CENTER *for* COMPETITIVE POLITICS
Congress shall make no law...

February 12, 2013

The Honorable Terry Murphy
Montana Senate
P.O. Box 200500
Helena, MT 59620-0500

The Honorable Scott Sales
Montana Senate
P.O. Box 200500
Helena, MT 59620-0500

Re: Constitutional Issues with House Bill 129

Dear Chairman Murphy, Vice-Chair Sales, and Members of the Committee:

On behalf of the Center for Competitive Politics, I am writing you today to respectfully submit the following comments regarding the legal and practical impact of the provisions contained in House Bill 129, which amends various aspects of Montana's campaign finance law and political-civil libel law.

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 member and Chairman of the Federal Election Commission (FEC).

I write to express concern about the proposed version of H.B. 129, scheduled for a hearing before the Senate Judiciary Committee on February 14, 2013 at 9:00 AM. Our concerns arise out of recent court precedent and the First Amendment's protections for campaign speech.

While we commend the Legislature for considering a measure to correct the state's political-civil libel law, which was deemed unconstitutionally vague in *Lair v. Murry*,[1] unfortunately, the proposed revisions would almost certainly be deemed unconstitutional in many of its applications.

Accordingly, if H.B. 129 is signed into law as written, there is a high likelihood that the provision will again be successfully 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 award legal fees to any potential plaintiffs. Legal fee awards are often costly, and can cost governments well over one hundred thousand dollars.

Indeed, the Sixth Circuit of the United States recently struck down a similar provision in Ohio law in *Susan B. Anthony List v. Driehaus* based on existing and recent Supreme Court

[1] *Lair v. Murry*, 846 F.Supp. 2d 1116 (D. Mt. 2012).

precedent.[2] In Justice Timothy S. Black's opinion, he agreed with Susan B. Anthony List's claim that "associating a political candidate with a mainstream political position, *even if false*, cannot constitute defamation, as a matter of law."[3] (Emphasis added). Based on the similarities between the statute in question in Ohio and the political-civil libel statute being amended by H.B. 129 in Montana, following the Sixth Circuit's decision, it is even more likely that a statute patterned after H.B. 129 would be challenged and found unconstitutional.

As such, it is in the best interest of the Legislature to amend H.B. 129 by eliminating the political-civil libel statute entirely in accordance with the constitutional and practical issues set forth below.

I. Montana's existing libel law already provides a remedy for any speech that H.B. 129 would prohibit.

It is axiomatic to note that the First Amendment protects *all* speech, subject to very limited exceptions. Indeed, consistent with the Constitution, there can be a civil remedy for *damaging* false speech, which is often provided for in anti-defamation statutes. But H.B. 129 is unnecessary as Montana law already has such an anti-defamation provision.

§ 27-1-802 of the Montana Code defines libel as "a false and unprivileged publication by writing, printing, picture, effigy, or other fixed representation that exposes any person to hatred, contempt, ridicule, or obloquy or causes a person to be shunned or avoided or *that has a tendency to injure a person in the person's occupation.*" (Emphasis added). The Code further provides that "compensation is the relief or remedy provided by the law of this state for the violation of private rights and the means of securing their observance."[4] Thus, any unlawfully-damaging false speech that H.B. 129 would prohibit is already actionable under existing law.

Moreover, the United States Supreme Court considered defamation laws in the context of public figures – including candidates for office – in a 1964 case, *New York Times v. Sullivan.* In that case, the Court unanimously held that public figures can still recover for defamation or libel, but in order to do so, they must prove that "actual malice" motivated the false statements in question.[5] This highlights an additional practical problem incurred by H.B. 129: proving that "actual malice," rather than an honest mistake, caused a false statement to appear in an ad would be next to impossible (particularly in as nuanced and confusing a context as a candidate's voting record).

II. H.B. 129 is unnecessary, since candidates who are harmed by libelous speech may sue under the existing libel laws – and prevail when appropriate.

Perhaps nothing demonstrates the lack of a need for Montana's political-civil libel statute better than the case of Nevada, which has a standard libel law similar to Montana's libel statute. Through use of Nevada's standard libel law, politicians in that state have demonstrated that libel

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[2] *Susan B. Anthony List v. Driehaus*, Case No. 1-10-cv-720, (S.D. Ohio Jan. 25, 2013).
[3] *Id.* at 2.
[4] Mont. Code Anno., § 27-1-107.
[5] *New York Times v. Sullivan*, 376 U.S. 254 (1964).

suits for false statements can be successfully brought by persons who are harmed. For example, in 2004 challenger Danny Tarkanian sued incumbent Nevada State Senator Mike Schneider for publishing ads stating that Tarkanian helped set up scam telemarketing businesses. When the jury found for Tarkanian, Schneider ultimately settled the libel suit for $150,000 (fearing the jury might award even more).[6]

Similarly, an incumbent state senator filed a lawsuit against the Nevada State Democratic Party for circulating a flyer containing false information about him during a campaign. The Party admitted the falsity of their statement and made a donation to the Senator's favorite charity to settle the lawsuit.

Another former state senator in Nevada, Sandra Tiffany, sued the Nevada State Education Association for circulating a flyer depicting her behind bars. Tiffany had previously admitted to ethics violations, but there was never a threat of imprisonment as punishment. She settled the defamation suit, reportedly for $250,000.[7]

For more background information on Nevada's experience with its standard libel law and the cases described above, please review the April 2012 Las Vegas Review-Journal article, "System works when it comes to negative campaigns," which appears at the end of these comments.

Taken together, these lawsuits demonstrate that existing standard libel laws are effective in punishing campaign speech that is actually damaging. Particularly in light of the high "actual malice" standard, these victories show that allegations, which cross the line, are addressed by existing libel laws that do not suffer from the constitutional difficulties posed by this legislation.

Nevada's experience also proves that laws like the one amended by H.B. 129 are vulnerable in court. Indeed, when Nevada had a system of assessing fines for false campaign statements, they assessed a fine against a candidate who had not, in fact, made any untruthful allegations. The wrongly accused candidate, represented by the American Civil Liberties Union, sued, and the state's statute was invalidated.

In short, the government should not be in charge of deciding what is true or false about officials in government. Nor should the government have the ability to impose fines or other punishments for speech. Instead, regular libel laws are available for settling disputes between the candidates regarding false statements, allowing for the results to be determined by a jury.

III. A plurality of the United States Supreme Court noted that even false speech is protected by the First Amendment.

Libel laws already prohibit damaging false speech, and the Supreme Court has indicated that false speech is not exempt from First Amendment protection merely because of its falsity.

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[6] Steve Sebelius, "System works when it comes to negative campaigns," *Las Vegas Review-Journal*. Available at: http://www.lvrj.com/opinion/system-works-when-it-comes-to-negative-campaigns-148227365.html (April 20, 2012).

[7] *Id.*

Thus, as written, the provisions in H.B. 129 pose a serious threat of infringing constitutional rights.

In *Alvarez v. United States*, an elected official falsely claimed to have been awarded the Medal of Honor, and was subsequently prosecuted for violating the Stolen Valor Act, which made it a misdemeanor to make false statements about being awarded a military medal.[8] Justice Kennedy, writing for a plurality (which also included Justices Sotomayor and Ginsburg and Chief Justice Roberts), noted that "[o]ur prior decisions have not confronted a measure...that targets falsity and nothing more."[9] Recognizing that some specific categories of false speech – like perjury – can be prohibited and penalized, the plurality found that "[t]he Government has not demonstrated that false statements generally should constitute a new category of unprotected speech."[10]

The dissenters in *Alvarez* – Justices Alito, Scalia, and Thomas – argued that the First Amendment does not, in fact, protect lies. Despite the highly fractured nature of the Court's ruling, it highlights two important elements to inform this Legislature's consideration of H.B. 129. First, criminalizing false campaign speech is highly questionable under the Constitution. Second, as a democratic Legislature, this governing body should consider that many reasonable people may disagree on this highly nuanced issue.

IV. In addition to the Constitutional issues at stake, there are practical and philosophical problems with H.B. 129's usurpation of voter autonomy in favor of a bright-line rule.

H.B. 129's treatment of speech regarding candidate voting records is also problematic because much speech on this issue is highly susceptible to interpretation. Indeed, rather than mentioning specific bills, many political ads make general characterizations of a candidate's voting record (such as, "Candidate X voted for Big Coal," or "Candidate Y voted to support small businesses."). Certainly, reasonable parties can disagree as to what such statements mean, as well as what specific votes on bills (which can include multiple provisions on myriad subjects) indicate about a candidate's positions. Thus, demonstrating the falsity of such a statement would prove time-consuming, at best, and impracticable, at worst.

* * *

Ultimately, it is essential to our democratic form of government that voters are free to judge the probativeness of campaign messages for themselves. Each election cycle sees a flood of messages from various sources, all with their own interests. Voters are no doubt well-practiced in sifting through this information and determining how much weight to give each detail based on its message, source, method of delivery, and any other factors that each individual may deem influential. It is a voter's right to do so; otherwise the electoral process

[8] *Alvarez v. United States*, 123 S. Ct. 1421 (2012).
[9] *Id.* at 588.
[10] *Id.*

itself becomes meaningless. Ultimately, H.B. 129 would set a dangerous precedent allowing the government itself to define the truth or falsity of campaign speech, and would erode the very dialogue that allows our democratic society to function.

Instead, given recent court precedent, the political-civil libel statute that H.B. 129 seeks to amend should be repealed outright to preserve the political speech rights of Montanans and to avoid a costly and likely successful lawsuit against the state.

Thank you for allowing me to submit comments on House Bill 129. 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

LAS VEGAS REVIEW-JOURNAL

System works when it comes to negative campaigns

By Steve Sebelius, April 20, 2012

Now on the checklist for any political campaign in Southern Nevada: A good libel lawyer.

Everybody knows political scuffles can get nasty and personal. Thus it's ever been, and today's mean-spirited contests are actually tame compared to some of the material slung historically.

But in a few recent cases, mudslinging has become the subject of court cases, and even cash settlements.

Danny Tarkanian sued state Sen. Mike Schneider in 2004, after Schneider accused Tarkanian during a re-election race of helping to set up scam telemarketing businesses and later testifying against those businesses to avoid prosecution. After a jury came down for Tarkanian, Schneider settled the lawsuit for $150,000, fearing a jury could have awarded even more.

Tarkanian lost the 2004 race in the Democratic district.

Bob Beers, a state senator at the time, now a Las Vegas city councilman, sued his Democratic opponent, Allison Copening, and the Nevada State Democratic Party during his 2008 race, when fliers alleged he was under Ethics Commission investigation when he wasn't. Copening was dropped from the action, since she didn't participate in the attacks (although they helped her win the election.)

In the end, the Democratic Party wrote a letter admitting the allegation against Beers was false, and agreeing to donate $2,500 to his favorite charity, Opportunity Village.

This year, in the midst of a bitter special election that pitted Beers against Planning Commissioner Ric Truesdell, Beers filed another libel suit. Truesdell accused Beers - repeatedly - of using his position as a state senator to help a former employer escape an administrative fine back in 2007. The details are complicated, but the charge was untrue. That lawsuit is pending.

Former state Sen. Sandra Tiffany sued the Nevada State Education Association over a particularly harsh flier mailed to voters in 2006, which depicted her behind bars. (Tiffany lost that election to Joyce Woodhouse.)

Tiffany was accused (and later admitted to) ethics violations connected to her side business buying surplus state property. But while she paid $10,000 to settle her case before the Ethics Commission, jail time was never a potential punishment.

This week, Tiffany settled her case. Although there's a gag order in place, sources told the Review-Journal's Ed Vogel that the teacher union wrote Tiffany a hefty $250,000 check.

Talk about your favorite charity - I'd wager more than a few state senators would consider a quarter-mil (less attorney fees, even) to be a fair trade for their seat.

As a political journalist, I've seen enough campaign mudslinging to last a lifetime, but you won't catch me denouncing it. People deploy negative attacks because they've been shown to work, since they stick with voters longer than do positive ads.

Since it's not easy to win a libel lawsuit - especially if you're considered a "public figure" - this list of successful actions shows the system works. Hurl a defensible charge, and you're fine; cross the line a little, and you could end up writing a big check.

And that's a lot better than the alternative, in which the state tries to ban untruthful statements in political campaigns. Nevada tried that once, and it was (ironically enough) Bob Beers who stood accused of a violation during his 1998 run for the Assembly. He was assessed a $5,000 fine.

The problem was, everything Beers had said in his campaign had been true, and, with the help of the American Civil Liberties Union of Nevada, he successfully fought and eventually killed the truth-in-campaigning law in federal court.

Ultimately, the voters decide if a campaign has gone too far. And, for the still-aggrieved, there's always court.

The above article, "System works when it comes to negative campaigns," can be accessed at: http://www.lvrj.com/opinion/system-works-when-it-comes-to-negative-campaigns-148227365.html.