CENTER *for* COMPETITIVE POLITICS

Congress shall make no law...

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March 29, 2016

The Honorable Michael J. McCaffrey
Rhode Island State Senate
82 Smith Street
Providence, RI 02903

The Honorable Paul V. Jabour
Rhode Island State Senate
82 Smith Street
Providence, RI 02903

Re: Significant Constitutional and Practical Issues with Senate Bill 2369, to amend Section 17-25-7 of the General Laws

Dear Chairperson McCaffrey, Vice Chairperson Jabour, and members of the Senate Judiciary Committee:

On behalf of the Center for Competitive Politics,[1] I respectfully submit the following comments on constitutional and practical issues with Senate Bill 2369 and existing Section 17-25-7 of the Rhode Island General Laws. This legislation exacerbates significant issues within existing law and turns Rhode Island's long and storied history of direct democracy and citizen advocacy on its head. Far from promoting these values, this bill and the existing statute actively discourage citizen groups and civically-engaged individuals in Rhode Island from participating in the state's proud tradition of financial town meetings and financial town referenda.

Section 17-25-7 already chills participation in Rhode Island's financial town meetings by subjecting all "entities" to the same regulatory burdens and reporting requirements as political groups. To make matters worse, S. 2369 aggravates this already constitutionally-suspect approach by requiring such reporting from private individuals and by making explicit that such reporting is required of even small nonprofits – for whom such burdens have outsized effect. To this end, S. 2369 would chill protected speech by mandating the disclosure of donors to individuals, charities, and other organizations who desire to engage in basic issue advocacy relating to issues relevant to financial town meetings and referenda. Such speech chilling laws are unconstitutional.

Section 17-25-7 imposes burdensome reporting requirements on legally non-political organizations in the same manner as candidate campaigns. Specifically, this bill makes explicit that even 501(c)(3) charitable organizations must publicly report the names, home addresses, and employers of donors who give as little as $9 a month, even though these groups, by their very nature,

[1] 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 Delaware, Texas, and Utah. We are also involved in litigation against the state of California.

are forbidden from engaging in political activity. The measure further imposes those same burdens on individuals participating in town meetings, activity that is generally considered praiseworthy.

While Section 17-25-7 needs to be revised, this bill goes in the wrong direction. To comply with the First Amendment and to match Rhode Island's proud tradition of participatory democracy, the bill should be amended to change existing law to require disclosure only of donations in excess of $1,000; it should be explicit that reports require the name, address, and place of employment only of those donors whose contributions are in furtherance of the nomination, election, or defeat of a candidate or in furtherance of the approval or rejection of a question put to voters at a town meeting; and it should revise Section 17-25-7 so that all other requirements affecting local questions match statewide law.

If this language of S. 2369 becomes law, there is a high likelihood that it will be found unconstitutional if challenged in court. This is especially true given the constitutional infirmities present in the existing statute that this bill exacerbates. 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 frequently costly – often well over one hundred thousand dollars.

I outline the aforementioned issues surrounding S. 2369 and Section 17-25-7 in greater detail below.

I. S. 2369 runs contrary to *Citizens United* and other federal jurisprudence.

While the Supreme Court upheld certain disclosure in *Citizens United v. Federal Election Commission*,[2] it addressed only a narrow and far less burdensome form of disclosure than that contemplated by Section 17-25-7 and S. 2369. In that case, the Court upheld a law that required a one-time report disclosing only those who had given more than $1,000 *for the purpose of furthering* the electioneering communication triggering the disclosure.[3] The U.S. Court of Appeals for the D.C. Circuit recently emphasized the importance of this earmarking limitation, stating that its absence would raise "important constitutional questions."[4]

In *Citizens United*, the Supreme Court contrasted the limited disclosure of an independent expenditure report, which it described as a "less restrictive alternative to more comprehensive regulations of speech," with the burdens of political action committee ("PAC") style reporting – burdens similar to those already required by Section 17-25-7 and expanded by S. 2369.[5]

In *Massachusetts Citizens For Life, Inc. v. Federal Election Commission* ("*MCFL*"),[6] both the plurality and the concurrence were troubled by the PAC-style disclosure burdens placed upon nonprofit corporations. The plurality was concerned with the burdens due to detailed record keeping and frequent reporting.[7] Likewise, Justice O'Connor was concerned with "organizational restraints," including "a more formalized organizational form" and the loss of funding availability.[8]

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[2] *Citizens United v. FEC*, 558 U.S. 310 (2010).
[3] 72 Fed. Reg. 72899, 72911 (Dec. 26, 2007); 52 U.S.C. § 30104(f); *Citizens United*, 558 U.S. 366-67.
[4] *Van Hollen v. Federal Election Commission*, 2016 U.S. App. LEXIS 1005, at *37 (D.C. Cir. Jan. 21, 2016).
[5] *Citizens United*, 130 S. Ct. at 915 (contrasting independent expenditure reports with the burdens discussed in *MCFL*).
[6] *Massachusetts Citizens For Life, Inc. v. Federal Election Commission*, 479 U.S. 238 (1986).
[7] *MCFL*, 479 U.S. at 253 (Brennan, J., plurality opinion).
[8] *Id.* at 266 (O'Connor, J., concurring).

Section 17-25-7, especially as it would be amended by S. 2369, raises the very concerns addressed by the Supreme Court in *MCFL*. It mandates detailed record keeping and requires many groups to collect and report information that is commonly collected by political parties and candidates in an election, but not by either nonprofit organizations or individuals speaking incidentally – not as their primary purpose or career[9] – on topics before voters. The law, as amended by S. 2369, requires that 501(c)(3) organizations and individuals nonsensically appoint "campaign treasurer[s]," as it is "campaign treasurer[s]" who must file the disclosure reports required of "any person or entity."

Moreover, the law also affects fundraising. Like a Colorado law struck down by the U.S. Court of Appeals for the Tenth Circuit earlier this month, Section 17-25-7 would require that individuals and nonprofits expose their friends' and supporters' families and careers to attack by disclosing their home addresses and places of employment.[10] Thus, as the Tenth Circuit stated, "We would expect some prospective contributors to balk at producing their addresses or employment information."[11] Charities could further expect to lose donations because of donors' religious beliefs requiring them to do good in secret, a position that is generally admired. Thus, as this law is enforced, nonprofits – including churches and charities – should expect to lose critical donations over $100,[12] as well as be compelled to implement tedious procedures to reassure other donors that the group will protect their identities from falling into the legal snare set by this legislation.

In making explicit that Section 17-25-7's reporting requirements on "any entity" apply to nonprofits, S. 2369 proceeds in the wrong direction. Both the United States Congress and the courts have recognized that nonprofits' voter education efforts should be encouraged, and even "subsidize[d]. . . to promote the public welfare."[13] Nonprofits are explicitly allowed to engage in voter education efforts not related to candidate campaigns, such as those at issue before town financial meetings.[14] Moreover, the Federal Election Commission, in its efforts to regulate campaign disclosure, has recognized the importance of exempting most nonprofit activity to avoid "discouraging such charitable organizations from participating in what the public considers highly desirable and beneficial activity, simply to foreclose a theoretical threat [from activity that] *such organizations, by their very nature, do not do*."[15]

In *Citizens United*, the Chief Justice emphasized that the First Amendment does not protect only "the individual on a soapbox and the lonely pamphleteer," but it *clearly* protects such individuals – who can be easily analogized to individuals and small groups attending a financial town meeting. Nor does the First Amendment end there: its protection extends beyond individuals to organizations.[16] Senate bill 2369 would strip even that most basic of First Amendment freedoms, yoking single

[9] *See, e.g.*, *New Mexico Youth Organized v. Herrera*, 611 F.3d 669, 677 (10th Cir. 2010) (restricting PAC-style regulations to those entities that have as their primary purpose the election of a candidate).
[10] *Coal. for Secular Gov't v. Williams*, No. 14-1469, 2016 U.S. App. LEXIS 3949, at *7, 8 (10th Cir. Mar. 2, 2016).
[11] *Id*. at *30.
[12] Donors giving below this threshold in the aggregate in a calendar year need not be reported under both Section 17-25-7 and S. 2369.
[13] *Regan v. Taxation With Representation*, 461 U.S. 540, 544 (1983); I.R.S. Rev. Rules 78-248, 80-282.
[14] *See* IRS Pub. No. 4221-NC, Compliance Guide for Tax Exempt Organizations (2014) at 6; IRS Pub. No. 4221-PC, Compliance Guide for 501(c)(3) Public Charities (2014) at 5.
[15] 67 Fed. Reg. 65190, 65200 (Oct. 23, 2002) (emphasis added). This language was later overturned on administrative law grounds, as the Commission failed to develop an adequate administrative record. But the statement remains legally correct.
[16] *Citizens United*, 558 U.S. at 373 (Roberts, C.J., concurring); *see also McIntyre v. Ohio Elections Comm'n,* 514 U.S. 334, 337 (1995) (invalidating state statute compelling disclosure for individual distributing leaflets at a public meeting).

individuals with the type of disclosure requirements that courts have held too burdensome even for some groups, which can spread the burdens over multiple people.[17]

Moreover, in the town meetings regulated here, people often know one another, if not everything about one another's lives. More than most other campaign regulation laws, the disclosure will add little or nothing to the electorate's knowledge about who or what is supporting or opposing the issue before the town. Thus, the government's informational interest necessary to support a violation of First Amendment rights is "minimal,"[18] if not non-existent. Thus, when such a minimal interest is balanced against the substantial burden of the law, as in cases like *Sampson v. Buescher* and *Coalition for Secular Government v. Williams*, this law cannot pass First Amendment exacting scrutiny.

Rather, courts will encounter a law that forces individuals and nonprofits to either form separate PACs, face extensive regulatory costs and the loss of donors necessary to conduct their mission and exercise their rights, or avoid any speech on any issues before voters. As the Supreme Court noted in *MCFL*, these sorts of "incentives" serve to "necessarily produce a result which the State [cannot] command directly. It only result[s] in a deterrence of speech which the Constitution ma[de] free."[19]

II. The type of disclosure mandated by organizations required to report under S. 2369 could deter individuals from contributing to organizations by impinging on their right to freedom of association.

S. 2369 requires any "entity" that advocates for or against any question presented to voters at financial town meetings or referendums to submit detailed reports equivalent to those required by political candidates. "Entity" is expansively defined in the bill to include, "any political action committee, political party committee, authorized campaign committee of a candidate or officer holder, corporation, whether for profit, not-for-profit, or exempt nonprofit pursuant to 26 U.S.C.§501(c)(3) of the Internal Revenue Code, domestic corporation or foreign corporation, as defined in §7-1.2-106, financial institution, cooperative, association, receivership, partnership, committee, union, charity, trust, holding company, firm, joint stock company, public utility, sole proprietorship, limited partnership, or any other entity recognized by the laws of the United States and/or the state of Rhode Island."[20] Such "entities" would be required to file intricate reports *every seven days*, detailing the name, address, and place of employment of any individual that donated more than $100 in the last calendar year to the "entity" for the purpose of furthering the approval or rejection of a particular question proposed at a financial town meeting or referendum.

The practical effect of this law will chill political speech and participation of nonprofits and charities in three ways:

1) By lumping together large organizations with infrastructure to deal with disclosure requirements (namely candidate committees) with small organizations with no such infrastructure – most notably 501(c)(3) charities who have no knowledge or expertise with regard to disclosure laws – S. 2369 discourages these small groups from engaging in basic

[17] *See, e.g., Coal. for Secular Gov't*, 2016 U.S. App. LEXIS 3949, at *25; *Sampson v. Buescher*, 625 F.3d 1247, 1259 (10th Cir. Colo. 2010) (noting "substantial" burdens).
[18] *Sampson*, 625 F.3d at 1260.
[19] *MCFL*, 479 U.S. at 256 (plurality opinion).
[20] Rhode Island Senate, S. 2369 (2016), p. 2, Lines 7-14.

issue speech. For example, imagine a 501(c)(3) charity, which aids the homeless, that normally engages in no political activity, but wants to advocate one time for a particular local program that uses town resources to help feed the homeless. Under S. 2369, that organization likely would not want to deal with the headache that comes with learning and complying with formal political disclosure reports. In such an instance, a valuable voice will not be heard by the community.

2) By requiring detailed disclosure reports with an unprecedented frequency, even for express political advocacy (that is, every seven days), small and inexperienced organizations are even less likely to participate in basic issue speech. Charities, in particular, do not have the complicated record keeping infrastructure that is standard in political campaigns, so untold hours would be required each week to meet the burdens imposed by S. 2369.

3) Finally, by mandating disclosure of donors at such a low threshold, charities and nonprofits would be chilled from speaking for fear of losing donors who wish to remain private. Donors elect to give to charities privately for any number of legitimate reasons, including personal religious convictions. Forcing charities to choose between respecting the rights of donors to give privately and engaging in basic local advocacy is an unconstitutional false choice.

While the courts have generally upheld these types of reporting requirements for political committees – whose main purpose is to ensure the election or defeat of candidates – these reporting burdens are inappropriate given the government's lesser interest in imposing such requirements on organizations engaging in speech about policy issues and matters of local importance to the public. Moreover, the deterrent effect of having donors' names, addresses, and employers publicly reported encroaches on the organizations' and the donors' First Amendment right to freedom of association.

Indeed, when faced with the knowledge that their full name, residential address, and employer will be reported to the government and made publicly available on the Internet for journalists, employers, and nosy neighbors to access, it is quite plausible that many of these would-be donors will decide not to donate, preferring instead to maintain their privacy. This could lead to the demise of many societally important nonprofit groups.

III. 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 S. 2369 and the existing Section 17-25-7, it is important to note that disclosure laws implicate citizen privacy rights protected by Supreme Court precedent. The use of threats and intimidation to silence individuals exercising their protected First Amendment rights is an increasingly serious issue, and much of the Supreme Court's concern over compulsory disclosure lies in its consideration of the potential for such 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.[21] In recognizing the sanctity of privacy in 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

[21] 357 U.S. 449 (1958).

freedom of association as [other] forms of governmental action."[22] This is why the privacy of citizens when speaking out about government officials and actions has been protected in certain contexts and has been summarily reaffirmed in Rhode Island as recently as October of 2014.[23]

The targets may change, but dislike and even hatred by government officials and citizens against those with whom they disagree will always remain, and donors and members of groups supporting unpopular causes still need protection today. Such protection is demanded by the principles embedded in the founding principles of our republic, and by the prudent recognition that any group may someday be in the minority. It is hardly impossible to imagine a scenario in 2016 in which donors to controversial causes in Rhode Island – for or against same-sex marriage; for or against abortion rights; or even to groups associated with others who have been publicly vilified, such as the Koch family, Sheldon Adelson, Tom Steyer, or George Soros – might be subjected to similar threats.

Indeed, in today's polarized political environment, more and more individuals have suffered violent threats, harassment, and property damage as a result of compulsory disclosure information. For example, during the hotly contested debate over same-sex marriage in California in 2008, the personal information of supporters of traditional marriage was exposed due to overly broad disclosure laws. Some traditional marriage supporters recounted being told, "Consider yourself lucky. If I had a gun I would have gunned you down along with each and every other supporter."[24] In New York, the state ACLU chapter has documented that its employees and members have been the subject of death threats.[25] Citizens in Rhode Island will eventually be at risk due to the private information forcibly and publicly disclosed by Section 17-25-7, and the amendments to this statute in S. 2369 only aggravate this danger by applying the disclosure demands to individuals as well as entities receiving contributions and advocating the approval or rejection of questions presented to voters.

This danger illustrates the fundamental problem with the approach taken in Section 17-25-7. 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 or other citizens, as is required by the First Amendment. Worse still, little can be done once individual contributor information – a donor's full name, street address, 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 a disfavored cause.

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. The indiscriminate disclosure requirement and vague and overbroad standards triggering disclosure in Section 17-25-7 are not sufficiently tailored to minimize the likelihood of harassment.

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[22] *Id.* at 462.

[23] *See, e.g., McIntyre v. Ohio Elections Commission*, 514 U.S. 334, 337-338 (1995); *Blakeslee v. Sauveur*, 51 F. Supp. 3d 210 (D.R.I. 2014).

[24] *Citizens United*, 558 U.S. at 481 (J. Thomas, concurring).

[25] Donna Lieberman and Irum Taqi, "The Contents Of A Lobbyist's Statement Of Registration: Testimony Of Donna Lieberman And Irum Taqi On Behalf Of The New York Civil Liberties Union Before The New York City Council Committee On Governmental Operations Regarding Int. 502-b," New York Civil Liberties Union. Retrieved on March 28, 2016. Available at: http://www.nyclu.org/content/contents-of-lobbyists-statement-of-registration (April 11, 2007).

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Senate Bill 2369 seeks to improve transparency, but ultimately falls short in this effort by discouraging donors from contributing to societally important charities and nonprofit organizations, making disclosure information less meaningful overall by broadly capturing activity that is not related to the issues at hand, and subjecting these donors to potential harassment. Coupled with the bill's serious constitutional overreach, members of the Senate Judiciary Committee should carefully consider S. 2369 as well as the faults in the existing statute that this bill amends.

Thank you for allowing me to submit comments on Senate Bill 2369. I hope you find this information helpful. 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,

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