CENTER *for* COMPETITIVE POLITICS

Congress shall make no law...

WWW.CAMPAIGNFREEDOM.ORG

May 11, 2015

The Honorable Joe Straus
Room 2W.13, Capitol
P.O. Box 2910
Austin, TX 78768

The Honorable Byron Cook
Room GN.11, Capitol
P.O. Box 2910
Austin, TX 78768

Re: Constitutional and Practical Issues with House Bill 37

Dear Speaker Straus, Representative Cook, and members of the House of Representatives:

The Center for Competitive Politics respectfully submits the following comments on House Bill 37, as substituted by the House State Affairs Committee. This draconian measure would require a "person or group" making aggregate undefined political expenditures exceeding $25,000 in a calendar year to file numerous reports to the government publically identifying a group's supporters, even if a supporter has no knowledge, and may not agree with, some or all of the communications that trigger the reports. We strongly believe such requirements would violate the First Amendment to the United States Constitution, as interpreted by the Supreme Court.

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 and Delaware. We are also involved in litigation against the state of California.

CCP writes to emphasize the high likelihood that H.B. 37 – if enacted – will be challenged in court, and likely invalidated as unconstitutional. Defending the law will cost the state a great deal of money. Further, it will distract at least two divisions of the Attorney General's Office – the General Litigation Division and the Office of Solicitor General – from meritorious legal work. Moreover, federal law provides for legal fees when plaintiffs must sue state governments to vindicate their constitutional rights. Such awards often amount to several hundred thousand dollars.

Thus, H.B. 37, as substituted by the House State Affairs Committee, merits this body's serious attention before it becomes law. In particular, the measure suffers from problems similar

to those that plagued 2013's S.B. 346, which were criticized in an editorial in *The Wall Street Journal*,[1] and which Governor Perry vetoed (in large part due to its unconstitutional intrusions upon Texans' fundamental First Amendment freedoms).[2]

I. H.B. 37 requires detailed reports to be filed with the government from groups that lack a major purpose of supporting or opposing the election of candidates. This violates the First Amendment, as articulated by the Supreme Court in *Buckley v. Valeo*.

H.B. 37 would force nonprofit groups to bear similar burdens on First Amendment activity as political committees. This is problematic because, for nearly forty years, the Supreme Court has made clear that an organization must have a "major" or "primary" purpose of influencing elections before it may be regulated as a political committee. This is because the organizational, registration, reporting, and disclosure requirements imposed upon political committees burden the expressive and associational activity the First Amendment protects.

The term "major purpose" is born of the Supreme Court's 1976 decision in *Buckley v. Valeo*, an omnibus challenge to the Federal Election Campaign Act (FECA). When *Buckley* was decided, FECA required disclosure from "political committees," which the law defined only as organizations making "contributions" or "expenditures" over a certain threshold amount.[3] Concerned that this definition "could be interpreted to reach groups engaged purely in issue discussion," the Court promulgated the "major purpose" test to distinguish between entities engaged in sufficient activity to justify imposing burdensome political committee requirements.[4]

The test is straightforward: the government may compel generalized contributor disclosure from "organizations that are under the control of a candidate or the major purpose of which is the nomination or election of a candidate."[5] This is permissible *only* because such an organization's expenditures "are, by definition, campaign related."[6] Thus, it is safe to assume that donors to these entities wish to further the organization's purpose: influencing a campaign. When the organization lacks such a purpose, however, that assumption no longer holds, save for instances in which a contribution to an organization is earmarked for the purposes of political activity.

---

[1] Editorial, "Texas Targets Conservatives," *The Wall Street Journal*. Retrieved on May 11, 2015. Available at: http://www.wsj.com/articles/SB10001424127887324767004578489183521250950 (May 21, 2013).

[2] Governor Rick Perry, "Governor's Veto Proclamation, S.B. 346," Office of Governor Rick Perry. Retrieved on May 11, 2015. Available at: http://www.lrl.state.tx.us/scanned/vetoes/83/sb346.pdf#navpanes=0 (May 25, 2013). ("Freedom of association and freedom of speech are two of our most important rights enshrined in the Constitution. My fear is that Senate Bill 346 would have a chilling effect on both of those rights in our democratic political process. While regulation is necessary in the administration of Texas political finance laws, no regulation is tolerable that puts anyone's participation at risk or that can be used by any government, organization or individual to intimidate those who choose to participate in our process through financial means. At a time when our federal government is assaulting the rights of Americans by using the tools of government to squelch dissent it is unconscionable to expose more Texans to the risk of such harassment, regardless of political, organizational or party affiliation. I therefore veto Senate Bill 346.")

[3] *Buckley v. Valeo*, 424 U.S. 1 at 79 (1976).

[4] *Id.*

[5] *Id.*

[6] *Id.*

This threshold for contributor disclosure has been widely adopted and upheld by state and federal courts, which have reiterated *Buckley*'s holding that "a political committee may 'only encompass organizations that are *under the control of a candidate or the major purpose of which is the nomination or election of a candidate*.'"[7] Indeed, "disclosure laws may not impose overly burdensome administrative costs and organizational requirements for groups…'whose major purpose is not campaign advocacy, but who occasionally make independent expenditures.'"[8]

Consistent with this binding Supreme Court precedent, multiple federal courts of appeals have adopted this approach in considering the constitutionality of various political committee statutes and regulations. In *New Mexico Youth Organized v. Herrera* (*NMYO*),[9] for example, the Tenth Circuit held that New Mexico's definition of "political committee" had to satisfy "the major purpose test."[10] The facts were not atypical: NMYO, a nonprofit, worked with another nonprofit, Southwest Organizing Project, to disseminate mailings. Both nonprofits had a history of public education on issues relating to youth, equality, and government transparency issues.[11] The mailings suggested that certain legislators were beholden to health insurance interests, noting that those legislators' donors included health insurance companies.[12] Both nonprofit organizations spent a relatively small portion of their respective budgets on the mailings: $15,000 out of a $225,000 budget for NMYO, and $6,000 out of a $1.1 million budget for Southwest Organizing Project.[13]

The Tenth Circuit, using *Buckley* as a guide, held that the state's political committee definition could "only encompass organizations that are under the control of a candidate or *the major purpose of which* is the nomination or election of a candidate."[14] Because neither NMYO nor Southwest Organizing Project spent "a *preponderance* of its expenditures on express advocacy or contributions to candidates,"[15] neither could be regulated as a political committee. This "preponderance" standard is, at least in some cases, far higher than the arbitrary $25,000 threshold in H.B. 37. Thus, at least in some cases, this legislation is sure to operate in violation of the First Amendment.

Similarly, in 2012, the *en banc* Eighth Circuit struck down a Minnesota law that required independent expenditure funds to have "virtually identical regulatory burdens" to political

---

[7] *N.M. Youth Organized v. Herrera*, 611 F.3d 669, 677 (10th Cir. 2010) (quoting *Buckley* at 79) (emphasis added); *EMILY's List v. FEC*, 581 F.3d 1, 16 n.15 (D.C. Cir. 2009) (noting in a First Amendment challenge to FEC regulations governing how nonprofits raise and spend money for political speech that such "regulations apply only to those non-profits that must register with the FEC as political committees – namely, groups that receive or spend more than $1000 annually for the purpose of influencing a federal election and whose 'major purpose' involves federal elections.") (citing *Buckley* at 79).

[8] *Cal Pro-Life Council, Inc., v. Getman*, 328 F. 3d 1088, 1104 n. 21 (9th Cir. 2003) (quoting *FEC v. Mass. Citizens for Life, Inc.*, 479 U.S. 238, 251 (1986)).

[9] 611 F.3d 669.

[10] *Id*. at 677.

[11] *Id*. at 671.

[12] *Id*. at 671-72.

[13] This amounts to approximately 6.7% of NMYO's budget and 0.5% of Southwest Organizing Project's budget.

[14] *Id.* at 677 (quoting *Buckley*, 424 U.S. at 79) (emphasis added).

[15] Furthermore, the statute at issue in *NMYO* provided that $500 of expenditures a year is "sufficient" to render an organization's "major purpose" political. 611 F.3d at 678 (citing N.M. STAT. ANN. § 1-19-26(L)). Notably, the Tenth Circuit also held that a monetary trigger was not constitutionally sufficient as a stand-in for "the major purpose" test. *Colorado Right to Life Committee, Inc. v. Coffman*, 498 F.3d 1137, 1154 (10th Cir. 2007). The *NMYO* Court applied *Colorado Right to Life Committee* and held the $500 trigger unconstitutional. *Id.* at 679. Thus, there are now two Tenth Circuit rulings rejecting a monetary trigger as a stand-in for a "major purpose" finding.

committees.[16] This included filing periodic reports, even if the fund no longer engaged in political activity. Ultimately, *Swanson* held that only political organizations could constitutionally be subject to such a burden – not organizations without such a major purpose.[17]

Even the most lax reading of the major purpose test imposes a far higher bar than H.B. 37. In *Human Life of Washington v. Brumsickle*, the Ninth Circuit considered the "major purpose test" in the context of an organization opposed to euthanasia.[18] Under *Brumsickle*, finding a "primary purpose" of political advocacy was sufficient to trigger political committee status. But this was precisely *because* the statute already limited political committee regulation to groups who made political activity a priority, and a significant portion of their overall activity:

> The Disclosure Law does not extend to all groups with "a purpose" of political advocacy, but instead is tailored to reach only those groups with a "primary" purpose of political activity. This limitation ensures that the electorate has information about groups that make political advocacy a priority, without sweeping into its purview groups that only incidentally engage in such advocacy.[19]

Nevertheless, H.B. 37 treats any organization that makes aggregate political expenditures exceeding $25,000 in a year as a general-purpose political committee, regardless of the character and scope of its other activities. This blurs the distinction between groups that exist for electing and defeating candidates, and groups that do not, but happen to engage in some political advocacy for or against candidates. Such a distinction is a bedrock principle of First Amendment law, and blurring it places H.B. 37 firmly on the unconstitutional side of this analysis.

II. The "contribution in connection with campaign activity" trigger is unconstitutionally vague, overbroad, or both.

In addition to the "major purpose" issues just described, H.B. 37 is of further concern given its contemplation of what it means to make a "contribution in connection with campaign activity." In the bill's substituted form, it presumes that a non-political committee accepts "contributions in connection with campaign activity" if "a donor to a person or group that, at the time that the donor makes the contribution, the donor knows or *has reason to know* [the contribution] *may be used* to make a political contribution or political expenditure or may be commingled with other funds used to make a political contribution or political expenditure."[20]

This provision is unconstitutionally vague, overbroad, or both – and makes little sense.

First, according to the Texas Election Code, "'[p]olitical expenditure' means a campaign expenditure or an officeholder expenditure."[21] The most relevant phrase in this definition is

[16] *Minnesota Citizens Concerned for Life, Inc. v. Swanson*, 692 F.3d 864, 872 (8th Cir. 2012).
[17] *Id*.
[18] 624 F.3d 990, 995 (9th Cir. 2010).
[19] 624 F.3d at 1011 (quoting *North Carolina Right to Life v. Leake*, 525 F.3d at 328 (Michael, J., dissenting) ("The key word providing guidance to both speakers and regulators in 'the major purpose' test or 'a major purpose' test is the word 'major,' not the article before it.") (emphasis added)).
[20] Emphasis added.
[21] TEX. ELEC. CODE § 251.001(10).

"campaign expenditure." Under the Code, "'[c]ampaign expenditure' means an expenditure made by any person in connection with a campaign for an elective office or on a measure. Whether an expenditure is made before, during, or after an election does not affect its status as a campaign expenditure."[22]

It is not at all clear what activities the phrase "in connection with a campaign" would encompass. To eliminate unconstitutional vagueness, the Texas Election Code should clearly define what activities are covered, such as contributions to candidates or parties, or express advocacy in support of or opposition to any candidate. Indeed, *Buckley* itself turned upon vagueness in the phrase "relative to a clearly identified candidate" to draw the distinction between "express advocacy" and speech that could not trigger PAC-style burdens.[23]

Second, since the Supreme Court's ruling in *Citizens United v. FEC*, organizations are entitled to speak about candidates.[24] Thus, any contributor to any of these entities, arguably, "has reason to know" that their donations to the recipient organization "may be used" in this manner. Moreover, what might give a potential donor a "reason to know" that a donation might be used for a political expenditure? The vagueness of this provision, too, has serious First Amendment implications.

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.[25]

H.B. 37's attempt to impose a sort of "reverse earmarking" limitation upon this trigger fails to pull the legislation within the realm of constitutionality. That is, the bill currently provides that "[a] donor who signs a statement indicating that the donor's contribution to the person or group may not be used to make a political contribution or political expenditure does not have reason to know that the donor's contribution may be used to make a political contribution or political expenditure." But the Constitution does not require donors to take affirmative action to avoid having their personal information disclosed. Under *Buckley*, there is a presumption against donor disclosure *unless* a contributor gives to a group with the *major purpose* of making political contributions or expenditures.[26] The only exception to this rule is for

[22] TEX. ELEC. CODE § 251.001(7).
[23] 424 U.S. at 43 ("The key operative language of the provision limits 'any expenditure…relative to a clearly identified candidate.' Although 'expenditure,' 'clearly identified,' and 'candidate' are defined in the Act, there is no definition clarifying what expenditures are 'relative to' a candidate. The use of so indefinite a phrase as 'relative to' a candidate fails to clearly mark the boundary between permissible and impermissible speech.")
[24] *See, e.g., Citizens United v. FEC*, 558 U.S. 310 (2010).
[25] 424 U.S. at 42-43.
[26] 424 U.S. at 80.

contributors who specifically earmark their contributions for these purposes. To be constitutional, H.B. 37 would have to possess at least such a safeguard. It does not.

Indeed, in the context of an organization *without* "the major purpose" of supporting or opposing a candidate or measure, the *Buckley* Court emphasized that "when the maker of the expenditure is…an individual other than a candidate or a group other than a 'political committee' – the relation of the information sought to the purposes of the Act may be too remote."[27] To ensure that reporting requirements applicable to non-major purpose organizations were "not impermissibly broad," the Court "construe[d] 'expenditure' for purposes of that section…to reach only funds used for communications that expressly advocate the election or defeat of a clearly identified candidate."[28]

Thus, absent a finding of major purpose, the Court has deemed donor disclosure constitutional *only* for contributions earmarked for speech specifically supporting the election or defeat of candidates. In other words, compulsory, generalized contributor disclosure, as H.B. 37 would require, can only be required of groups insofar as they exist to advocate a particular electoral result. In such cases, donors may be presumed to *know* and intend that their money will be used to unambiguously call for a particular result in an election. Alternatively, if a contributor earmarks his or her donation for such purposes, then disclosure of that particular contributor may be required. The assumption is not, as H.B. 37 would have it, that *any* contributor to any organization "has reason to know" that his donation may be used for political purposes, or commingled with funds used for that purpose.

III. The proposed reporting thresholds for non-political committees would result in "junk disclosure" by associating some donors with a communication they have no knowledge of and may not even support.

In addition to the constitutional and practical issues just discussed, the proposed reporting regime under H.B. 37 is ill-advised, as it will create confusion among voters.

When an individual donates to a political committee or party, she knows the funds will be used to try to win an election campaign. The same is not true of donors to 501(c) membership organizations, trade associations, and other groups that may be subject to burdensome government regulation under H.B. 37. As a result, if a group decides to advocate the election or defeat of candidates as a minority of its multiple activities, many of its donors could potentially be subject to public disclosure, regardless of whether their donations were earmarked or intended for this purpose.

---

[27] 424 U.S. at 79.

[28] *Id.* at 80. What it means to "expressly advocate" has been the subject of some litigation since *Buckley*. *Compare id.* at n.52 (restricting the disclosure law's application to "communications containing express words of advocacy of election or defeat, such as 'vote for,' 'elect,' 'support,' 'cast your ballot for,' 'Smith for Congress,' 'vote against,' 'defeat,' 'reject.'") *with McConnell v. FEC*, 540 U.S. 93, 193 (2003) ("Nor are we persuaded, independent of our precedents, that the First Amendment erects a rigid barrier between express advocacy and so-called issue advocacy. That notion cannot be squared with our longstanding recognition that the presence or absence of magic words cannot meaningfully distinguish electioneering speech from a true issue ad.") This distinction, perhaps happily, is irrelevant for purposes of this analysis. That is, regardless of what the precise trigger for regulable political advocacy is, there remains a presumption against disclosure unless a contributor has specifically indicated an intent that their contribution be used for electoral advocacy. It is *not* subject do dispute that a contributor may only do so by contributing to a major purpose organization, or by earmarking their funds for electoral advocacy – whatever its precise contours.

People give to associations and nonprofits not necessarily because they agree with everything those organizations do, or share every position those organizations take, but because on balance they think that a particular group provides a valuable service or represents an important viewpoint. To publicly associate contributing individuals with expenditures of which they have no advance knowledge (and may even oppose) is both unfair to donors and misleading to the public – it is "junk disclosure."

IV. Disclosure can result in the harassment of individuals by their political opponents.

The desire to preserve privacy stems from an awareness that threats and intimidation of individuals because of their political views can pose a serious threat to First Amendment freedoms. Much of the Supreme Court's concern over compulsory disclosure lies in its consideration of this potential to chill individuals' association with other like-minded citizens. This is an outgrowth of a Civil Rights Era case, *NAACP v. Alabama*,[29] where the Court recognized that the government may not compel disclosure of a private organization's general membership or donor list. In recognizing the sanctity of the freedom to speak and associate privately, the Court noted, "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."[30]

Similarly, it is easy to imagine a scenario in which a group takes a controversial stand – for or against same-sex marriage; for or against legal abortion; for or against certain immigration measures; for or against animal or environmental protection laws. Donors may not agree with every stance, but may wish to support the organization's mission as a whole. Nevertheless, they may decline to do so for fear of being linked with one specific stance they do not agree with. Donors might also be wary of associating with groups that have been linked with persons who have been publicly vilified for the causes and ideas they support, such as Charles Koch or George Soros.

Recently, some left-of-center organizations that oppose speech by business groups have been seeking such government reporting requirements in order to organize boycotts against businesses that support trade associations. Requirements such as those included in this legislation are likely to be used by anti-business groups to chill funding to trade associations.

CCP believes that this harassment problem is most effectively addressed by limiting opportunities for harassment. This is best achieved by crafting reporting requirements for those who contribute large sums to *political candidates*, to those who *earmark* donations for independent expenditures, and to those who give to organizations whose *major purpose* is political advocacy – and not those working primarily on advocacy concerning a cause or a trade.

* * *

[29] 357 U.S. 449 (1957).
[30] 357 U.S. at 462.

As written, H.B. 37 is constitutionally suspect because it ignores decades of jurisprudence regarding the need for a "major purpose" test for organizational registration and reporting as a political committee, and employs a vague definition of "contribution in connection with campaign activity." Furthermore, H.B. 37 would make disclosure less meaningful overall by broadly associating contributors with communications they may not support, while simultaneously subjecting many of these donors to potential harassment or financial harm.

The Center thanks members of the House for considering the foregoing comments, and would be happy to assist in modifying this legislation to comport with the free speech guarantees of the Constitution. Should you have any further questions regarding this legislation 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