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

February 25, 2014

The Honorable Caleb Jones
Missouri House of Representatives
201 West Capitol Avenue
Room 233A
Jefferson City, MO 65101

The Honorable Todd Richardson
Missouri House of Representatives
201 West Capitol Avenue
Room 404A
Jefferson City, MO 65101

Re: Constitutional and Practical Issues with House Bill 1340

Dear Chairman Jones, Vice Chair Richardson, and Members of the Committee:

On behalf of the Center for Competitive Politics, I respectfully submit the following comments concerning House Bill 1340, which is currently being considered by the House General Laws Committee. Specifically, I write to note several significant constitutional and practical problems raised by the bill. Aside from 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 nonprofit, incorporated educational associations in challenges to state campaign finance laws in Colorado and Delaware. We are also involved in litigation currently before the U.S. Supreme Court.

While it's commendable for the Legislature to consider ethics provisions that would clarify existing provisions in Missouri law, this legislation contains several gratuitous provisions that are practically deficient and constitutionally questionable. In particular, this legislation: (I) ignores decades of jurisprudence establishing the necessity of a "major purpose" test in its misguided attempt to regulate 501(c)(4) organizations as political committees; (II) unnecessarily imposes campaign contribution limits, contradicting trends around the country, even though academic research shows that these limits will neither decrease corruption, produce "good" government, nor improve public confidence in government; (III) seemingly prohibits PAC-to-PAC transfers by instituting a complicated, unworkable, and legally dubious "rebuttable presumption" requirement on such transfers; and (IV) grants the Missouri Ethics Commission's Executive Director extraordinary investigative and subpoena powers, allowing for political speech largely to be regulated at the appointed Director's whim.

Accordingly, if H.B. 1340 becomes law as written, its newly created definition of "committee" is likely to be challenged, its newly-created contribution limits will have negligible effects on government while trampling on the speech rights of individuals and citizens groups, its "rebuttable presumption" provision is likely to be challenged, and the Missouri Ethics Commission's newly-empowered Executive Director would have enormous powers that might well allow the Commission to conduct political witch-hunts to the benefit of no one, least of all the citizens of Missouri. Any potential legal action stemming from the expanded "committee" definition and the PAC-to-PAC transfer "rebuttable presumption" requirement will cost the state a great deal of money defending these provisions, 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 four aforementioned issues in greater detail below.

I. The bill flouts the landmark *Buckley v. Valeo* decision and decades of jurisprudence establishing the necessity of a "major purpose" test in order to compel filings as a political committee.

H.B. 1340 would force nonprofit 501(c)(4) social welfare organizations to register and file reports that are identical to those that must be filed by political committees by expanding the existing definition of what entities constitute "committees" under Missouri law to include "organizations exempt from taxation under 26 U.S.C. Section 501(c)(4)."[1]. This is directly contrary to the landmark U.S. Supreme Court decision in *Buckley v. Valeo*, an omnibus challenge to the then-recently enacted Federal Election Campaign Act (FECA). The *Buckley* decision is notable for its ruling that shields groups that primarily engage in issue speech from having to file as political committees, as was mandated by FECA.[2] In its decision, the Court found the government could only compel reporting as a political committee for "organizations that are under the control of a candidate *or the major purpose of* which is the nomination or election of a candidate."[3]

H.B. 1340 clearly fails this "major purpose" test for nonprofit 501(c)(4) social welfare groups, which this legislation covers under the definition of "committee." According to IRS tax laws and regulations, these groups must have non-political activities as their primary purpose.

Essentially, the bill appears to treat any 501(c)(4) organization that receives contributions in excess of $500 (or in excess of $250 from a single contributor)[4] as a 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. Violation of this principle would make the state of Missouri susceptible to legal challenge.

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[1] House Bill 1340 (as Introduced), Missouri General Assembly 97th (2014) Session, p. 80, lines 37-38.
[2] *Buckley v. Valeo*, 424 U.S. 1 at 42-44 (1976).
[3] *Id.* at 79 (emphasis added).
[4] "When to Form & Register a Committee," Missouri Ethics Commission. Retrieved on February 24, 2014. Available at: http://www.mec.mo.gov/WebDocs/PDF/CampaignFinance/Forming_Registering_Committee.pdf (June 2012), p. 2.

II. H.B. 1340 imposes campaign contribution limits at a time when states around the nation are raising their contribution limits or eliminating them altogether, all while research demonstrates that these limits will neither reduce corruption, nor produce "good" government, or improve public confidence in government.

In 2013, nine states – Alabama, Arizona, Connecticut, Florida, Maryland, Michigan, Minnesota, North Carolina, and Wyoming – raised or eliminated their campaign contribution limits.[5] Alabama is notable for becoming the sixth state with no limits on the size or source of campaign contributions, joining the ranks of Missouri, Nebraska, Oregon, Utah, and Virginia. In early 2014, Vermont increased its limits and neighboring Oklahoma's legislators are poised to do the same this session. In fact, since 2010, thirteen states, or over one-third of the 38 states that impose contribution limits on individuals, have increased or repealed their contribution limits in some manner. The trend around the country is one of state legislators liberalizing existing limits and enhancing the First Amendment freedoms of their constituents. Any attempts to do otherwise with this legislation would mark a backwards step away from First Amendment rights for Missouri.

Legislative changes to state contribution limits in 2013 generally occurred on a bipartisan basis and were signed into law by governors from both parties. When arguing for these changes, many legislators noted that increased contribution limits allow candidates and parties to have a stronger voice during election campaigns and better compete with independent groups, which by law cannot be controlled by candidates.

Furthermore, academic research and studies by the Center for Competitive Politics have shown that contribution limits have no impact on reducing corruption,[6] promoting "good" government,[7] or improving trust in government,[8] but rather reduce campaign speech. Academic research also demonstrates that campaign cash and legislative votes are not linked.[9]

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[5] Luke Wachob, "2013 State Legislative Trends: Campaign Contribution Limits Increase in Nine States," Center for Competitive Politics' Legislative Review. Retrieved on February 23, 2014. Available at: http://www.campaignfreedom.org/wp-content/uploads/2013/12/2014-02-06_Legislative-Review_Wachob_2013-State-Legislative-Trends-Campaign-Contribution-Limits-Increase-In-Nine-States.pdf (February 2014).

[6] Adriana Cordis and Jeff Milyo, "Working Paper No. 13-09: Do State Campaign Finance Reforms Reduce Public Corruption?" Mercatus Center at George Mason University. Retrieved on February 24, 2014. Available at: mercatus.org/sites/default/files/Milyo_CampaignFinanceReforms_v2.pdf (April 2013); Matt Nese and Luke Wachob, "Do Lower Contribution Limits Decrease Public Corruption?," Center for Competitive Politics' Issue Analysis No. 5. Retrieved on February 24, 2014. Available at: http://www.campaignfreedom.org/wp-content/uploads/2013/08/Issue- Analysis-5.pdf (August 2013).

[7] Matt Nese and Luke Wachob, "Do Lower Contribution Limits Produce 'Good' Government?," Center for Competitive Politics' Issue Analysis No. 6. Retrieved on February 24, 2014. Available at: http://www.campaignfreedom.org/wp-content/uploads/2013/10/2013-10-08_Issue-Analysis-6_Do-Lower-Contribution-Limits-Produce-Good-Government1.pdf (October 2013); Matt Nese, "Do Limits on Corporate and Union Giving to Candidates Lead to 'Good' Government?," Center for Competitive Politics' Issue Analysis 7. Retrieved on February 24, 2014. Available at: http://www.campaignfreedom.org/wp-content/uploads/2013/11/2013-11-20_Issue-Analysis-7_Do-Limits-On-Corporate-And-Union-Giving-To-Candidates-Lead-To-Good-Government.pdf (November 2013).

[8] Jeff Milyo, "Do State Campaign Finance Reforms Increase Trust and Confidence in State Government?," Paper Presented at the 2012 Annual Meetings of the Midwest Political Science Association. Retrieved on February 23, 2014. Available at: http://web.missouri.edu/~milyoj/files/CFR%20and%20trust%20in%20state%20government_v3.pdf (April 2012).

[9] Steven Levitt, "How Do Senators Vote? Disentangling the Role of Party Affiliation, Voter Preferences and Senator Ideology," American Economic Review, Vol. 86 (1996): 425–441; Gregory Wawro, "Legislative Entrepreneurship in the United States House of Representatives." (Ann Arbor: University of Michigan Press, 2000); Stephen Ansolebehere, John M. de Figuerido, and

Understanding how contribution limits distort election campaigns helps explain why states without limits have fared as well or better in corruption rankings and good governance measurements than states with low limits. First, many people wrongly assume that in the absence of financial contributions, all citizens would have equal access to candidates. In reality, established interested groups like trade associations, labor unions, media, well-organized public interest groups, celebrities, and established political players already have an overwhelming advantage in access to elected officials. Equal limits don't have equal impacts; candidates who are personally wealthy are able to spend much more on their campaigns than candidates from ordinary backgrounds. The ability to receive larger contributions is an important equalizer for candidates with modest personal wealth or who are relatively unknown. While contribution limits are intended to reduce the influence of wealth, in reality they make it difficult for an average citizen to run against a famous or wealthy opponent.

Ultimately, contribution limits infringe upon the free speech rights guaranteed under the First Amendment. While courts have upheld many limits on contributions as constitutional due to a government interest in combating corruption or the appearance of corruption, there is broad agreement that limits on campaign contributions harm the right to free speech guaranteed by the First Amendment. However, now that evidence proves that contribution limits do not reduce corruption, produce "good" government, or increase trust in government, citizens and policymakers alike have recognized that the logic underlying contribution limits is weak at best. Limiting free speech rights should not be undertaken lightly, even when it is constitutionally permissible to do so. Many state legislators now believe that raising or eliminating limits entirely better conforms to the First Amendment, and therefore better fulfills every lawmaker's commitment to upholding the Constitution. For Missouri Legislators to impose contribution limits on Missourians and citizen groups in the face of the above research and national trends would be antithetical to both common sense and the First Amendment.

III. As written, the language creating a "rebuttable presumption" requirement for PAC-to-PAC transfers seemingly prohibits such transfers, and, as such, is susceptible to legal challenge.

Ostensibly, H.B. 1340 includes a provision regulating PAC-to-PAC transfers to prevent circumvention of the bill's contribution limits provisions. However, in practice, the bill's PAC transfer provisions would seemingly outlaw many legitimate contributions from PACs. This is especially troubling given that the definition of "committee" would be expanded to include not only true PACs, but also nonprofit advocacy organizations.

Beyond this legal issue, discussed in Section I above, the "rebuttable presumption" requirement is illogical. The bill presumes that whenever a committee receives contributions from two committees controlled by the same person, those contributions are intended to avoid contribution limits. But, of course, this "presumption" can only function because that person's identity is already public, together with his or her personal contributions. Moreover, there is no

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James M. Snyder Jr., "Why Is There So Little Money in U.S. Politics?," Journal of Economic Perspectives, Vol. 17:1 (Winter 2003): 105–130.

indication in the legislation of how large such contributions must be before triggering a mandatory state investigation.

In any event, the "rebuttable presumption" cannot be rebutted in practice, at least not without triggering an expensive defense of a state investigation that, the statute states, must include the cooperation of the Attorney General's office. Such an investigation is *mandatory.* Again, the state can only invoke the presumption because it already knows who is a majority donor to the contributing committee based on their filings to the Missouri Ethics Commission (MEC). And the MEC also knows that individual's contributions. Why must an investigation be initiated, attorneys hired, press conferences called, and political gamesmanship allowed when the state is already in possession of all relevant information? Why must the state be required to initiate an investigation for small contributions (again, there is no monetary trigger) that raise no real probability that the contribution limits proposed in this bill are being skirted? These practical problems are quite aside from the constitutional difficulties imposed by a presumption of intent that, as any attorney knows, is an important and fact-specific inquiry implicating fundamental due process concerns.

Beyond this nonsensical requirement, other serious issues exist as to the nature of the MEC's investigation process. H.B. 1340 prohibits the MEC from allowing dismissal for lack of probable cause. This is a dangerous requirement that further assumes guilt on the part of the contributor.

Absent some reasoned governmental interest, this entire arrangement is legally questionable and likely to draw a court challenge on the basis of both First Amendment liberties and due process.

IV. H.B. 1340 delegates new and unprecedented powers to the Missouri Ethics Commission's Executive Director, potentially subjecting citizens of the state to political witch-hunts, by what amounts to a "Political Speech Czar."

H.B. 1340 bestows extraordinary regulatory power unto an unelected Executive Director within the Missouri Ethics Commission. The bill further provides that this Executive Director may serve indefinitely. The powers granted to this Executive Director and the nature of the Director's powers will chill speech and are ripe for abuse, as there appears to be little to stop the Executive Director from acting on a personal whim or for political reasons.

One such power conferred on the Executive Director by this legislation is the power to issue subpoenas unilaterally. At a minimum, something as serious as the power to subpoena individuals and groups should be undertaken by a bipartisan Commission or with judicial review, and not by an Executive Director acting alone.

One particularly chilling power given to the Executive Director by H.B. 1340 would authorize the Executive Director to conduct autonomous investigations subject to no legislative or administrative control *without the receipt of a formal complaint*, if there are reasonable grounds to believe a violation of election law has occurred. Indeed, the same provision establishes the same legal standard to both open and close an investigation – reasonable grounds.

Perhaps this circularity is one reason the Commission should continue to dismiss complaints lacking probable cause. Moreover, this very loose and arbitrary standard also has the power to subject even the most compliant organizations and individuals to intense regulatory scrutiny in an area of the law filled with uncertainties. For average citizens and small, poorly funded grassroots groups who wish to speak about politics, but may accidentally trip over a complicated aspect of election law, this provision all but prohibits them from speaking without the fear of investigative action. Added to the bill's clauses that would eliminate the Legislature's fiscal control of the MEC, these provisions effectively create an all-powerful individual with the ability to police political speech and no accountability to the Legislature and little to the Commission.

Finally, not only are the grounds for violating Missouri election law subject largely to the Executive Director's discretion, but the penalties for doing so are great. As currently written, under H.B. 1340, a first offense incurs a fine of no less than $5,000, a second offense is a misdemeanor with the potential of a monetary fine, and a third offense is a felony with the potential of a monetary fine. These stiff penalties are a danger for any citizen or group who wishes to exercise their First Amendment speech rights and in doing so may accidentally stumble over the complicated provisions contained in this legislation and in existing Missouri law. These penalties are even more dangerous when they may be imposed by an unchecked Executive Director, whose actions have the potential to be political in nature.

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Ultimately, House Bill 1340 proposes to flout decades of jurisprudence regarding the need for a "major purpose" test in its treatment of 501(c)(4) organizations as political committees, unnecessarily imposes campaign contribution limits, in opposition to both current legislative trends and prevailing academic research, seemingly prohibits PAC-to-PAC transfers by instituting a constitutionally questionable "rebuttable presumption" requirement on such transfers, and expands the powers of the Executive Director position within the Missouri Ethics Commission in a manner tantamount to that of a "Political Speech Czar" with unprecedented authority to investigate Missourians, citizen groups, and candidates with few outside limits on his or her authority. As a result, many provisions in this legislation raise serious legal and practical concerns.

Thank you for allowing me to submit comments on House Bill 1340. I hope you find this information useful. Should you have any questions regarding this legislation and its impact on the First Amendment 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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