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

April 5, 2013

The Honorable Krayton Kerns
Montana House of Representatives
P.O. Box 200400
Helena, MT 59620-0400

The Honorable Jerry Bennett
Montana House of Representatives
P.O. Box 200400
Helena, MT 59620-0400

The Honorable Margie MacDonald
Montana House of Representatives
P.O. Box 200400
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Re: Constitutional and Practical Issues with Senate Bill 375

Dear Chairman Kerns, Vice Chairs Bennett and MacDonald, and Members of the Committee:

On behalf of the Center for Competitive Politics, I respectfully submit the following comments on several significant constitutional and practical issues with Senate Bill 375, which was amended and passed by the Senate and is currently being considered before the House Judiciary Committee. While the Center recognizes the Legislature's desire to increase transparency in Montana politics, Senate Bill 375 actually generates a variety of serious constitutional concerns that could subject the state to costly litigation, and which may frustrate the intended goals of the bill.

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 Colorado's campaign finance laws. We are also involved in litigation currently before the U.S. Supreme Court.

This legislation proposes new and burdensome reporting requirements for organizations and would cover many activities that have no relation to express advocacy concerning a candidate. In short, the new reporting requirements proposed by S.B. 375 mandate constitutionally questionable disclosure that mistakenly extends the logic of recent court rulings, require inappropriate disclosure of "incidental committees," may perversely generate less informative disclosure than a more narrowly tailored measure, could deter donors from contributing to organizations, and may subject individuals to harassment based on their political beliefs. Additionally, the bill's long overdue increase to the state's contribution limits are diminished by making said limits apply to an election cycle rather than to an election.

Accordingly, if S.B. 375 is signed into law as written, many of its provisions 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.

I outline the six aforementioned issues in greater detail below.

I. Recent federal jurisprudence likely renders the type of disclosure mandated by S.B. 375 unconstitutional in many of its applications.

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*.[1] 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.[2]

By contrast, this legislation proposes, in many cases, an extremely broad disclosure regime. Depending on an organization's structure, the names, mailing addresses, and occupations of many of its donors must be disclosed if that entity happens to make an expenditure of $500 or more, and the resulting communication simply mentions the name of a candidate or political party. 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," such as those proposed in S.B. 375.[3]

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 nonprofit corporations by certain disclosure requirements.[4] 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.[5] Likewise, Justice O'Connor was concerned with the "organizational restraints" including "a more formalized organizational form" and a significant loss of funding availability.[6]

If this bill becomes law, it will create conditions that raise the very concerns addressed by the Supreme Court in *MCFL*. S.B. 375 would mandate detailed record keeping and force groups to create multiple bank accounts and solicitations. The bill would require the collection and reporting of information that is commonly gathered 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 speaks using the name of a candidate or political party, including charities.

Essentially, the proposed bill would force nonprofit groups to face disclosure to the government of many of their donors if the groups spend even $500 on communications that merely mention the name of a candidate or political party, or instead avoid all speech that mentions the name of a candidate or political party entirely. *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."[7]

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[1] 2 U.S.C. § 434 (2013); *Citizens United v. Federal Election Commission*, 130 S. Ct. 876, 913-914 (2010).
[2] *Ctr. for Individual Freedom v. Van Hollen*, 694 F.3d 108 (D.C. Cir. 2012).
[3] *Citizens United*, 130 S. Ct. at 915 (contrasting independent expenditure reports with the burdens discussed in *MCFL*).
[4] *Massachusetts Citizens For Life v. Federal Election Commission*, 479 U.S. 238 (1986).
[5] *MCFL*, 479 U.S. at 253 (plurality opinion).
[6] *Id.* at 266 (O'Connor, J. concurring).
[7] *MCFL*, 479 U.S. at 256 (plurality opinion).

Additionally, in *Sampson v. Buescher*, the Tenth Circuit examined burdensome disclosure requirements for small ballot issue organizations under nearby Colorado's campaign finance disclosure scheme.[8] In holding that Colorado's requirements "substantial[ly]" burdened the organization's First Amendment rights, the court balanced the "substantial" burden of reporting and disclosure against the informational interest at stake, which it considered "minimal."[9] If S.B. 375 is signed into law and challenged, it is possible that the Ninth Circuit will view the burdens imposed on small ballot issue committees by this bill with similar skepticism.

II. The reporting required of "incidental committees" is inappropriate under *MCFL* given that "incidental committees," by definition, lack a primary purpose of influencing elections.

This iteration of S.B. 375 defines an "incidental committee" as "a political committee that is *not specifically organized for a primary purpose* of influencing elections but that may incidentally become a political committee by making a contribution or expenditure to support or oppose a candidate or ballot issue or both."[10] In contrast, as currently written, S.B. 375 defines "political committee" as "a combination of two or more individuals or a person other than an individual who makes aggregate contributions or expenditures of $500 or more."[11] The bill further notes that "political committees include ballot issue committees, incidental committees, independent committees, and political party committees."[12]

As proposed in this bill, if an incidental committee – which *does not* have a primary purpose of influencing elections – becomes a political committee by making an expenditure of $500, it becomes subjected to the following complex and burdensome reporting requirements, depending on its form:

(1) If an incidental committee is not a corporation with shareholders, but maintains a separate segregated fund for the purpose of making contributions or expenditures in Montana, it must disclose information about all contributions to the fund;
(2) If an incidental committee is not a corporation with shareholders and does not maintain a separate segregated fund, it must report the top ten persons making the largest aggregate contributions to the committee; or
(3) If an incidental committee is a corporation with shareholders, among other things, it must disclose all shareholders possessing 10% or more of the corporation's stock.

Under current law, an "incidental committee" must simply report *only* the earmarked contributions its received over $35[13] 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.[14] S.B. 375 grossly expands the reporting requirements of incidental committees by subjecting them to the burdensome disclosure requirements above, provided that an incidental committee makes a contribution or expenditure of $500. This burdensome reporting required of "incidental committees" that

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[8] *Sampson v. Buescher*, 625 F.3d 1247 (10th Cir. 2010).
[9] *Id* at 1260.
[10] Senate Bill 375, Montana 63rd Legis., p.8 at lines 5-7. (emphasis added).
[11] *Id.*, p. 9 at lines 12-13.
[12] *Id.*, p. 9 at lines 19-20.
[13] "Accounting and Reporting Manual for Political Committees," *Commissioner of Political Practices*. Available at: http://politicalpractices.mt.gov/content/5campaignfinance/2011AccountingandReportingManualforCommittees (November 2011), p. 31.
[14] *Id.*, at p. 33-34.

spend a paltry $500 on a contribution or expenditure under this bill is likely not sufficient to withstand judicial scrutiny according to the constitutional concerns of the Court under *MCFL*.

III. The proposed reporting thresholds for incidental committees are burdensome and would often uncouple the disclosed "donor" from the actual speech funded, resulting in "junk disclosure" by associating a donor with a communication they have no knowledge of or may not even support.

Furthermore, the proposed reporting regime for incidental committees in S.B. 375 may well confuse rather than enlighten voters.

When we speak of political committees and political parties, we can be reasonably assured that all donors to such organizations intend for their contributions to be used for political purposes. The same is not true of donors to 501(c) membership organizations and other forms of incorporated advocacy groups, which are likely to fall under the snare of incidental committees, according to the provisions of this bill. As a result, if a group decides to engage in the extremely broad types of communications covered in the bill at a $500 monetary threshold, many of its donors and stockholders could potentially be made public, regardless of whether their donations were earmarked for the purpose of furthering an independent expenditure.

This is problematic, as many of these donors will have given for very different reasons. Imagine, then, the Billings cattle rancher, who is a proud Republican, contributing to the Montana Cattleman's Association as his professional association. Then, suddenly a bill is introduced for additional regulation of ranching in Montana, and this cattle rancher finds himself listed as contributing to ads mentioning Republican elected officials that were run by the group. People give to trade associations and nonprofits not because they agree with everything the organization does, or particular political positions it takes, but because on balance they think it provides a valuable service. To publicly identify contributing individuals with expenditures that are not, in fact, express advocacy is both unfair to members and donors and will often be misleading to the public. Our cattle rancher in the above hypothetical does not take issue with those Republican candidates and may actually support the candidates; it is "junk disclosure."

More specifically, the requirement of incidental committees that are not corporations with shareholders and do not maintain a separate segregated fund to disclose their top ten donors, as well as the requirement for corporations with shareholders to report all of their shareholders that possess 10% or more of the corporation's stock, could sweep in donors (or shareholders) who potentially did not give (or buy stock) for the purpose of sponsoring independent expenditures or electioneering communications. This could further result in a situation where all of the donors who actually gave for the purpose of sponsoring an independent expenditure or an electioneering communication *are not* reported because they fall under the above thresholds, and all of the donors who *are* reported did not give for that purpose.

In any event, by mandating disclosure at such a low threshold, it is actually more difficult for voters to discern who major supporters of an organization are. If disclosure information is to tip voters as to specific sources of financial support, muddying up the report's contents with the names, addresses, and occupations of donors that may disagree with the organization's expenditure runs counter to this aim. In effect, this amounts to "junk disclosure" – disclosure that is primarily used by other parties to look for potential donors and by prying neighbors to search their fellow citizens' political activity and affiliations.

Ultimately, it is difficult to argue that public reporting on contributions to organizations speaking on issues, which do not advocate for or against a candidate, advances the legitimate purposes of informing the public or preventing corruption.

IV. The type of disclosure mandated by organizations making independent expenditures under S.B. 375 could deter individuals from contributing to organizations.

Under the provisions of this bill, among other things, an "independent expenditure" is very broadly defined as an "expenditure for a communication made at any time that is not coordinated with a candidate or ballot issue committee but...otherwise refers to or depicts one or more clearly identified candidates, political parties, or ballot issues in a manner that is susceptible of no reasonable interpretation other than as a call for the nomination, election, or defeat of the candidate in an election, the election or defeat of the political party, or the passage or defeat of the ballot issue or other question submitted to the voters in an election."[15]

To the contrary, "independent expenditures" often refer to communications that urge voters to cast a vote for or against a candidate, as defined in subsection (a) of the bill's definition of "independent expenditure" in Section 2. This deceptively worded addition in subsection (b) of this definition will trap many nonprofit groups that simply mention the name of a candidate or political party in communications with the public on legislative issues. To take one of many examples, a simple scorecard rating of legislator votes published on a website may be covered under the bill's reporting requirements. In any event, rather than risk coming within the ambit of the bill, nonprofit entities may choose not to publish such materials, despite their constitutional right to do so.

Furthermore, as mentioned previously, depending on an organization's form, S.B. 375 requires any incidental committee that makes a $500 expenditure to report either: (a) all of its donors who earmarked their donation for the expenditure; (b) the top ten donors to the organization, regardless of whether their contribution was earmarked for the expenditure; or (c) all shareholders possessing 10% or more of the organization's stock.

Thus, if an organization planned to sponsor an issue advocacy communication or communications in Montana identifying a candidate or political party that would cost $500 or more, in order to avoid having to report the names, mailing addresses, and occupations of its major donors or stockholders who gave to the organization preceding the communication or communications, the organization would be forced to either:

(1) Create and pay for ads in Montana through a separate segregated account, which would be funded solely through solicitations from donors specifically for the purpose of making contributions or expenditures in the state – even though those donors' names, addresses, and occupations would still have to be reported; or
(2) Cancel their planned communication or communications.

Indeed, when faced with the knowledge that their full name, residential address, and occupation 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 nonprofit groups, and the loss of constitutionally-protected speech.

V. 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."

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.

[15] Senate Bill 375, Montana 63rd Legis., p. 8 at lines 15-16 and 21-24.

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.[16] 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."[17]

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 – 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.

Worse still is that little can be done once individual contributor information – a donor's full name, street address, and occupation – 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. 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 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. 375 about an individual who donates to an organization speaking about a particular issue is sufficient to meet this standard.

VI. The contribution limits proposed in the bill should apply to an "election" rather than an "election cycle."

Lastly, while this bill does slightly increase Montana's very low contribution limits, this welcome step is not without its own concerns. Section 10, subsection 6 of S.B. 375 changes the time measurement for contribution limits from "election" to "election cycle." This is not merely a cosmetic alteration, as this change may have a substantive impact on state elections and the ability of candidates to operate their campaigns. Constructing campaign contribution limitations as applicable to an "election cycle" will limit candidate contributions to the statutory numbers for both the primary and general elections combined. In contrast, the term "election" would allow the contribution limits to apply separately to the primary and general elections.

For example, using the campaign contribution limits proposed in this legislation, if an individual can donate $500 to a candidate for the House of Representatives per *election cycle*, then the $500 limit applies to the candidate's entire candidacy – from primary to general election. Conversely, a $500 limit

[16] *NAACP v. Alabama*, 357 U.S. 449 (1958).
[17] *NAACP v. Ala. ex rel. Patterson*, 357 U.S. at 462.

per *election* means that an individual can contribute $500 for the primary and $500 for the general election.

Existing Montana law applies campaign contribution limits to an "election." Currently, an individual can give a maximum of $130 to a candidate for the House of Representatives in both the primary *and* general election, for a total of $260 – just $240 less than the maximum an individual could donate under the revised limits, which would now apply to an election cycle. By revising contribution limits slightly upward while simultaneously changing the same limits to apply to an election cycle as opposed to an election, any appreciable increase in the state's contribution limits will become significantly diminished.

Accordingly, the Center suggests that S.B. 375 be amended to restore the original definition of the term "election" in Section 10, subsection 6. The primary and general elections are distinct elections, and should be treated as such. By artificially limiting contribution limits over an entire election cycle, S.B. 375 will likely reduce the competitiveness of elections in Montana. Additionally, the effect of this change may be to favor incumbent politicians, or other candidates who do not have to fight through a costly primary process. By amending the language as suggested, the state will be able to maintain fair and competitive elections without discriminatorily favoring incumbents. This is not only superior as a policy measure, but it also helps Montana avoid any constitutional litigation. It is notable that the Supreme Court has supported the proposition that prohibitive contribution limits can be unconstitutional if they functionally prevent challengers from mounting a campaign.[18]

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Senate Bill 375 seeks to improve transparency, but falls short in this effort by discouraging donors from contributing to societally important nonprofit organizations, requiring inappropriate disclosure by "incidental committees," making disclosure information less meaningful overall by broadly capturing the activity of contributors that is unrelated to the election or defeat of candidates and that those contributors may not support, and by subjecting these donors to potential harassment. Coupled with the bill's serious judicial overreach in the disclosure it mandates and its ill-advised switch to applying its revised contribution limits on an election cycle basis, the Committee should carefully scrutinize S.B. 375. Many provisions in this legislation raise serious legal concerns, and these provisions should be reconsidered and revised.

Thank you for allowing me to submit comments on Senate Bill 375. 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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Center for Competitive Politics

[18] *See Randall v. Sorrell*, 548 U.S. 230 (2006).