CENTER for COMPETITIVE POLITICS
Congress shall make no law...
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March 24, 2016

The Honorable Thomas M. Bakk
95 University Avenue W.
3113 Minnesota Senate Building
Saint Paul, MN 55155

The Honorable David W. Hann
100 Rev. Dr. Martin Luther King Jr. Boulevard
147 State Office Building
Saint Paul, MN 55155

Re: Analysis of the Proposed Minnesota Constitutional Amendment Requiring Disclosure of Certain Contributions and Campaign Expenditures (S.F. 3117)

Dear Majority Leader Bakk, Minority Leader Hann, and members of the Senate:

On behalf of the Center for Competitive Politics (CCP),[1] we respectfully submit the following comments analyzing a bill to amend Minnesota's Constitution, as introduced by members of the Senate on March 23, 2016. Known informally as the "Minnesota DISCLOSE Act," the proposed constitutional amendment would require disclosure of contributions and expenditures made for express advocacy concerning state candidates and certain other communications the bill asserts to be election-related. This bill, S.F. 3117, contains two unconstitutionally vague and overbroad standards to regulate speech that are contradictory with each other. The first – a straightforward "reasonable person" standard – would regulate speech based on a hypothetical "reasonable" audience's subjective and varied understandings, and directly contradicts U.S. Supreme Court and other federal court rulings concerning the First Amendment generally, and campaign finance laws specifically.

The second standard in the proposal makes a fatally flawed attempt at mimicking the Federal Election Commission's ("FEC") "*no other* reasonable meaning" express advocacy definition.[2] While the second standard comes closer to comporting with established campaign finance precedents, it is still excessively vague and overbroad and contradicts the first standard. Because of this internal contradiction, the proposed constitutional amendment is void as a matter of Minnesota law and may not be submitted to the voters in its current form. Even if the proposal is revised to address these fatal flaws, the donor disclosure language still must be clarified so that it requires public disclosure of only those contributors who give for the specific purpose of funding regulable speech, rather than all of an organization's general donors. Such broad disclosure could also result in the harassment of citizens.

These concerns are discussed in more detail below.

[1] 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 Delaware, Texas, and Utah. We are also involved in litigation against the state of California.

[2] *See* 11 C.F.R. § 100.22(a); *see also id*. § 100.22(b) (addressing communications that "could only be interpreted by a reasonable person as containing advocacy of the election or defeat" of a candidate). As discussed in more detail below, the proposal addresses communications that are "not susceptible to any other interpretation by a reasonable person other than as advocating the election or defeat of a candidate," and appears to be intended to mirror the FEC rule.

I. The proposed constitutional amendment is unconstitutionally vague and overbroad and fails to comply with U.S. Supreme Court and other federal court rulings.

To borrow from the text of the proposed amendment itself, the amendment, "when taken as a whole," is "susceptible" to multiple, varied, and contradictory interpretations. In light of the amendment's inherent ambiguity and internal contradiction, it is unclear exactly what speech this measure purports to regulate, therefore rendering it unconstitutionally vague and overbroad.

It is a bedrock principle of the First Amendment that speech laws – including campaign finance laws specifically – may not "pu[t] the speaker . . . wholly at the mercy of the varied understanding of his hearers."[3] As the U.S. Court of Appeals for the Eighth Circuit (in whose jurisdiction Minnesota lies) has explained in the context of campaign finance disclosure requirements, "When a definition depends on the meaning others attribute to the speech, there is no security for free discussion because the definition 'blankets with uncertainty whatever may be said,' requiring 'the speaker to hedge and trim.'"[4]

Section 2 of the proposed amendment asks Minnesota voters to approve language in the state Constitution to "require public disclosure of contributions and expenditures for communications made within a reasonable proximity to an election that clearly identify a candidate, communications that expressly advocate for or against a candidate for state elected office, and communications *that could be interpreted by a reasonable person* as advocating the election or defeat of a candidate for state elected office."[5] However, the First Amendment does not permit a "reasonable person" standard to define what speech is regulable as campaign speech, precisely because such an open-ended and subjective standard would put speakers "at the mercy of the varied understanding of his hearers." As the U.S. Court of Appeals for the Fourth Circuit has explained in the context of campaign finance disclosure requirements, a statute is vague where it "determine[s] whether speech [is] regulable based on how a 'reasonable person' interpret[s]" the speech.[6]

Rather, the U.S. Supreme Court has upheld regulation of campaign speech as the "functional equivalent" of express advocacy "*only if* the ad is susceptible of *no reasonable interpretation other than* as an appeal to vote for or against a specific candidate."[7] Although these appear to be subtle differences at first blush, the conditional phrase "only if" and the word "no" preceding the phrase "reasonable interpretation" make all the difference in the world. Under the "reasonable person" standard set forth in Section 2 of the proposal, speech may unwittingly subject a speaker to regulation even if it is susceptible to varied interpretations, so long as under *any one* (or multiple) reasonable interpretation(s), it could be said that the speech is election advocacy. By contrast, under the U.S. Supreme Court's formulation, speech can be regulated as election advocacy only after *all other reasonable interpretations have been foreclosed*, so that there is *one and only one* interpretation of election advocacy.

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[3] *See, e.g.*, *Morse v. Frederick*, 551 U.S. 393, 442 (2007) (quoting *Thomas v. Collins*, 323 U.S. 516, 535 (1945)); *Buckley v. Valeo*, 424 U.S. 1, 43 (1976) (same); *Iowa Right to Life Comm., Inc. v. Williams*, 187 F.3d 963, 969 (8th Cir. 1999) (quoting *Buckley*, 424 U.S. at 43).

[4] *Iowa Right to Life Comm., Inc. v. Williams*, 187 F.3d at 969 (quoting *Buckley*, 424 U.S. at 43).

[5] Minn. Senate, S.F. No. 3117 § 2 (emphasis added).

[6] *Ctr. for Individ. Freedom v. Tennant*, 706 F.3d 270, 287 (4th Cir. 2013) (quoting *North Carolina Right to Life., Inc. v. Leake*, 525 F.3d 274, 285-86 (4th Cir. 2008).

[7] *Fed. Election Comm'n v. Wis. Right to Life, Inc.*, 551 U.S. 449, 470 (2007) (emphasis added); *see also Citizens United v. Fed. Election Comm'n*, 558 U.S. 310, 326 (2010) ("there is *no reasonable interpretation* of *Hillary* [: *The Movie*] *other than* as an appeal to vote against Senator Clinton.") (emphasis added).

II. The proposal's internal contradiction renders it void as a matter of Minnesota law.

Exacerbating the proposal's ambiguity is the contradiction between Section 1 and Section 2, which renders the text of the ballot question to be submitted to the voters void as a matter of Minnesota law.

Section 1 provides, in relevant part, that:

> At a minimum, disclosure must be required for contributions and expenditures for communications made within a reasonable proximity to an election that clearly identify a candidate, communications that use words or phrases of express advocacy, and communications that, when taken as a whole and with limited reference to external events, including the proximity to an election, are *not susceptible to any other interpretation* by a reasonable person other than as advocating the election or defeat of a candidate.[8]

This "not susceptible to any other interpretation" language comes closer to articulating the U.S. Supreme Court's "no reasonable interpretation other than" language. However, as discussed above, this is contradictory to the straightforward (and unconstitutional) "reasonable person" standard contained in Section 2.

Under Minnesota's constitutional amendment process, the Legislature votes to approve the proposed text of the constitutional amendment (here, Section 1) in its entirety, along with the text of the ballot question to be voted on by the electorate (here, Section 2). However, the voters will only vote on the text of the ballot question and not the entire amendment language.[9]

Here, because the Legislature will be voting to approve the "*not susceptible to any other interpretation*" standard for regulating speech as election advocacy, but the voters will be voting to approve the "reasonable person" standard, it is unclear *which* of these contradictory standards is actually going to be adopted if this amendment is approved. When it comes time to enact legislation to implement the constitutional amendment or to adjudicate concerning the same, it will be impossible for legislators and judges looking at the relevant legislative history to determine exactly what standard it was that the voters enacted.

Accordingly, ballot questions asking voters to approve constitutional amendments are void in Minnesota if "the clear and essential purpose of the act" is not "fairly expressed in the question submitted," or if the language is "so unclear or misleading that voters of common intelligence cannot understand the meaning and effect of the amendment."[10] Here, given the plain contradiction between the ballot question text to be submitted to the voters and the constitutional amendment text the Legislature will be voting on, the proposal is void on its face.

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[8] Minn. Senate, S.F. No. 3117 § 1 (emphasis added).

[9] *See* "Minnesota Constitutional Amendments, Historic and Legal Principles," Minnesota House of Representatives Research Department. Retrieved on March 24, 2016. Available at: http://www.house.leg.state.mn.us/hrd/pubs/constamd.pdf (March 2013), p. 32.

[10] *Breza v. Kiffmeyer*, 723 N.W. 2d 633, 636 (Minn. 2006); *State v. Duluth & N.M. Ry. Co.*, 112 N.W. 897, 898-99 (Minn. 1907).

III. The proposal fails to properly articulate the FEC's express advocacy rule.

Even if the proposed ballot question text in Section 2 is revised to harmonize it with the proposed amendment text in Section 1, the proposal would still be unconstitutionally vague and overbroad.

Section 1 appears to be modeled after the Federal Election Commission's definition of "express advocacy" at 11 C.F.R. § 100.22(b), but it is a fatally flawed attempt at mimicking what is already a controversial regulatory standard. Under the FEC rule, a communication may be considered express advocacy if:

> When taken as a whole and with limited reference to external events, such as the proximity to the election, [the communication] could only be interpreted by a reasonable person as containing advocacy of the election or defeat of one or more clearly identified candidate(s) ***because*** –
>
> > (1) The electoral portion of the communication is unmistakable, unambiguous, and suggestive of only one meaning; and
> > (2) Reasonable minds could not differ as to whether it encourages actions to elect or defeat one or more clearly identified candidate(s) or encourages some other kind of action.[11]

Crucially, S.F. 3117 omits all of the limiting language after the conjunction "because." The fact that "because" is a conjunction is grammatically and legally significant, *because* it means that both of the additional two conditions in the FEC rule are necessary in order for speech to be regulated as express advocacy, thereby significantly limiting the scope of the rule's reach.[12] Indeed, the U.S. Court of Appeals for the Fourth Circuit found these additional factors highly significant when it upheld the FEC rule against a constitutional challenge, noting that the regulation is sufficiently "narrow[]" because "it requires a communication to have *an* '*electoral portion*' that is 'unmistakable' and 'unambiguous,'" and because the requirement that a communication is "suggestive of only one meaning" is "stringent."[13]

Not surprisingly, the FEC also believes the additional language present in 11 C.F.R. § 100.22(b), but which is omitted in S.F. 3117, is essential to ensuring the rule's constitutionality. Per the FEC, the additional language was written "to alleviate . . . concerns" about overbreadth and to "emphasiz[e] that *the electoral portion* of the communication must be unmistakable, unambiguous and *suggestive of only one meaning*."[14]

By contrast, under the proposed text in Section 1, a communication could lack any nexus to an election whatsoever and could be suggestive of multiple meanings other than that of election advocacy, but nonetheless could be regulated as election speech. Due to this vast open-endedness, it is impossible

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[11] 11 C.F.R. § 100.22(b) (emphasis added).
[12] *See* "Because," Merriam-Webster. Retrieved on March 24, 2016. Available at: http://www.merriam-webster.com/dictionary/because (2015).
[13] *The Real Truth About Abortion, Inc. v. Fed. Election Comm'n*, 681 F.3d 544, 552 and 554 (4th Cir. 2012) (emphasis added).
[14] Fed. Elec. Comm'n, Explanation and Justification for Final Rules on Express Advocacy, 60 Fed. Reg. 35291, 35295 (Jul. 6, 1995) (emphasis added).

for a "person of ordinary intelligence . . . to know what is prohibited," and the proposal is therefore repugnant to the First Amendment and the Constitution's guarantee of due process of law.[15]

While CCP does not specifically support the FEC's express advocacy definition, and notes that its validity is highly questionable,[16] S.F. 3117's fatally flawed attempt at mimicking the already tenuous federal rule creates an express advocacy standard that almost certainly will crumple under the weight of a constitutional challenge.

IV. The proposal must be narrowly written to cover disclosure only of earmarked contributions.

Even if the proposed constitutional amendment and ballot question were to be amended to address the fatal constitutional flaws discussed above, the disclosure requirement still must be written more clearly to cover only those contributions that are earmarked for the purpose of funding express advocacy communications. As the U.S. Court of Appeals for the Eighth Circuit has held with respect to Minnesota's campaign finance laws, disclosure requirements are "subject to 'exacting scrutiny,' which requires a 'substantial relation' between the disclosure requirement and a 'sufficiently important' governmental interest."[17]

Here, it appears that the proposed amendment text in Section 1 is intended to cover disclosure only of those contributions for communications "that clearly identify a candidate [and] communications that use words or phrases of express advocacy . . . ." However, this disclosure requirement should be made even clearer by adopting language from the FEC's similar disclosure requirements for independent expenditures and electioneering communications. Specifically, the proposed text should read as follows:

> Disclosure must be required for ~~contributions and~~ expenditures for communications… that clearly identify a candidate, communications that use words or phrases of express advocacy… and contributions made for the purpose of furthering such communications.[18]

Failure to clarify the scope of the donor disclosure requirement will result in "junk disclosure" that misleads the public. Citizens will often be unfairly linked with communications that are deemed to be "political" even if they did not donate to an organization for the purpose of funding political activity. Take the following example articulated by the U.S. Court of Appeals for the D.C. Circuit in

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[15] *See Grayned v. City of Rockford*, 408 U.S. 104, 108 (1972).

[16] *See, e.g.*, *Me. Right to Life Comm. Inc. v. FEC*, 914 F. Supp. 8, 13 (D. Me. 1996) ("conclud[ing] that 11 CF.R. § 100.22(b) is contrary to the statute as the U.S. Supreme Court and the First Circuit Court of Appeals have interpreted it and is thus beyond the power of the FEC"), *aff'd per curiam*, 98 F.3d 1 (1st Cir. 1996), *cert. denied*, 522 U.S. 810 (1997). *See also Va. Soc'y for Human Life, Inc. v. FEC*, 263 F.3d 379, 382 (4th Cir. 2001) ("[T]he FEC voted 6-0 to adopt a policy that 11 C.F.R. § 100.22(b) would not be enforced in the First or Fourth Circuits because the regulation 'has been found invalid' by the First Circuit and 'has in effect been found invalid' by the Fourth Circuit.").

[17] *Minn. Concerned Citizens for Life, Inc. v. Swanson*, 692 F.3d 864, 874-75 (8th Cir. 2012).

[18] *See* 11 C.F.R. § 104.20(c)(9) (requiring disclosure of "each person who made a donation . . . *for the purpose of furthering* electioneering communications") (emphasis added); *Van Hollen v. Fed. Election Comm'n*, No. 15-5016 (D.C. Cir. Jan. 21, 2016) slip op. (upholding the FEC rule against a challenge under the Administrative Procedure Act). *See also* 11 C.F.R. § 109.10(e)(vi) (requiring disclosure of "each person who made a contribution . . . *for the purpose of furthering* the reported independent expenditure") (emphasis added).

upholding the FEC's limitation of its electioneering communications disclosure rule only to earmarked contributions:

> Imagine the following not unlikely scenario. A Republican donates $5,000 to the American Cancer Society (ACS), eager to fund the ongoing search for a cure. Meanwhile, Republicans in Congress, aware of a growth in private donations to ACS, push for fewer federal grants to scientists studying cancer in order to reduce the deficit. In response to their push, the ACS runs targeted advertisements against those Republicans, leading to the defeat of several candidates in the upcoming election. Wouldn't a rule requiring disclosure of ACS's Republican donor, who did not support issue ads against her own party, convey some misinformation to the public about who supported the advertisements?[19]

Or consider the following two examples provided by the FEC in explaining the agency's disclosure rule, and which the D.C. Circuit quoted approvingly:

> A corporation's general treasury funds are often largely comprised of funds received from investors such as shareholders who have acquired stock in the corporation and customers who have purchased the corporation's products or services, or in the case of a non-profit corporation, donations from persons who support the corporation's mission. These investors, customers, and donors do not necessarily support the corporation's electioneering communications. Likewise, the general treasury funds of labor organizations and incorporated membership organizations are composed of member dues obtained from individuals and other members who may not necessarily support the organization's electioneering communications.[20]

As the above examples illustrate, citizens give to nonprofits not because they agree with everything the organization does, or particular policy positions a group may take, but because on balance they believe the group provides a valuable service. To publicly identify contributing individuals with particular speech they do not necessarily support, and which they had no advance knowledge of, is unfair to members and donors and will often be misleading to the public – again, it is "junk disclosure."

V. Donor disclosure may result in the harassment of individuals by their political opponents and should be carefully balanced with the public's "right to know."

In considering S.F. 3117, 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.[21] In recognizing

[19] *Van Hollen*, slip op. at 20.
[20] *Id.* at 19-20 (quoting Fed. Election Comm'n, Explanation and Justification for Final Rules on Electioneering Communications, 72 Fed. Reg. 72899, 72911 (Dec. 26, 2007)).
[21] 357 U.S. 449 (1958).

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."[22] This is why the privacy of citizens when speaking out about government officials and actions has been protected in certain contexts.[23]

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 speak in the broadly-defined standards enumerated in this proposal – 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.

Indeed, in today's polarized political environment, more and more individuals have suffered violent threats, harassment, and property damage as a result of compulsory disclosure information. For example, during the hotly contested debate over same-sex marriage in California in 2008, the personal information of supporters of traditional marriage was exposed due to overly broad disclosure laws. Some traditional marriage supporters recounted being told, "Consider yourself lucky. If I had a gun I would have gunned you down along with each and every other supporter."[24] In New York, the state ACLU chapter has documented that its employees and members have been the subject of death threats.[25] Presumably, if the private information of donors to similar groups in Minnesota were forcibly and publicly disclosed, these citizens also would be at risk.

This danger illustrates the fundamental problem with the approach taken in S.F. 3117. 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 a disfavored cause.

Ultimately, the Court has made clear that this concern over harassment exists, whether the threats or intimidation come from the government or from private citizens who receive their information because of the forced disclosure. In short, mandatory 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. The indiscriminate disclosure requirement and vague and overbroad standards triggering disclosure in S.F. 3117 are not sufficiently tailored to minimize the likelihood of harassment.

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[22] *Id.* at 462.
[23] *See, e.g., McIntyre v. Ohio Elections Commission*, 514 U.S. 334, 337-338 (1995).
[24] *Citizens United*, 558 U.S. at 481 (J. Thomas, concurring).
[25] Donna Lieberman and Irum Taqi, "The Contents Of A Lobbyist's Statement Of Registration: Testimony Of Donna Lieberman And Irum Taqi On Behalf Of The New York Civil Liberties Union Before The New York City Council Committee On Governmental Operations Regarding Int. 502-b," New York Civil Liberties Union. Retrieved on March 24, 2016. Available at: http://www.nyclu.org/content/contents-of-lobbyists-statement-of-registration (April 11, 2007).

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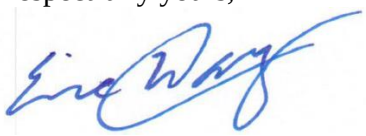
The proposed constitutional amendment contains two different standards for regulating political speech as "express advocacy" that not only contradict one another, but each of which, standing alone, is also unconstitutionally vague and overbroad. As such, the proposal not only violates the First Amendment of the U.S. Constitution, but is also void under Minnesota state law governing amendments to the state constitution. Even if the proposal were revised to address these fatal flaws, it would still pose an undue burden on free speech and result in "junk disclosure" and harassment unless it were also narrowed to require disclosure of only those contributions that are earmarked for the purpose of funding express advocacy communications.

Thank you for allowing us to submit comments on S.F. 3117. Should you have any further questions regarding these issues or any other campaign finance proposals, please do not hesitate to contact Matt Nese at (703) 894-6835 or by e-mail at mnese@campaignfreedom.org.

Respectfully yours,



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