CENTER *for* COMPETITIVE POLITICS

Congress shall make no law...

March 26, 2013

The Honorable Pat Spearman
Nevada Legislature
401 S. Carson Street
Carson City, NV 89701-4747

The Honorable Mark Manendo
Nevada Legislature
401 S. Carson Street
Carson City, NV 89701-4747

Re: Constitutional Issues with Senate Bill 246

Dear Chairwoman Spearman, Vice Chairman Manendo, and Members of the Committee:

On behalf of the Center for Competitive Politics, I respectfully submit the following comments concerning Senate Bill 246, which is currently being considered by the Senate Legislative Operations and Elections Committee. Specifically, I write to note several significant legal and practical concerns raised by the bill. In addition to raising public-policy concerns, these weaknesses could subject the state to costly litigation.

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 a nonprofit, incorporated educational association in a challenge to nearby Colorado's campaign finance laws. We are also involved in litigation currently before the U.S. Supreme Court.

This legislation proposes a new definition for "committees for political action" that would cover many organizations, which only minimally involve themselves in electoral politics. In short, the new and burdensome definition proposed in S.B. 246 is constitutionally questionable because it ignores decades of jurisprudence establishing the necessity of a "major purpose" test, because the burden it places on many moderately-sized organizations is inconsistent with recent judicial precedent, and because it may subject individuals to harassment based on their political beliefs.

Accordingly, if S.B. 246 becomes law, its expanded definition of "committee for political action" 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.

After a brief synopsis of S.B. 246, I outline the three aforementioned issues below.

I. The bill's expanded definition of "committee for political action," which contains no language concerning an organization's major purpose, is inappropriate and burdensome.

S.B. 246 expands the existing definition of what entities constitute "committees for political action" to include "any business or social organization, corporation, partnership, association, trust, unincorporated organization or labor union."[1] The bill further sub-classifies a "committee for political action" as an organization "(1) which *has as its major purpose* affecting the outcome of any...election or any question on the ballot and for that purpose receives contributions in excess of $1,500 in a calendar year or makes expenditures in excess of $1,500 in a calendar year; or (2) which *does not have as its major purpose* affecting the outcome of any...election or any question on the ballot but for the purpose of affecting the outcome of any election or question on the ballot receives contributions in excess of $5,000 in a calendar year or makes an expenditure in excess of $5,000 in a calendar year."[2]

As proposed in this bill, if a committee for political action – that *does not* have a primary purpose of influencing elections – makes an expenditure of just $5,000 for the purpose of affecting the outcome of any election, it becomes subjected to the same reporting requirements as a committee for political action – which *does* have a primary purpose of influencing elections. Essentially, the bill states that any organization that spends $5,000 is a political committee, regardless of the character and scope of its other activities. This blurs the distinction between groups that exist for political purposes, and groups that do not, but happen to incidentally engage in political speech. But such a distinction is a bedrock principal of First Amendment law.

Under current law, a "committee for political action" must report each of its contributions and expenditures over $100, if it makes any expenditures on behalf of a candidate.[3] As a result, S.B. 246 significantly expands the reporting requirements of organizations that do not have a major purpose of influencing elections, by subjecting them to the same reporting requirements as political committees, simply because they make an expenditure of $5,000. This statutory scheme likely would not survive constitutional scrutiny, for the reasons given below.

II. It is constitutionally impermissible to use a monetary trigger, rather than an analysis of an organization's major purpose, to determine whether an organization qualifies as a committee for political action.

In 1976, the U.S. Supreme Court heard *Buckley v. Valeo,* an omnibus challenge to the then-recently enacted Federal Election Campaign Act ("FECA"). Among the cornerstones of First Amendment law, the Court's decision is notable for its determined policy in favor of shielding issue speech from the force of federal regulation.[4] The relevant portion of FECA had a "plan[ed] effect...to prohibit all individuals, who are neither candidates nor owners of

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[1] Senate Bill 246, Nevada 77th (2013) Session, p.2, lines 9-11.
[2] *Id.* p.2, lines 12-24. (emphasis added).
[3] "State of Nevada Committee For Political Action (PAC) Registration Information," *Secretary of State Ross Miller.* Available at: http://nvsos.gov/Modules/ShowDocument.aspx?documentid=2109#page=2&zoom=auto,0,650 (November 16, 2011), p. 2.
[4] *Buckley v. Valeo*, 424 U.S. 1 at 42-44 (1976).

institutional press facilities, and all groups, except political parties and campaign organizations from voicing their views relative to a clearly identified candidate through means that entail aggregate expenditures of more than $1,000 in a calendar year."[5] Because of this, the Court found the government could only regulate contributions and expenditures made by "organizations that are under the control of a candidate *or the major purpose* of which is the nomination or election of a candidate."[6]

More recently, in *Human Life of Washington, Inc. v. Brumsickle*, the Ninth Circuit looked at the major purpose test in the context of an organization opposed to euthanasia.[7] The court noted that the inclusion of a "primary purpose" requirement could shield a statute from constitutional scrutiny:

> 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. Under this statutory scheme, the word "primary" -- not the words "a" or "the" -- is what is constitutionally significant.[8] While we do not hold that the word "primary" or its equivalent is constitutionally necessary, we do hold that it is sufficient in this case to ensure that the Disclosure Law is appropriately tailored to the government's informational interest.[9]

Likewise, in *New Mexico Youth Organized v. Herrera* ("*NMYO*"),[10] the Tenth Circuit held that New Mexico's campaign finance law's definition of "political committee" must satisfy "the major purpose test."[11] Significantly, the challenge dealt with political committee registration and disclosure, at issue in S.B. 246, and not any challenge to electioneering communication disclosure.[12]

The facts of the NMYO case were typical: one nonprofit organization, NMYO, worked with another nonprofit organization, Southwest Organizing Project, to disseminate mailings, as both nonprofits had a history of education on issues relating to youth, equality, and government transparency issues.[13] The mailings suggested that certain legislators were beholden to health insurance interests, and highlighted that the legislators' donors included health insurance companies.[14] Both nonprofit organizations spent a relatively small portion of their budget on the

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[5] *Id.* at 39-40 (internal quotation marks omitted); this figure has the equivalent buying power today of approximately $4,669.80.
[6] *Id.* at 79 (emphasis added).
[7] *Human Life of Washington, Inc. v. Brumsickle*, 624 F.3d 990, 995 (9th Cir. 2010).
[8] *See 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 [**52] 'a major purpose' test is the word 'major,' not the article before it.").
[9] *Human Life of Washington, Inc. v. Brumsickle*, 624 F.3d at 1011.
[10] *New Mexico Youth Organized v. Herrera*, 611 F.3d 669 (10th Cir. 2010).
[11] *Id.* at 677.
[12] *Id.* at 672.
[13] *Id.* at 671.
[14] *Id.* at 671-72.

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.[15]

The Tenth Circuit, using *Buckley* as a guide, held 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."[16] The court found that because neither group spent "a *preponderance* of its expenditures on express advocacy or contributions to candidates,"[17] neither could be regulated as a political committee.

As recently as last year, in *Minnesota Citizens Concerned for Life, Inc. v. Swanson*, the *en banc* Eighth Circuit struck down a law requiring independent expenditure funds to have "virtually identical regulatory burdens" as PACs.[18] This included having to file periodic reports, even if the fund no longer engaged in political activity.[19] Ultimately, the *Swanson* Court required the major purpose test to ensure that only political organizations face that burden – and not organizations that lack such a major purpose.[20] S.B. 246 would fail that test.

If this bill becomes law, it will raise the very concerns addressed by the above cases.

III. S.B. 246 would likely be unconstitutional in many of its applications due to the burdens it would place on many moderately-sized organizations.

Although *Citizens United v. Federal Election Commission* upheld the constitutionality of "disclosure," it approved only a particular, narrow type. The Court merely upheld the disclosure of an independent expenditure 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 independent expenditure*.[21] This has been interpreted by the Federal Election Commission to mean contributions earmarked for these independent expenditures, 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.[22] By contrast, this legislation would require disclosure of the names and mailing addresses of anyone who contributes $100 or more to an entity if that entity makes an expenditure over $5,000 – regardless of whether or not its major purpose is to influence elections.

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

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[15] These figures amount to approximately 6.7% of NMYO's budget and 0.5% of Southwest Organizing Project's budget.
[16] *Id.* at 677 (quoting *Buckley*, 424 U.S. at 79) (emphasis added).
[17] Furthermore, the New Mexico statute in *NMYO* provided that $500 in expenditures in a year is "sufficient" to establish the organization's "major purpose" as political. *NMYO*, 611 F.3d at 678 (citing N.M. Stat. Ann. § 1-19-26(L)) (emphasis added). 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. There are now two major Tenth Circuit cases rejecting monetary triggers as stand-ins for an organization's "major purpose," which is what S.B. 246 purports to do.
[18] *Minnesota Citizens Concerned for Life, Inc. v. Swanson*, 692 F.3d at 872 (8th Cir. 2012).
[19] *Id.*
[20] *Id.*
[21] 2 U.S.C. § 434 (2013); *Citizens United v. Federal Election Commission*, 130 S. Ct. 876, 913-914 (2010).
[22] *Ctr. for Individual Freedom v. Van Hollen*, 694 F.3d 108 (D.C. Cir. 2012).

nonprofit corporations by certain disclosure requirements.[23] 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.[24] Likewise, Justice O'Connor was concerned with "organizational restraints" including "a more formalized organizational form" and a significant loss of funding availability.[25]

If this bill becomes law, it will create conditions that raise the very concerns addressed by the Supreme Court in *MCFL*. S.B. 246 would mandate detailed record keeping and force groups to create multiple bank accounts and solicitations. The bill would require collection and reporting information that is commonly collected 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 entity that makes an expenditure of $5,000.

Essentially, the proposed bill would force a nonprofit to either face disclosure to the government of many of its donors, if it spends even $5,000 on communications, or instead speak at a monetary threshold of $4,999 or less. *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."[26]

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."

On another note, the Supreme Court has evidenced a growing awareness 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.[27] 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."[28]

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 causes still need protection today. It is hardly impossible to imagine a scenario in 2014 in which donors to controversial causes that make independent expenditures in Nevada – 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.

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[23] *Massachusetts Citizens For Life v. Federal Election Commission*, 479 U.S. 238 (1986).
[24] *MCFL*, 479 U.S. at 253 (plurality opinion).
[25] *Id.* at 266 (O'Connor, J. concurring).
[26] *MCFL*, 479 U.S. at 256 (plurality opinion).
[27] *NAACP v. Alabama*, 357 U.S. 449 (1958).
[28] *NAACP v. Ala. ex rel. Patterson*, 357 U.S. at 462.

Worse still is that little can be done once individual contributor information – a donor's full name and street address – is made public under government compulsion, as 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.

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 registration and 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 monetary disclosure threshold mandated by S.B. 246 for organizations, which lack a primary purpose of influencing elections, but may opt to speak about a particular issue, is sufficient to meet this standard.

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Ultimately, Senate Bill 246 inappropriately ignores decades of jurisprudence regarding the need for a "major purpose" test for organizational registration and reporting, places an unreasonable and legally-suspect burden on many organizations, and may subject donors to harassment. As a result, many provisions in this legislation raise serious legal concerns, and the bill should be reconsidered and revised.

Thank you for allowing me to submit comments on Senate Bill 246. I hope you find this information useful. 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

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