CENTER *for* COMPETITIVE POLITICS

Congress shall make no law...

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February 12, 2016

The Honorable Pam Roach
112 Irv Newhouse Building
P.O. Box 40431
Olympia, WA 98504

The Honorable Sharon Nelson
316 Legislative Building
P.O. Box 40434
Olympia, WA 98504

The Honorable Andy Billig
412 Legislative Building
P.O. Box 40403
Olympia, WA 98504

Re: Significant Constitutional and Practical Issues with Senate Bill 5153

Dear President Pro Tempore Roach, Democratic Leader Nelson, Democratic Deputy Leader Billig, and members of the Senate:

On behalf of the Center for Competitive Politics, I am writing you today to respectfully submit the following comments regarding the constitutional and practical impact of the provisions contained in Senate Bill 5153, as amended before the Senate Rules Committee. Specifically, I write to note several significant legal concerns raised by the bill, which proposes amendments to Washington's campaign finance laws. Aside from raising serious 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, Delaware, and Utah. We are also involved in litigation against the state of California.

This legislation proposes a new and stunningly broad definition of "incidental committee" – by definition, organizations that only minimally involve themselves in electoral politics – and proposes to treat these organizations similarly to "political committees" – by definition, groups organized specifically to involve themselves in electoral politics. This new definition proposed in S.B. 5153 is of dubious constitutionality under the First Amendment for four primary reasons: (1) it ignores decades of jurisprudence establishing the necessity of a "major purpose" test; (2) it places a regulatory burden on many moderately-sized organizations in defiance of recent judicial precedent; (3) it dilutes the value of disclosure by perversely creating "junk disclosure"; and (4) it may subject individuals to harassment based on their political beliefs. <u>As currently drafted, this bill even appears to force certain 501(c)(3) charitable organizations to report the names and home addresses of their significant supporters to the government, even though (c)(3)s by their very nature</u>

are forbidden from engaging in political activity. Moreover, because the measure references other vague provisions in existing state law, such as the definitions of "contribution," "election campaign," "expenditure," and "political advertising," and the undefined terms "support" and "opposition," the measure suffers from additional infirmities not present on its face.

In particular, the measure is unconstitutionally vague in that it requires incidental committees to report only those expenditures "that were made directly *or indirectly* in support of or in opposition to any election campaign or to a political or incidental committee."[1] What qualifies as "indirect" support of a political committee, or an incidental committee or election campaign, for that matter? The measure is silent on this question, and those speakers who are attempting to comply with these reporting requirements will likely opt not to speak, rather than risk running afoul of the law. If they do speak and attempt to comply with the measure's reporting mandates, they will face the very real possibility of tripping over the unclear wording of the law and incurring costly financial penalties. This is a significant weakness because the Supreme Court has consistently stated that such lengthy and confusing requirements chill speech: "Prolix laws chill speech for the same reason that vague laws chill speech: People of common intelligence must necessarily guess at the law's meaning and differ as to its application."[2] This danger is especially pronounced in Washington, where private parties may bring campaign finance complaints for minor reporting violations.

Accordingly, if S.B. 5153 becomes law, its newly proposed definition of "incidental committee" and attendant reporting requirements 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 award legal fees to successful plaintiffs. Legal fee awards are often expensive, and can cost governments well over one hundred thousand dollars.

I. S.B. 5153 creates a new definition of "incidental committee" – with no language concerning such an entity's major purpose – to reach groups that cannot be regulated as political committees under current law. Such a definition is inappropriate and burdensome.

S.B. 5153 proposes a new definition of "incidental committee," defined as "any nonprofit organization not otherwise defined as a political committee but that may incidentally make a contribution or an expenditure in support of, or opposition to, any candidate or any ballot proposition in Washington, directly or through a political committee."[3]

As proposed in this bill, if an incidental committee – a group that, as the very name suggests, is not primarily engaged in political campaign activity, but may incidentally exercise its speech rights – makes vaguely defined "contributions" or "expenditures" of $25,000 or more, it must file a statement of organization with the state and subject itself to functionally similar reporting requirements as a political committee – which, by definition, has "the expectation of receiving contributions or making expenditures in support of, or opposition to, any candidate or

[1] Sec. 7(6) (emphasis added).
[2] *Citizens United*, 558 U.S. at 324.
[3] Sec. 3(25)(a).

any ballot proposition."[4] Essentially, the bill states that *any organization* that spends $25,000 on poorly defined activities 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. Such a distinction is a bedrock principle of First Amendment law.

By making no distinction between organizations that do and do not have a major purpose of supporting or opposing the election of candidates or the passage of defeat of ballot measures, S.B. 5153 imposes significant reporting requirements on "incidental committees," by subjecting such groups to functionally similar reporting requirements as political committees, simply because they make vaguely defined "contributions" or "expenditures" of $25,000 or greater. 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 political committee.

In 1976, the U.S. Supreme Court decided *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 governmental regulation.[5] The relevant portion of FECA had a "plan[ed] effect…to prohibit all individuals, who are neither candidates nor owners of 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."[6] 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."[7]

More recently, in *Human Life of Washington, Inc. v. Brumsickle*, the Ninth Circuit, which has jurisdiction over Washington, examined the major purpose test in the context of an organization opposed to euthanasia.[8] 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"

[4] Sec. 3(38).
[5] *Buckley v. Valeo*, 424 U.S. 1 at 42-44 (1976) (emphasis added).
[6] *Id*. at 39-40 (internal quotation marks omitted); this figure has the equivalent buying power today of approximately $4,807.65.
[7] *Id*. at 79 (emphasis added).
[8] *Human Life of Washington, Inc. v. Brumsickle*, 624 F.3d 990, 995 (9th Cir. 2010).

> – not the words "a" or "the" – is what is constitutionally significant.[9] 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.[10]

Likewise, in *New Mexico Youth Organized v. Herrera* ("*NMYO*"),[11] the Tenth Circuit held that New Mexico campaign finance law's definition of "political committee" must satisfy "the major purpose test."[12] Significantly, the challenge dealt with political committee registration and disclosure, at issue in S.B. 5153, and not any challenge to electioneering communication disclosure.[13]

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.[14] The mailings suggested that certain legislators were beholden to health insurance interests, and highlighted that the legislators' donors included health insurance companies.[15] Both nonprofit organizations spent a relatively small portion of their budget on the 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.[16] It's worth noting that these spending amounts are similar in scope to the $25,000 monetary threshold proposed in S.B. 5153.

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."[17] The court found that because neither group spent "a *preponderance* of its expenditures on express advocacy or contributions to candidates,"[18] neither could be regulated as a political committee.

As recently as 2012, 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.[19] This included having to file periodic reports, even if the fund no longer engaged in political activity.[20] Ultimately, the *Swanson* Court required the major

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[9] *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 'a major purpose' test is the word 'major,' not the article before it.").
[10] *Human Life of Washington, Inc. v. Brumsickle*, 624 F.3d at 1011.
[11] *New Mexico Youth Organized v. Herrera*, 611 F.3d 669 (10th Cir. 2010).
[12] *Id*. at 677.
[13] *Id*. at 672.
[14] *Id*. at 671.
[15] *Id*. at 671-72.
[16] These figures amount to approximately 6.7% of NMYO's budget and 0.5% of Southwest Organizing Project's budget.
[17] *Id.* at 677 (quoting *Buckley*, 424 U.S. at 79) (emphasis added).
[18] 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. 5153 purports to do.
[19] *Minnesota Citizens Concerned for Life, Inc. v. Swanson*, 692 F.3d at 872 (8th Cir. 2012).
[20] *Id*.

purpose test to ensure that only political organizations face that burden – and not organizations that lack such a major purpose.[21] S.B. 5153 would fail that test.

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

III. S.B. 5153 would likely be unconstitutional in many of its applications due to the burdens it would impose on many moderately sized organizations.

While the Supreme Court upheld certain disclosure in *Citizens United v. Federal Election Commission*,[22] it addressed only a narrow and far less burdensome form of disclosure to that contemplated by S.B. 5153. 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*.[23]

By contrast, this legislation would mandate disclosure of the names and mailing addresses of the top ten contributors to a nonprofit of $10,000 or more and all contributors who have given $100,000 or more in a calendar year to the organization if that entity makes expenditures of $25,000 – *regardless of whether or not its major purpose is to influence elections, and regardless of those donors' relationship to the organization's contributions or expenditures*.

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*"),[24] 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."[25]

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.[26] Likewise, Justice O'Connor was concerned with the "organizational restraints," including "a more formalized organizational form" and a significant loss of funding availability.[27]

Accordingly, any disclosure requirements imposed on "incidental committees" that compel generalized donor disclosure would likely be unconstitutional. Conversely, language that only requires the disclosure of those contributions *specifically intended* for political contributions or expenditures would be constitutional, pursuant to a forty-year-old unbroken chain of U.S. Supreme Court litigation.[28]

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[21] *Id*.
[22] *Citizens United v. FEC*, 558 U.S. 310 (2010).
[23] 52 U.S.C. § 30104(f); *Citizens United*, 558 U.S. 366-67.
[24] *Massachusetts Citizens For Life, Inc. v. Federal Election Commission*, 479 U.S. 238 (1986).
[25] *Citizens United*, 130 S. Ct. at 915 (contrasting independent expenditure reports with the burdens discussed in *MCFL*).
[26] *MCFL*, 479 U.S. at 253 (Brennan, J., plurality opinion).
[27] *Id.* at 266 (O'Connor, J., concurring).
[28] *Buckley v. Valeo*, 424 U.S. 1, 80 (1976).

Essentially, the proposed bill would force a nonprofit to either face disclosure to the government of its significant donors as well as other extensive regulatory costs, if it spends just $25,000 on activities that are poorly defined, or instead avoid speaking. *MCFL* noted that these sorts of "incentives" serve to "necessarily produce a result which the State [cannot] command directly. It only result[s] in a deterrence of speech which the Constitution ma[de] free."[29]

IV. 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.

In addition to the significant regulatory burdens imposed on organizations whose major purpose is not political, the proposed reporting regime for incidental committees in S.B. 5153 will mislead 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 and business organizations, some of whom are likely to fall under the snare of incidental committee regulation, 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 $25,000 monetary threshold, many of its significant donors could potentially be made public, regardless of whether their donations were intended to be used for broadly defined "contributions" or "expenditures," as defined in existing state law.

This is problematic, as many of these donors will have given for very different reasons. Imagine the Yakima businesswoman who owns a small chain of pharmacies and is a proud and continual supporter of the Association of Washington Business (AWB) as her professional association. She gives $12,000 each year for general support of the association's efforts. Then, suddenly a bill is introduced for additional regulation on the construction of power plants, and AWB opposes these regulations as well as the local legislators or candidates who support the bill. *This businesswoman finds herself listed as contributing to ads that were run by the group opposing regulations that would not affect her, and opposing legislators or candidates she may actually support; it is "junk disclosure."*

People give to trade associations and nonprofits not because they agree with everything an organization does, or particular political positions a group may take, but because on balance they believe the group provides a valuable service. To publicly identify contributing individuals with expenditures of which they had no advance knowledge and may even oppose is both unfair to members and donors and will often be misleading to the public. Our businesswoman in the above hypothetical does not take issue with this particular bill and those elected officials who support it; again, it is "junk disclosure."

This problem is further exacerbated by temporal issues with donations to nonprofits. The Yakima businesswoman in the above example may have given her donation in April of 2015, well before the 2016 election, and long before the nonprofit to which she contributed decided to engage

[29] *MCFL*, 479 U.S. at 256 (plurality opinion).

in political activity. Thus, she is being reported as an opponent of a candidate *who may not have even declared their candidacy* when she contributed to the organization and therefore could not have factored into her motivation for contributing. This, once more, 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.

In short, ignoring the major purpose test, as S.B. 5153 does, creates "junk disclosure." Such disclosure regimes fall outside the purview of legitimate state interests and go beyond reporting requirements approved by the Court. It is difficult to argue that such public reporting advances the legitimate purposes of informing the public and preventing corruption.

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."

In considering this bill, it's worth noting that disclosure laws implicate both citizen privacy rights and touch on Supreme Court precedent. Indeed, 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.[30] In recognizing the sanctity of privacy in 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."[31] This is why the privacy of citizens when speaking out about government officials and actions has been protected in certain contexts.[32]

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 contribute to nonprofit groups in Washington – for or against same-sex marriage; for or against abortion rights; or even to groups associated with others who have been publicly vilified, such as the Koch family, Sheldon Adelson, Tom Steyer, or George Soros – might be subjected to similar threats.

This danger, no matter how remote, 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 or other citizens, as is required by the First Amendment. Worse still, 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.

[30] *NAACP v. Alabama*, 357 U.S. 449 (1958).
[31] *NAACP v. Ala. ex rel. Patterson*, 357 U.S. at 462.
[32] *See McIntyre v. Ohio Elections Commission*, 514 U.S. 334, 337-338 (1995).

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 express advocacy regarding such candidates* – and not to organizations engaging in issue advocacy about a particular topic relevant to the voters of Washington.

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[33] 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 provide the provision of only such information as is particularly important to voters. It is questionable that the monetary disclosure threshold mandated by S.B. 5153 for organizations that lack a major purpose of influencing elections, but may opt to speak about a particular issue, is sufficient to meet this standard.

* * *

Senate Bill 5153 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, will perversely create "junk disclosure," and may subject donors to harassment. As a result, many provisions in this legislation raise serious legal concerns.

Thank you for allowing me to submit comments on Senate Bill 5153. 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

[33] *Brown v. Socialist Workers' '74 Campaign Comm*, 458 U.S. 87 (1982).