CENTER for COMPETITIVE POLITICS

*Congress shall make no law...*

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March 14, 2017

**VIA ELECTRONIC MAIL**

Hon. Susana Martinez
Governor, State of New Mexico
490 Old Santa Fe Trail
Room 400
Santa Fe, NM 87501

**RE: Constitutional and Practical Issues with Senate Bill 96**

Dear Governor Martinez:

On behalf of the Center for Competitive Politics ("the Center"),[1] we respectfully submit the following comments on constitutional issues with portions of Senate Bill 96,[2] as amended by the House and currently before the Senate in concurrence. This legislation is expected to pass the Senate and be delivered to your desk, potentially as soon as today. 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 provisions of S.B. 96 would ultimately chill protected speech by mandating the disclosure of donors to organizations engaged solely in issue advocacy.[3]

The legislation proposes new and burdensome reporting requirements for organizations. It purports to cover only "independent expenditures," 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. Furthermore, the bill extends onerous disclaimer requirements that "call out" an organization's funders – whether or not the donors agree with the specific communication. Complicating matters, S.B. 96 goes even further and creates a vague "coordination" standard.

[1] The Center 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. Just this past year, we secured judgments in federal court striking down laws in the states of Colorado and Utah on First Amendment grounds. We are also currently involved in litigation against California, Missouri, and the federal government.

[2] Campaign Finance Fixes, S.B. 96, 53 Leg., 1st Sess. (N.M. 2017) (as substituted by S. Jud. Comm.) ("S.B. 96").

[3] Issue advocacy is speech about public policy issues, as distinct from speech that advocates for or against candidates for office.

## I. Senate Bill 96's mandated disclosure is not properly tailored to a substantial governmental interest and includes a reporting threshold that is too low.

### a. The Supreme Court and the Tenth Circuit Court of Appeals have severely limited New Mexico's ability to compel disclosure for speech that is not campaign-related.

Senate Bill 96 attempts to reform how New Mexico's campaign finance disclosure system operates. But in so doing, it impermissibly catches speech about public policy issues in the net designed to regulate campaign speech. Worse, once entangled in New Mexico's campaign finance regime, the bill imposes onerous registration and multiple reporting requirements on speakers in New Mexico. These flaws in the bill are fatal.

Under the First Amendment and United States Supreme Court guidance, campaign finance disclosure must be tied to informing the public concerning groups seeking some electoral outcome. Courts review state and federal laws demanding donor lists under "exacting scrutiny," which demands there be "a 'relevant correlation' or 'substantial relation' between the governmental interest and the information required to be disclosed."[4] This heightened scrutiny is required because, under the First Amendment, "compelled disclosure… cannot be justified by a mere showing of some legitimate governmental interest."[5] Therefore, the Supreme Court has long demanded a nexus between campaign finance disclosure and actual campaign-related activity in order to protect organizations merely discussing questions of public policy.[6]

Candidate committees (and, in the state law context, ballot measure committees) obviously support or oppose electoral outcomes and are campaign-related.[7] Organizations with the "major purpose" of supporting or opposing candidates or ballot measure questions are also subject to campaign finance disclosure.[8] Indeed, the United States Court of Appeals for the Tenth Circuit specifically applied the "major purpose" requirement to New Mexico's campaign finance law.[9]

But if an organization is neither controlled by a candidate nor has as its "major purpose" speech targeting electoral outcomes, then disclosure is appropriate *only* for activity that is "unambiguously campaign related."[10] The more disclosure is divorced from the interest of who is speaking about candidates or ballot measures, the greater the threat to protected issues speech under the First Amendment.

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[4] *Buckley v. Valeo*, 424 U.S. 1, 64 (1976) (per curiam).
[5] *Id*.
[6] *Id*. at 14 (noting "there is practically universal agreement that a major purpose of that Amendment was to protect the free discussion of governmental affairs,… of course includ[ing] discussions of candidates….") (quoting *Mills v. Alabama*, 384 U.S. 214, 218 (1966)) (brackets and ellipses in *Buckley*).
[7] *Id*. at 79.
[8] *Id*.
[9] *N.M. Youth Organized v. Herrera*, 611 F.3d 669, 677 (10th Cir. 2010) ("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.'") (quoting *Buckley*, 424 U.S. at 79).
[10] *Buckley*, 424 U.S. at 81.

While the Center commends the drafters of S.B. 96 for trying to avoid reaching activity by § 501(c)(3) nonprofit organizations,[11] the definition of "independent expenditure" is broad enough to cover grassroots lobbying by § 501(c)(3) organizations if they run their communications close in time to an election. Under Section 4(N)(3)(c), an "independent expenditure" can be a communication that "refers to a clearly identified candidate or ballot measure and is published and disseminated to the relevant electorate… within thirty days before the primary election or sixty days before the general election…." Thus, if a § 501(c)(3) organization runs a communication calling for support of a bill while mentioning a sitting member of the Legislature (who happens to be running for reelection),[12] the communication would qualify as an "independent expenditure" if disseminated close in time to an election. Once qualified as an "independent expenditure," the activity would compel the § 501(c)(3) organization to register and disclose its donors.

In its current form, the provisions of S.B. 96 would chill protected speech by mandating the disclosure of donors to organizations that never endorse, support, or oppose a candidate and speak solely about issues. Despite the claims of the bill's proponents, the First Amendment does not permit the imposition of unbounded government registration and reporting requirements as a precondition to speech.

**b. S.B. 96 requires disclosure that is burdensome, especially for small entities, and therefore is not properly tailored to the state's interest.**

For the sake of argument, even if the state has an interest in compelling disclosure, the reporting must be tailored to its interest and be in balance with the burdens it places on speakers. If the state's demand for disclosure is too onerous – demanding too much information or demanding regular registration and reporting to the state – then it may be too burdensome under the First Amendment. Thus, the *scope and method* of the state's disclosure system matters too. One-time, event-driven reports are less burdensome, and therefore more likely to survive a federal court's exacting scrutiny, than the continual reporting mandated of Political Action Committees ("PACs"). S.B. 96 imposes PAC-like status on speakers,[13] and in that manner goes too far.

It is sometimes said that the Supreme Court's decision in *Citizens United v. Federal Election Commission*[14] upheld the constitutionality of "disclosure," but, in fact, the Court approved only a particular, narrow type of disclosure subject to a large array of statutory and regulatory limitations. It did not reverse a long line of precedent placing limits on disclosure. Rather, the

[11] *See, e.g.*, The definition of "advertisement" in S.B. 96 § 4(A)(4) exempts "nonpartisan voter guides allowed by the federal Internal Revenue Code… for Section 501(c)(3) organizations."

[12] Section 501(c)(3) organizations are prohibited from engaging in any activity supporting or opposing candidates. 26 U.S.C. § 501(c)(3); *see also* 26 C.F.R. § 1.501(c)(3)-1(a)(3)(ii). But such political activity is distinctly different than advocating for a particular policy. The Internal Revenue Service ("IRS") has recognized that "[a]n organization may be educational even though it advocates a particular position or viewpoint." 26 C.F.R. § 1.501(c)(3)-1(d)(3)(i)(b). IRS regulations, therefore, require some indicia of support or opposition to a candidate to disqualify a § 501(c)(3)'s activity as non-exempt. *See* IRS Rev. Rul. 2007-41, 2007-25 I.R.B. 1421 ("Whether an organization is participating or intervening, directly or indirectly, in any political campaign on behalf of or in opposition to any candidate for public office depends upon all of the facts and circumstances of each case."). The IRS uses seven factors to examine a § 501(c)(3) organization's communications for impermissible political campaign intervention. *Id.* at 1424. Even when an ad is close in time to an election, the IRS may still find it to not be political campaign intervention. *See, e.g.*, *id.* (Situation 14, featuring an ad that "ends 'Call or write Senator C to tell him to vote for S. 24.'").

[13] *See* S.B. 96, §§ 5 and 6 (amending the reporting requirements). While § 6(G) ameliorates this demand somewhat, by allowing those committees that have neither received any contributions nor made any expenditures to avoid reporting in a non-election year, the bill still requires speakers to be ready to report on the next due date.

[14] 558 U.S. 310, 369 (2010).

Court merely upheld the disclosure of an independent expenditure report for an electioneering communication, which discloses the *entity making the expenditure* and the purpose of the expenditure.[15] Additionally, the federal report only discloses contributors giving over $1,000 *for the purpose of furthering the communication*.[16] This has been interpreted by the Federal Election Commission to mean contributions earmarked for these independent expenditures,[17] an interpretation recently upheld by the United States Court of Appeals for the District of Columbia Circuit in a case involving analogous "electioneering communication" reporting requirements.[18]

By contrast, this legislation proposes, in many cases, an 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 that simply mention the name of a candidate. This is not like the disclosure at issue in *Citizens United*, and instead resembles the disclosure regimes designed for PACs. In contrasting the disclosure burdens dealt with by the Court in the 1986 case *Massachusetts Citizens for Life, Inc. v. Federal Election Commission* ("*MCFL*"),[19] 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. 96.[20]

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.[21] Likewise, Justice O'Connor was concerned with the "organizational restraints" imposed upon nonprofit corporations, including "a more formalized organizational form" and a significant loss of funding availability.[22]

If this bill becomes law, it will create conditions that raise the very concerns addressed by the Supreme Court in *MCFL*. S.B. 96 would mandate detailed record keeping and force groups to create multiple bank accounts and solicitations. The bill would require the collection and reporting of information that is commonly kept by political parties and candidates in an election, but not by nonprofit organizations or charities that might incidentally speak on a topic before the voters. Indeed, charities often receive anonymous donations because of donors' religious or ethical 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 proximity to an election, and reassure non-public funders that they have procedures in place to avoid falling into the snare of S.B. 96.

Just last year, in *Coalition for Secular Government v. Williams*, the Tenth Circuit held that an organization's planned activity of $3,500 was impermissibly low for triggering neighboring

[15] 52 U.S.C. § 30104(f)(2)(A)-(D).
[16] 52 U.S.C. § 30104(f)(2)(E)-(F); *Citizens United*, 558 U.S. at 366-367.
[17] 11 C.F.R. § 104.20(c)(9).
[18] *Van Hollen v. Fed. Election Comm'n*, 811 F.3d 486, 501 (D.C. Cir. 2016) (upholding 11 C.F.R. § 104.20(c)(9)).
[19] 479 U.S. 238 (1986).
[20] *Citizens United*, 558 U.S. at 369 (contrasting federal independent expenditure reports with the burdens discussed in *MCFL*).
[21] *MCFL*, 479 U.S. at 253 (Brennan, J., plurality opinion).
[22] *Id*. at 266 (O'Connor, J. concurring).

Colorado's regulation of an organization as an "issue committee" with attendant reporting requirements similar to those proposed in S.B. 96.[23] Nor is *Coalition for Secular Government* a recent development. In 2010, the Tenth Circuit also examined burdensome disclosure requirements for small ballot measure organizations under Colorado's campaign finance disclosure scheme in *Sampson v. Buescher*.[24] 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."[25]

S.B. 96 proposes reporting burdens on many nonprofits that would be similar to filings by political parties or PACs, drowning such groups in regulatory red tape. If, for example, a small nonprofit wants to spend more than $3,000 on an issue ad or mailing encouraging legislators to support prison reform in New Mexico, and that ad mentions any current lawmakers by name in specified time frames before an election, in order to avoid disclosure of many of its significant donors, the organization must either: (1) form and maintain a separate bank account, make sure that funds between the two bank accounts are not transferred in the wrong way or commingled, maintain a separate roster of donors who contribute to the segregated account, and report only those donors to the government (even those who gave as little as $201 to the group over the course of an election cycle); (2) contact all donors who contributed in the current election cycle and obtain written permission indicating their funds were not meant for said separate account, and comply with all tax regulations relating to operating two separate accounts; or (3) cancel the planned communication.

Worse still, the definition of "advertisement" is expansive, covering "print, broadcast, satellite, cable or electronic media, including recorded phone messages, or by printed materials, including mailers, handbills, signs and billboards."[26] Unlike its federal analogue,[27] there is no *de minimis* limitation upon the audience that makes something a campaign "advertisement." Even reaching one person counts. Yet the United States Supreme Court has specifically protected from disclosure hearty souls who pass out handbills of their own accord (as opposed to being funded by a formal campaign).[28]

If S.B. 96 is signed into law and challenged, it is likely that the Tenth Circuit will view the burdens imposed on small ballot measure organizations by this bill with the same skepticism it brought to *Coalition for Secular Government* and *Sampson*. The state cannot impose heavy burdens on the ability to speak, particularly for groups spending little funds. Of significance, the

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[23] *Coal. for Secular Gov't v. Williams*, 815 F.3d 1267, 1275, 1281 (10th Cir. 2016), *cert. denied sub. nom Williams v. Coal. for Secular Gov't*, 580 U.S. ___, 137 S. Ct. 173 (2016).

[24] *Sampson v. Buescher*, 625 F.3d 1247 (10th Cir. 2010).

[25] *Id* at 1260.

[26] S.B. 96 § 4(A).

[27] For example, federal electioneering communications are defined as "any broadcast, cable, or satellite communication" that "refers to a clearly identified candidate for Federal office" and is made either within 60 days of a general election or 30 days before a primary election. 52 U.S.C. § 30104(f)(3)(A)(i)(I)-(II). The ad must also be "targeted to the relevant electorate," 52 U.S.C. § 30104(f)(3)(A)(i)(III), meaning in practice that it "can be received by 50,000 or more persons" in the relevant jurisdiction. 52 U.S.C. § 30104(f)(3)(C).

[28] *Talley v. Calif.*, 362 U.S. 60 (1960) (striking down a disclosure statute regulating genuine issue speech); *McIntyre v. Ohio Elections Comm'n*, 514 U.S. 334 (1995) (striking down a disclosure statute regulating small-scale issue advocacy); *see also Buckley*, 424 U.S. at 14 ("Discussion of public issues…[is] integral to the operation of the system of government established by our Constitution.").

reporting requirements in S.B. 96 are triggered at only $3,000, which is below the thresholds permitted in Tenth Circuit precedent in the political committee context.

## II. Senate Bill 96's disclosure requirements may materially harm organizations in New Mexico and their donors.

### a. The type of disclosure mandated by organizations making independent expenditures under S.B. 96 would impinge upon donors' freedom of association and potentially deter individuals from contributing to regulated organizations.

The Supreme Court has emphasized that "[e]ffective advocacy of both public and private points of view, particularly controversial ones, is undeniably enhanced by group association,"[29] and that there is a "vital relationship between freedom to associate and privacy in one's associations."[30] Thus, the Court recognized that two rights touch on associations and civic groups. First, the First Amendment protects the right to engage in debate concerning public policies and issues, and, second, to protect that right, the Constitution protects the right to associational privacy. But the freedom of association must be protected "not only against heavy-handed frontal attack, but also from being stifled by more subtle governmental interference,"[31] such as registration and disclosure requirements and the attendant sanctions for failing to disclose.

In *NAACP v. Alabama*, the Supreme Court protected the right to privacy of association – in particular, from disclosure of an organization's contributors and members – by subjecting "state action which may have the effect of curtailing the freedom to associate… to the closest scrutiny."[32] In *Buckley*, the Supreme Court directly addressed both the associational rights discussed in *NAACP v. Alabama* and the "[d]iscussion of public issues"[33] – now referred to as "issue advocacy" or "issue speech."[34] The *Buckley* Court confronted a statute that "require[d] direct disclosure of what an individual or group contributes or spends."[35] The Court stated, "[i]n considering this provision we must apply the same strict standard of scrutiny, for the right of associational privacy developed in *NAACP v. Alabama* derives from the rights of the organization's members to advocate their personal points of view in the most effective way."[36] Thus, the Court required that "the subordinating interests of the State… survive exacting scrutiny."[37] And, under exacting scrutiny, the Supreme Court "insisted that there be a 'relevant correlation' or 'substantial relation' between the governmental interest and the information to be disclosed."[38]

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[29] *NAACP v. Ala. ex rel. Patterson*, 357 U.S. 449, 460-461 (1958) ("*NAACP v. Alabama*").
[30] *Id*. at 462 (noting that "[i]t is hardly a novel perception that compelled disclosure of affiliation with groups engaged in advocacy may constitute a[n] effective… restraint on freedom of association").
[31] *Bates v. City of Little Rock*, 361 U.S. 516, 523 (1960); *see also NAACP v. Button*, 371 U.S. 415, 433 (1963) (noting that the freedoms of speech and association are "delicate and vulnerable" to "[t]he threat of sanctions [which] may deter their exercise almost as potently as the actual application of sanctions").
[32] 357 U.S. at 460-61; *see also id*. at 462.
[33] 424 U.S. at 14.
[34] *See, e.g., McConnell v. Fed. Election Comm'n*, 540 U.S. 93, 190 (2003).
[35] 424 U.S. at 75.
[36] *Buckley*, 424 U.S. at 75; *see also id*. at 66 (noting "[t]he strict test established by *NAACP v. Alabama* is necessary because compelled disclosure has the potential for substantially infringing the exercise of First Amendment rights.").
[37] *Id*. at 64 (collecting cases).
[38] *Id*.

In the almost 60 years since *NAACP v. Alabama* and the over 40 years since *Buckley*, the right to engage in issue speech and the right to associate – and to associate privately – in order to more effectively debate policies and issues has neither changed nor diminished. Rather, as the Supreme Court recently held in *Citizens United*, laws that burden these fundamental rights must continue to meet "'exacting scrutiny,' which requires a 'substantial relation' between the disclosure requirement and a 'sufficiently important' governmental interest."[39]

S.B. 96 threatens the right of private association by mandating intrusive donor disclosure for organizations that may not even engage in electoral advocacy. The disclosure, therefore, threatens citizens with harassment, misinforms the public about who supports a specific advertisement or communication, and produces "junk disclosure" that intrudes on the privacy of average New Mexicans.

**b. Disclosure information can result in the harassment of individuals by their ideological opponents and should be carefully balanced with the public's "right to know."**

The reporting requirements proposed in S.B. 96 could lead to the harassment of donors based on their beliefs. In today's polarized political environment, more and more individuals have suffered threats, harassment, and property damage as a result of this compulsory disclosure information.

For example, the United States District Court for the Central District of California recently held a trial on the threats faced by organizations during these tumultuous times. Donors to the Americans For Prosperity Foundation ("AFPF") "faced threats, attacks, and harassment, including death threats."[40] And those threats extended broadly to AFPF's "employees, supporters and donors."[41] For example, a "technology contractor working inside AFPF headquarters posted online that he was 'inside the belly of the beast' and that he could easily walk into [the Chief Executive Officer's] office and slit his throat."[42] The individual making the threats was seen "in AFP[F]'s parking garage, taking pictures of employees' license plates."[43] Likewise, a major donor to AFPF recounted the story of attending an event in Washington, D.C., at which protestors shoved both him and a woman in a wheelchair as they attempted to exit an AFPF event.[44] Compelling the public disclosure of the names and addresses of individuals only heightens the fears of those in the middle of such tumult and civic strife. The court summarized: "The Court can keep listing all the examples of threats and harassment presented at trial; however, in light of these threats, protests, boycotts, reprisals, and harassment directed at those individuals publically associated with AFP[F], the Court finds that AFP supporters have been subjected to abuses,"[45] warranting protection from public disclosure.

[39] *Citizens United*, 558 U.S. at 366-367 (quoting *Buckley*, 424 U.S. at 64, 66).
[40] *Americans for Prosperity Found. v. Harris*, 182 F. Supp. 3d 1049, 1056 (C.D. Ca. 2016) (internal citation to hearing transcripts omitted).
[41] *Id*. at 1055.
[42] *Id*. at 1056 (citation omitted).
[43] *Id*. (citation omitted).
[44] *Id*. (citation omitted).
[45] *Id*.

But AFPF's woes are not unique. Recently, individuals who contributed to the Hillary Clinton campaign faced death threats.[46] Supporters of ballot measures in California also endured death threats.[47] Employees at the New York Civil Liberties Union and Goldwater Institute faced threats and harassment at their workplaces – and at their homes – due to their organizations' positions.[48] Nor is the media immune, for even newspaper staff faced death threats for their employer's political endorsements.[49] Even delegates to both major political parties' national nominating conventions faced death threats.[50] The list can go on, but all of the examples point to the same conclusion: in our current volatile political atmosphere, disclosure carries real danger to donors and employees of organizations speaking on hot button issues.

Presumably, if the private information of donors to similar groups in New Mexico were forcibly reported to the government, these citizens would also be at risk. To be clear, S.B. 96 would extend the same type of disclosure to supporters of any nonprofit that even incidentally engages in political speech.

**c. The bill will produce "junk disclosure" that associates a donor with a communication they have no knowledge of or may not even support – and who may even disagree with it.**

The Supreme Court explicitly defined the government's informational interest in disclosure as "increas[ing] the fund of information concerning those who *support* the candidates," such that voters can better define "the candidates' constituencies."[51] Consequently, the Court restricted the government's informational interest to situations involving "spending that is unambiguously related to the campaign of a particular… candidate,"[52] because it was only in that context that disclosure would provide any information about a candidate's *supporters*. Senate Bill 96 departs from this informational interest and will produce two primary types of "junk disclosure." First, the bill requires reporting of very minor donors, making detecting major donors more difficult. Second, the bill incorrectly assumes that giving to an organization, without earmarking or some

[46] *See, e.g.*, Casey Sullivan, "After Clinton Donation, Legal Recruiter Complains of Death Threat," *Bloomberg Law*. Retrieved on March 14, 2017. Available at: https://bol.bna.com/after-clinton-donation-legal-recruiter-complains-of-death-threat/ (October 11, 2016).

[47] *See, e.g.*, Brad Stone, "Prop 8 Donor Web Site Shows Disclosure Law Is 2-Edged Sword," *The New York Times*. Retrieved on March 14, 2017. Available at: http://www.nytimes.com/2009/02/08/business/08stream.html (February 7, 2009).

[48] *See, e.g.*, Donna Lieberman and Irum Taqi, "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, in Relation to the Contents of a Lobbyist's Statement of Registration," New York Civil Liberties Union. Retrieved on March 14, 2017. Available at: http://www.nyclu.org/content/contents-of-lobbyists-statement-of-registration; Tracie Sharp and Darcy Olsen, "Beware of Anti-Speech Ballot Measures," *The Wall Street Journal*. Retrieved on March 14, 2017. Available at: http://www.wsj.com/articles/beware-of-anti-speech-ballot-measures-1474586180 (September 22, 2016).

[49] *See, e.g.*, Kelsey Sutton, "Arizona Republic receives death threats after Clinton endorsement," *Politico*. Retrieved on March 14, 2017. Available at: http://www.politico.com/blogs/on-media/2016/09/arizona-republic-receives-death-threats-for-clinton-endorsement-228889 (September 29, 2016).

[50] *See, e.g.*, Alan Rappeport, "From Bernie Sanders Supporters, Death Threats Over Delegates," *The New York Times*. Retrieved on March 14, 2017. Available at: http://www.nytimes.com/2016/05/17/us/politics/bernie-sanders-supporters-nevada.html?_r=0 (May 16, 2016); Eli Stokols and Kyle Cheney, "Delegates face death threats from Trump supporters," *Politico*. Retrieved on March 14, 2017. Available at: http://www.politico.com/story/2016/04/delegates-face-death-threats-from-trump-supporters-222302 (April 22, 2016).

[51] *Buckley*, 424 U.S. at 81 (emphasis added).

[52] *Id*. at 80.

other indicia of support for a particular communication, is support for *all* the speech by the organization.

First, if disclosure information is to tip voters as to major sources of financial support, 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. Senate Bill 96's low thresholds for disclosure frustrates the very purpose of disclosure: to inform the electorate of a candidate's high-dollar backers. In fact, S.B. 96 makes it *more* difficult for voters to identify those supporters because it reports low-level donors, obfuscating the major donors on the list.

A simple test is this: in all of the stories about money in politics in the past two 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 (especially at such low thresholds), which also do not advocate for or against candidates, advances the legitimate purposes of informing the public or preventing corruption.

Second, S.B. 96 creates "junk disclosure" by associating donors with speech over which they have no control. By mandating general donor disclosure, and not just the listing of those who earmarked their money for campaign activity, the state mistakes general support for an organization with support for a specific advertisement.

For example, consider a hypothetical New Mexico cattle rancher: a proud, life-long Democrat, who donates to the New Mexico Cattle Growers' Association ("NMCGA"). This cattle rancher then finds himself listed as a supporter of Republican candidates in news accounts because the NMCGA ran an issue ad that mentioned Republican legislators. Or consider a Republican worker who supports her labor union for its work in helping her bargain for better pay. But one day she is associated with *opposing* Republican candidates because her union urged opposition to a right-to-work bill supported by a few Republicans. In both situations, neither of these individuals knew about or agreed with the organization's specific position. They instead opted to donate to these groups not because they agree with everything their trade association or their labor union does, or particular policy positions they take, but because on balance they think these organizations provide a voice for their views. But, under S.B. 96, they may be listed as supporting communications they disagree with, simply because they support the organization making the advertisement.

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 a group decides to engage in the extremely broad types of communications covered in the bill starting at the low level of $1,000,[53] all or many of its donors over a $200 threshold could potentially be made public.[54] Further, all donors over $5,000 will be

[53] S.B. 96 § 2(A).

[54] S.B. 96 §§ 1(B)(3) and 1(C). While § 1(C) has an earmarking provision, it also says donors are disclosed who donated "in response to a solicitation to fund independent expenditures." It is unclear what would qualify as a "response to a solicitation to fund independent expenditures" in practical effect for nonprofit organizations that solicit for a variety of projects in a single

disclosed, regardless of whether their donations were earmarked for the purpose of furthering an independent expenditure.[55]

To publicly identify these individuals with expenditures of which they had no advance knowledge, and which they may even oppose, is unfair to these citizens and misleads the public. The disclosure serves little purpose other than to provide a basis for official or private harassment.

## III. The "coordinated expenditure" definition is vague and would be better served by following the definition and safe harbors provided by the federal regulation of "coordination."

Senate Bill 96 uses vague and broad terms in defining "coordination." A much better means of ensuring the independence of independent expenditures is to follow the multi-factor test used by the federal government in the oversight of federal campaigns. This important tweak to S.B. 96 will ensure the citizens of New Mexico may continue to speak freely while providing a system to regulate coordinated expenditures.

The federal regulation of "coordination" uses multiple factors to clearly define expenditures that are not truly independent. Under the Federal Election Commission's regulations, a communication is coordinated when it is "paid for, in whole or in part, by a person other than" the candidate or political party *and* the communication satisfies one of several content standards *and* one of several conduct standards in the regulation.[56]

The *content* standards include, among other things, republishing or redistributing campaign materials,[57] referencing candidates or political parties by name shortly before the election,[58] or expressly advocating for candidates.[59] The *conduct* standards include, among other things, a candidate or party: requesting or suggesting the advertisement;[60] having material involvement in its creation;[61] or having a "substantial discussion" of the candidate or political party's campaign plans, projects, activities, or needs.[62] Thus, under the federal system, there must be some financial support and evidence in the form of content and conduct to suggest coordination.

Likewise, the federal regulation provides safe harbors that cannot give rise to a finding of "coordination." For example, an independent committee is permitted to ask a candidate about legislative or policy issues.[63] Similarly, one candidate endorsing another candidate is not

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communication to donors. S.B. 96 does not define these terms. As mentioned previously, the federal campaign finance laws have an earmarking requirement for such independent expenditures as electioneering communications. 11 C.F.R. § 104.20(c)(9); *Van Hollen*, 811 F.3d at 501.

[55] S.B. 96 § 1(D)(2). In fact, to avoid disclosure, the bill requires "the contributor request[] in writing that the contribution not be used to fund independent or coordinated expenditures or make contributions to a candidate, campaign committee or political committee." *Id*. In this way, the donor must "reverse earmark" – say what the funds cannot be used for – in order to not be disclosed.

[56] 11 C.F.R. § 109.21(a).

[57] 11 C.F.R. § 109.21(c)(2).

[58] 11 C.F.R. § 109.21(c)(4).

[59] 11 C.F.R. § 109.21(c)(3); *see also* 11 C.F.R. § 109.21(c)(5) (providing for communications that do not have express words of advocacy, but contain the "functional equivalent" of express advocacy).

[60] 11 C.F.R. § 109.21(d)(1).

[61] 11 C.F.R. § 109.21(d)(2).

[62] 11 C.F.R. § 109.21(d)(3).

[63] 11 C.F.R. § 109.21(f).

"coordination."[64] The federal system also exempts communications discussing a candidate who is "identified only in his or her capacity as the owner or operator of a business that existed prior to [their] candidacy."[65]

The federal law therefore requires there to be satisfaction of a number of factors before there may be a finding of "coordination" and provides multiple safe harbors. This clarity in the law protects speakers from inadvertently violating the law while still ensuring independent expenditures remain independent.

In contrast, under S.B. 96, a "coordinated expenditure" is one that is made "at the request or suggestion of, or in cooperation, consultation or concert with" a campaign or political party.[66] Certainly, a candidate requesting an independent expenditure negates the "independent" nature of the advertisement.[67] But the words "cooperation," "consultation," and "concert" are much broader than a backroom deal to coordinate an advertising campaign for a candidate, and the bill fails to define these terms.

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."[68] The First Amendment needs "'breathing space to survive, [and so] government may regulate in the area only with narrow specificity.'"[69] S.B. 96 has an expansive definition of "coordination" and leaves no room for the First Amendment to take a breath.

The bill may end up regulating speech that has nothing to do with an election. For instance, imagine a situation in which the governor agrees to be recorded for a public service announcement by a charity advertising an effort to collect clothing for the poor. In the announcement, the governor says she donates her unwanted clothes and urges people to do the same. The group spends $6,000 running the public service announcement during the wrong time in an election year. Unknowingly, the group just made a coordinated expenditure and illegal contribution to the governor's campaign. Under S.B. 96, the PSA subjects the group to significant sanctions and fines.

If New Mexico is concerned about coordination between political parties and candidates with those making independent expenditures, then the state should adopt the federal standard for "coordination" found at 11 C.F.R. § 109.21.

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[64] 11 C.F.R. § 109.21(g)(1).

[65] 11 C.F.R. § 109.21(i). That is, provided that the timing, content, and distribution of the communication was arranged prior to the candidacy and the ad does not "promote, support, attack, or oppose" the candidate or opponents in the race. 11 C.F.R. § 109.21(i)(1)-(2).

[66] S.B. 96 § 4(I)(2).

[67] *See, e.g.*, *Buckley*, 424 U.S. at 80 (where the Court "impose[d] independent reporting requirements on individuals and groups that are not candidates or political committees only in the following circumstances: (1) when they make contributions earmarked for political purposes *or authorized or requested by a candidate or his agent*, to some person other than a candidate or political committee, and (2) when they make expenditures for communications that expressly advocate the election or defeat of a clearly identified candidate.") (emphasis added).

[68] *Buckley*. 424 U.S. at 41 n. 48 (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)))) (internal quotation marks omitted).

[69] *Id*. (quoting *NAACP v. Button*, 371 U.S. at 433).

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Senate Bill 96 seeks to improve transparency, but ultimately provides little useful information. What S.B. 96 will do is discourage donors and workers from contributing to useful nonprofit organizations and subject donors and workers to potential harassment. Overall, S.B. 96 makes disclosure information less meaningful by broadly capturing the activity of smaller, inconsequential contributors or activity about issues of public importance that is not related to the election or defeat of candidates. Finally, if New Mexico is concerned with coordination between campaigns and third parties, it should adopt the federal standard of "coordination" instead of S.B. 96's vague definition. Therefore, we suggest your office should carefully consider the constitutional and practical difficulties posed by S.B. 96.

Thank you for allowing me to submit comments on Senate Bill 96. I hope you will find this information helpful. Should you have any further questions regarding this legislation or any other campaign finance proposals, please contact us through the Center's Director of External Relations, Matt Nese, at (703) 894-6835 or by e-mail at mnese@campaignfreedom.org.

Respectfully submitted,

Bradley A. Smith
Chairman
Center for Competitive Politics

Allen Dickerson
Legal Director
Center for Competitive Politics