February 17, 2015

The Honorable Mary Kay Papen
Room 105
State Capitol
Santa Fe, NM 87501

The Honorable Stuart Ingle
Room 109A
State Capitol
Santa Fe, NM 87501

Re: Constitutional Issues with Senate Bill 384

Dear President Pro Tempore Papen, Minority Floor Leader Ingle, and members of the Senate:

On behalf of the Center for Competitive Politics, I respectfully submit the following comments on constitutional issues with portions of Senate Bill 384. Among other things, this legislation amends the state's Campaign Reporting Act to create new reporting requirements for individuals and organizations that make independent expenditures or publish information that simply mentions the name of a candidate in a specified window before a primary or general election.

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, Delaware, and Nevada. We are also involved in litigation against the state of California.

The provisions of S.B. 384 would ultimately chill protected speech by mandating the disclosure of donors to organizations that are engaged solely in issue advocacy – that is, speech about public policy issues and not speech that advocates for or against candidates for office.

The legislation proposes new and burdensome reporting requirements for organizations. It purports to cover only "independent expenditures and covered transfers," but the definition of independent expenditure is so broad that it would cover many activities that have no relation to express advocacy for or against a candidate. In particular, the definition of "covered transfer" is so expansive as to place the responsibility on contributors to know how their donations will be used up to a year after contributing. Furthermore, as written, the bill extends onerous disclaimer requirements that name an organization's top funders on the face of a communication – without considering whether or not the named contributors even agree with the specific communication. Worse still, S.B. 384 creates a vague and constitutionally problematic "coordination" standard.

In short, the new reporting requirements proposed by S.B. 384 inappropriately extend the logic of the Supreme Court's holdings in *Citizens United v. Federal Election Commission* and other important cases, could deter donors from contributing to organizations by violating their right to freedom of association, may subject individuals to harassment based on their political beliefs, and would perversely generate less informative disclosure than a more narrowly tailored measure. In addition, the disclaimer requirements compel speech and attribute actions to donors who may have had no role in making a communication. Finally, the new "coordination" standard is vague and restricts individuals from aiding causes they are passionate about.

I outline these six issues surrounding S.B. 384 in greater detail below.

I. S.B. 384 misapplies the Supreme Court's endorsement of disclosure in its *Citizens United* decision and runs contrary to federal jurisprudence in several cases.

While the Supreme Court upheld certain disclosure in *Citizens United v. Federal Election Commission*,[1] it addressed only a narrow and far less burdensome form of disclosure than that contemplated by S.B. 384. The Court merely upheld the disclosure of an electioneering communication report, which disclosed the *entity* making the expenditure and the purpose of the expenditure. Such a report only disclosed contributors giving over $1,000 *for the purpose of furthering the expenditure*.[2]

By contrast, this legislation proposes, in many cases, open-ended disclosure of the names and addresses of everyone who contributes at a certain threshold to an entity that makes public communications over $3,000. These are communications that simply mention the name of a candidate. In contrasting the disclosure burdens dealt with by the Court in the 1986 case of *Massachusetts Citizens For Life, Inc. v. Federal Election Commission* ("*MCFL*"),[3] 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. 384.[4]

In *MCFL*, both the plurality and the concurrence were troubled by the burdens placed upon nonprofit corporations by certain disclosure requirements. 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. 384 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. Indeed,

[1] *Citizens United v. FEC*, 558 U.S. 310 (2010).
[2] 52 U.S.C. § 30104(f); *Citizens United*, 558 U.S. 366-67.
[3] *Massachusetts Citizens For Life, Inc. v. Federal Election Commission*, 479 U.S. 238 (1986).
[4] *Citizens United*, 130 S. Ct. at 915 (contrasting independent expenditure reports with the burdens discussed in *MCFL*).
[5] *MCFL*, 479 U.S. at 253 (Brennan, J., plurality opinion).
[6] *Id*. at 266 (O'Connor, J., concurring).

charities often receive anonymous donations because of donors' religious views – a fact that is generally praised. 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, including charities. Beyond administration, however, the bill would also affect fundraising, as now every nonprofit, church, and charity will have to reject anonymous donations over $100 individually or over $1,000 or $3,000 in the aggregate, depending on the election, and reassure nonpublic funders that they have procedures in place to avoid falling into the snare of S.B. 384.

Essentially, the proposed bill would force nonprofit groups to either form what is functionally a separate PAC, face disclosure to the government of significant donors if the groups spends $1,000 or more on communications that merely mention the name of a candidate, or avoid all speech that mentions the name of a candidate. *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]

Additionally, in *Sampson v. Buescher*, the Tenth Circuit, which holds jurisdiction over New Mexico, examined burdensome disclosure requirements for small ballot issue organizations under neighboring 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. 384 is signed into law and challenged, it is likely that the Tenth Circuit will view the burdens imposed on small ballot issue organizations by this bill with the same skepticism. In 2014, the federal district court in Colorado applied *Sampson* and held that an organization's planned activity of $3,500 was too low for state regulation of an organization as an "issue committee," striking down reporting requirements similar to those proposed in S.B. 384.[10]

Finally, the Tenth Circuit has stated that only organizations having the "major purpose" of influencing elections may be forced to register with the state at this level of detail. It is likely that subjecting both campaign committees and political committees, who have this "primary purpose," and independent expenditure committees, who do not have this "primary purpose," to the same reporting burdens would be unconstitutional under the law of this Circuit.[11]

II. The type of disclosure mandated by organizations making independent expenditures under S.B. 384 could deter individuals from contributing to organizations by impinging on their right to freedom of association.

Under the provisions of this bill, among other things, an "independent expenditure" is very broadly defined as an expenditure "made to pay for an advertisement that…refers to a clearly identified candidate or ballot measure, can reasonably be expected to be seen or heard by at least five hundred persons eligible to vote for the candidate or ballot measure and is published or disseminated within thirty days before the primary election or sixty days before the general election at which the candidate or ballot measure is on the ballot."[12]

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[7] *MCFL*, 479 U.S. at 256 (plurality opinion).
[8] *Sampson v. Buescher*, 625 F.3d 1247 (10th Cir. 2010).
[9] *Id* at 1260.
[10] *Coalition for Secular Government v. Gessler*, No. 1:12-cv-01708, slip op. at 10-11 (D. Colo. Oct. 10, 2014).
[11] *N.M. Youth Organized v. Herrera,* 611 F.3d 669, 677 (10th Cir. 2010).
[12] S.B. 384, Sec. 4(O)(3)(c).

This is misleading. The term "independent expenditures" usually refers to communications that urge voters to cast a vote for or against a candidate. The deceptively worded definition in this legislation will trap many nonprofit groups that simply mention the name of a candidate 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 would be a covered activity.

Furthermore, S.B. 384 requires any organization that pays for a so-called independent expenditure from its general treasury funds, aggregating more than $3,000 during a twelve-month period, to report all its donors who gave an aggregate of more than $5,000 during the preceding twelve months.

Alternatively, the proposed legislation allows organizations to pay for "independent expenditures" out of a segregated account for the purpose of making "independent expenditures." If a group creates a segregated account, all donors whose funds are deposited into the account who gave an aggregate of more than $200 during the prior twelve months would still need to be reported, provided the organization pays out of said account for independent expenditures aggregating more than $3,000 during a twelve-month period.

Taken together, under the proposed legislation, if an organization planned to sponsor an issue advocacy communication or communications in New Mexico identifying a candidate in the 30 or 60-day window before a primary or general election in excess of $3,000, in order to avoid having to report all its donors who give more than $5,000 during a twelve-month period preceding the communication or communications, the organization would have to either:

1) Limit its total spending on all issue ads during a twelve-month period in New Mexico to $3,000 or less; or
2) Pay for issue ads in New Mexico using a segregated account, which would be funded solely through solicitations from donors specifically for the purpose of paying for those ads – and those donors would still have to be reported if they gave more than $200 into the account during the prior twelve months; or
3) Cancel the planned communication or communications.

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 non-electoral speech about policy issues and matters of importance to the public. Moreover, the deterrent effect of having donors' names and addresses 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 and residential address 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.

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."

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. 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.[13] 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."[14]

Much as the Supreme Court sought to protect African Americans in the Jim Crow South and 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 2016 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.

This may seem unrealistic, but it illustrates the fundamental problem with the approach taken. 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, as is required by the First Amendment. 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. 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 New Mexico.

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. It is questionable that the monetary disclosure threshold mandated by S.B. 384 for an individual who donates to an organization speaking about a particular issue is sufficient to meet this justification.

IV. The proposed reporting thresholds for organizations making independent expenditures would often uncouple the disclosed "donor" from the actual speech funded, resulting in "junk disclosure" that associates a donor with a communication they have no knowledge of and may not even support.

The proposed reporting regime in S.B. 384 may well confuse rather than enlighten voters.

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

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. However, if the group decides to engage in the extremely broad types of communications covered in the bill starting at the low level of $1,000, all or many of its donors over a $200 threshold could potentially be made public – if they earmarked the donations for making independent expenditures – and the private information of all donors over $5,000 will be reported to the government, regardless of whether the 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 Santa Fe businessman, who is a proud Democrat, contributing to the Santa Fe Hispanic Chamber of Commerce as his professional association. Then, suddenly a bill is introduced for additional regulation of businesses in the Santa Fe area, and this businessman finds himself listed as contributing to ads mentioning Democratic 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 so-called "independent expenditures" that are not, in fact, express advocacy is both unfair to members and donors and will often be misleading to the public. Our businessman in the above hypothetical does not take issue with those Democratic candidates and may actually support the candidates; it is "junk disclosure."

By mandating disclosure at such low thresholds, it is actually more difficult for voters to discern who the major supporters of an organization are. Muddying up the report's contents with many relatively small donors 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.

A simple test is this: in all of the stories about disclosure in the past three elections, did any express alarm about persons donating $200 or even $5,000? We suggest that the answer is no.

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.

V. Compelled speech listing the names of an organization's top three donors has been viewed unfavorably by courts in the past and inappropriately identifies individuals who may have had no responsibility for authoring the communication – and may even disagree with it.

S.B. 384 requires speakers to add a disclaimer identifying the top three donors to the organization.[15] Since the 1960s, the Supreme Court has held that compulsory speech of this form is heavily disfavored under the First Amendment.[16] Indeed, more recently, when considering a similar statute in Nevada, the federal Ninth Circuit Court of Appeals held, "[s]tatutes like the one here at issue…must be, and have been, viewed as serious, content-based, direct proscription of political

[15] S.B. 384, Sec. 2(B)-(C).

[16] *Talley v. California*, 362 U.S. 60, 67 (1960) (striking down a "stand by your ad" requirement on handbills absent any adequate governmental interest).

speech: If certain content appears on the communication, it may be circulated; if the content is absent, the communication is illegal."[17] Even if individuals share policy beliefs with a group, it does not mean they lose their privacy interest when financially supporting an organization – that principle is precisely what the *NAACP* line of cases has upheld since the 1960s.[18]

Requiring a political communication to contain information about the "identity of the speaker" is not the same as requiring an advertisement to include the names of the organization's top three donors. Already, political advertisements and communications by other organizations identify the speaker: the organization itself. As discussed above in the Santa Fe businessman example, assigning consent to an individual donor is constitutionally problematic and may not realistically reflect the political or policy views of the donor. People and organizations give money to nonprofit organizations for many reasons – for membership, for example. Indeed, donors may give because they believe in the general mission of the organization, but may disagree about a particular advertisement or communication – yet their name appears as if they personally wrote and authorized the ad.

It is because of this compelled speech that this requirement is prone to legal challenge and is likely to be viewed suspiciously by the courts.

VI. The newly proposed "coordination" regulation goes far beyond actual coordination and punishes individuals that work for different organizations with similar policy perspectives.

The proposed bill attempts to define and provide examples of "coordination" that renders an independent expenditure a direct contribution to a candidate.[19] But the examples are vague and cross the line from merely prohibiting back-room deals – a rare occurrence in reality – to regulating the employment prospects of individuals. This bill goes so far as to hold that an organization is deemed to be coordinating if it employs anyone who has given "professional advice" (an admittedly loose, undefined term) to a candidate – even if it was a year ago.

What the bill misses is that many individuals who believe in a particular cause, such as renewable energy, often work for both a candidate and then return to private life by working for organizations directly focused on their cause. In other words, this bill limits the job prospects of true believers who wish to give their time and energy to both politics and charitable work in the areas they are most passionate about.

Further, the bill includes in the examples of "coordination" the possibility that a candidate can "indirectly… request or suggest[]" an independent expenditure be made. The word "indirectly" is not defined, and it is troublesome to enact a law that attempts to vaguely prohibit First Amendment activity such as speaking on public policy issues or supporting a candidate. The problem is not just that a vague law may be applied inconsistently or arbitrarily, but that such a law might also "operate to inhibit protected expression by inducing citizens to steer far wider of the unlawful zone" than they otherwise would.[20] The First Amendment needs "'breathing space to survive, [and so] government

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[17] *American Civil Liberties Union of Nevada v. Heller*, 378 F.3d 979, 992 (9th Cir. 2004).

[18] *See*, *e.g.*, *NAACP v. Ala. ex rel. Patterson*, 357 U.S. 449 (1958); *Bates v. Little Rock*, 361 U.S. 516 (1960); *Shelton v. Tucker*, 364 U.S. 479 (1960); *Gibson v. Florida Legislative Comm.*, 372 U.S. 539 (1963).

[19] S.B. 384, Sec. 3.

[20] *Buckley v. Valeo*, 424 U.S. 1, 41 n. 48 (1976) (quoting *Grayned v. City of Rockford*, 408 U.S. 104, 108-109 (1972) (quoting *Baggett v. Bullitt*, 377 U.S. 360, 372 (1964) (quoting Speiser v. Randall, 357 U.S. 513, 526 (1958)))).

may regulate in the area only with narrow specificity.'"[21] S.B. 384 has an expansive definition of "coordination" and leaves no room for the First Amendment to take a breath.

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Senate Bill 384 seeks to improve transparency, but ultimately falls short in this effort by discouraging donors and workers from contributing to societally important nonprofit organizations, subjecting these donors and workers to potential harassment, and making disclosure information less meaningful overall by broadly capturing the activity of smaller, inconsequential contributors or activity that is not related to the election or defeat of candidates. Coupled with the bill's serious overreach in justifying its provisions based on the Court's holding on disclosure in *Citizens United*, its inappropriate and misleading "top three funder" requirement, and its problematic "coordination" standard, members of the Senate should carefully consider the provisions within S.B. 384.

Thank you for allowing me to submit comments on Senate Bill 384. 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,

Matt Nese
Director of External Relations
Center for Competitive Politics

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[21] *Id*. (quoting *NAACP v. Button*, 371 U.S. 415, 433 (1963)).