 in which donors to controversial causes that make independent expenditures – for or against same-sex marriage; for or against abortion rights; or even groups associated with others who have been publicly vilified, such as the Koch family or George Soros, might be subjected to similar threats.

This may seem unrealistic, but it illustrates the fundamental problem with the approach taken. The assumption seems to be that citizens are dangerous to government, and the government must be protected from them. Little thought is given to protecting the citizens from government, as is required by the First Amendment. Worse still is that 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 then immediately be used by non-governmental entities and individuals to harass, threaten, or financially 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 not to organizations engaging in issue advocacy about a particular topic relevant to the voters of Montana.

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, who receive their information because of the forced disclosure. In short, mandatory disclosure of political activity requires a strong justification and must be carefully tailored to address issues of public corruption and the provision of only such information as is particularly important to voters.

VIII. Lastly, the two-business day reporting requirement for "incidental committees" receiving contributions over $500 near an election will severely burden less sophisticated speakers, and will increase the likelihood of inaccurate disclosure reports.

The proposal requires less-formalized organizations, which receive a contribution of $500 or more, to fill out reports within two business days of triggering the statute.[26] For less sophisticated speakers, who are not used to involving themselves in politics – and therefore have not registered with the Montana Commissioner of Political Practices, nor formed a PAC – aggregating records and filing for the first time will inevitably be a difficult endeavor, especially if the organization wasn't expecting to receive any such contribution. Lengthening the reporting time to involve less immediate disclosure will shield these less sophisticated actors from inadvertently filing incorrect reports –

[24] *NAACP v. Alabama ex rel. Patterson*, 357 U.S. 449 (1958).
[25] *NAACP*, 357 U.S. at 462.
[26] Section 11, 13-37-226(5)(b).

likely in an endeavor to comply with the burdensome deadline – or from incurring fines for late filing.

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Thank you for allowing me to submit comments on Senate Bill 289. I hope you 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
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