CENTER *for* COMPETITIVE POLITICS

Congress shall make no law...

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April 4, 2017

The Honorable Tom Gann
2300 N. Lincoln Boulevard
Room 500
Oklahoma City, OK 73105

Re: Significant Constitutional and Practical Issues with Senate Bill 579

Dear Vice Chair Gann:

On behalf of the Center for Competitive Politics (the "Center"),[1] I respectfully submit the following comments concerning constitutional and practical issues with portions of Senate Bill 579, as passed by the Senate on March 21, 2017 and currently before the House Government Modernization Committee. Among other things, the bill would create a new quarterly reporting regime for any individual or entity that so much as provides information about a state question. In addition, the bill would amend the Rules of the Oklahoma Ethics Commission by extending an already problematic event-based reporting regime for independent expenditures and electioneering communications to individuals.

Section 1 of S.B. 579 fails First Amendment scrutiny because it imposes burdensome, PAC-like reporting simply for engaging in individual instances of speech. Furthermore, the associated disclosure requirements will chill donations to individuals and organizations attempting to educate the public on important issues – and potentially silence some of these groups while confusing voters with junk disclosure.

I. Section 1's disclosure regime imposes PAC-style reports inconsistent with First Amendment scrutiny.

Section 1's disclosure regime, added on top of the regime already in place under Rules 2.107 and 2.108 of the Rules of the Ethics Commission,[2] does not pass First Amendment scrutiny. Although the current language of the bill would arguably require that individuals and entities file

[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.

[2] *See* Okla. Stat. tit. 74, ch. 62, app. I.

reports only in the quarters in which their relevant expenditures meet qualifying thresholds, the bill specifically and problematically requires that such individuals and entities file the exact same reports as PACs for those quarters, and it therefore necessarily requires that such speakers comply with continual, burdensome tracking requirements.

The First Amendment requires that campaign finance disclosure inform voters about who is supporting or opposing some candidate or state question. Courts review disclosure laws demanding donor lists under "exacting scrutiny," which requires there to "be a 'relevant correlation' or 'substantial relation' between the governmental interest and the information required to be disclosed."[3] Courts have recognized two types of disclosure regimes as meeting these requirements: 1) comprehensive, and more burdensome, status-related regulatory regimes over entities like PACs that are heavily engaged in politics, and 2) less burdensome, event-related regulatory regimes imposing one-time disclosure when an entity makes an independent expenditure or electioneering communication that crosses a certain threshold.

The more burdensome, status-related regulations have generally been upheld when applied to candidate and ballot measure committees and to what may be called "major purpose" organizations, because both types of groups are obviously political. The former exists solely to support or oppose some candidate or state question, and groups in the latter, while they may do some other things, have supporting or opposing candidates or state questions as their major purpose.[4] Because the political activity of "major purpose" organizations is so extensive, and because their donors are likely aware of such activity and thus give to support it, more comprehensive disclosure by such organizations is more likely to give voters a good idea of the most important supporters and opponents of a candidate or ballot measure.

Looking at it another way, because a "full panoply of regulations . . . accompany status as a" reporting entity like a PAC,[5] "courts have construed [reporting entities like] 'political committee[s]' more narrowly."[6] That is, courts have held that status-related regulatory regimes can "only encompass organizations that are under the control of a candidate or the major purpose of which" is advocacy.[7] Accordingly, only candidate and ballot committees and entities whose "major purpose may be regarded as campaign activity"[8] should be saddled with status-related, PAC-like burdens. And, as a corollary, organizations that fall short of such activity should not be "treat[ed to disclosure requirements] any differently than other organizations that only occasionally engage in" advocacy speech.[9] That is, if the state's demand for disclosure is too onerous for a one-time communication – demanding regular registration and reporting or demanding specialized corporate forms in order to speak – then it may violate the First Amendment.

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[3] *Buckley v. Valeo*, 424 U.S. 1, 64 (1976) (per curiam).
[4] *Id.* at 79; *see also 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)).
[5] *FEC v. Mass. Citizens for Life, Inc.* ("*MCFL*"), 479 U.S. 238, 262 (1986) (plurality opinion).
[6] *Buckley*, 424 U.S. at 79.
[7] *Id.*
[8] *MCFL*, 479 U.S. at 262 (plurality opinion).
[9] *Id.*

Thus, dealing with a group that did not qualify as a major-purpose organization, the Supreme Court in *Citizens United v. FEC*[10] upheld only the imposition of disclosure that was limited in scope and method. In that case, the Court upheld a law that was a far cry from the bill at issue here: When an organization engaged in electioneering communications exceeding $10,000, it merely had to disclose the *entity making the expenditure*, the purpose of the expenditure, and the names and addresses of those donors who supported the communication by giving over $1,000 *for the purpose of furthering the communication*.[11] Later courts have also remarked on such earmarking and large donor requirements as important to the constitutionality of event-related disclosure requirements.[12]

By contrast, the intent and effect of Section 1's reporting requirements is to move from an event-related disclosure regime toward a status-related, PAC-like regime. In fact, independent expenditures and electioneering communications are already subject to a disclosure regime under Oklahoma Ethics Commission Rules 2.107 and 2.108 that, with some notable exceptions, is more event-related.[13] Section 1 goes beyond the requirements of that regime, however, requiring that a speaker disclose "[t]he name, address, occupation and employer of *any person* . . . making a contribution or contributions exceeding Fifty Dollars ($50.00)" during the period covered by the report.[14] Unlike the earmarked disclosure in *Citizens United*, this generalized donor disclosure will not inform voters about candidate or state question constituencies. Rather, even though donors may have given to an organization for completely different reasons, this disclosure will fool voters into thinking that the donors in fact supported a particular communication. Furthermore, the $50 threshold pulls in marginal financial supporters, hiding major donors like a few grains of wheat among a pile of chaff.

In addition, the legislation imposes continual, burdensome recordkeeping requirements on persons and entities that entertain even the slightest idea of engaging in a covered expenditure. They must report the total donations made during a year by any donor who gives more than $50 during a given reporting period. Thus, they must track the small donations made by any donor throughout the year, and find a way to match contributions from the same donors, so that they can meet the individual reporting requirement should any donor give more than $50 in total during a required reporting period.

Furthermore, organizations must track the total of all contributions during every reporting period and the total of all contributions during the year; all such contributions by PACs; all in-kind contributions; all expenditures made during the reporting period and during the year; all refunds during the reporting period and during the year; all transfers from associated PACs during the

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[10] *Citizens United v. FEC*, 558 U.S. 310, 369 (2010) (noting "less restrictive" disclosure).

[11] 52 U.S.C. § 30104(f)(2); *Citizens United*, 558 U.S. at 366. This provision has been interpreted by the Federal Election Commission to mean contributions earmarked for these independent expenditures, 11 C.F.R. § 104.20(c)(9), 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, *Van Hollen v. FEC*, 811 F.3d 486, 501 (D.C. Cir. 2016).

[12] *See, e.g.*, *Indep. Inst. v. Williams*, 812 F.3d 787, 789 (10th Cir. 2016) (noting that the law's "scope [was] sufficiently tailored to require disclosure only of funds earmarked for the financing of [electioneering communications]"); *see also Indep. Inst. v. FEC*, No. 14-cv-1500, 2016 U.S. Dist. LEXIS 152623, at *34, 38 (D.D.C. Nov. 3, 2016), affirmed by *Indep. Inst. v. FEC*, No. 16-743, 2017 U.S. LEXIS 1506 (U.S. Feb. 27, 2017).

[13] *See* Rules 2.107 and 2.108.

[14] S.B. 579 § 2(B.)(1) (emphasis added).

reporting period and during the year; all independent expenditures made during the reporting period and during the year; all expenditures on electioneering communications made during the reporting period and during the year; the beginning and closing balances of accounts; total contributions from those giving less than $50 individually, and the total of such contributions during the year; the name, address, occupation, and employer of those to whom contributions were refunded, and the total contributions refunded; and loans.[15] In addition, the person or entity must provide "the name and address of any person or entity to whom an expenditure of more than Two Hundred Dollars ($200.00) in the aggregate was made during the time period covered by the report, a description of the goods or services purchased with the expenditure, and the aggregate total of all expenditures made to the person or entity during the calendar year of the time period covered by the report."[16] And such disclosure will be particularly onerous on individuals and small groups, who seem to be the overall target of Senate Bill 579.

Average citizens will find it difficult simply to read through a summary of all the reporting requirements, much less comply with them. Thus, Section 1's regime is not like the large-donor, earmarked, event-related disclosure at issue in *Citizens United*, and instead resembles the status-related disclosure regimes designed for professional political organizations – that is, PACs. In *MCFL*,[17] both the Supreme Court's plurality and concurring opinions expressed concern about the burdens placed on nonprofit corporations by certain disclosure requirements. The plurality's concerns included the detailed record keeping and the reporting schedules.[18] Likewise, Justice O'Connor was concerned with the "organizational restraints" imposed upon nonprofit corporations, including "a more formalized organizational form."[19]

The conditions created by this bill, particularly the detailed record keeping requirements, would raise similar concerns to those raised in *MCFL*. The bill would likely place a heavy burden of accounting and record keeping on persons or entities daring to mention candidates or address many public issues, even when those discussions cost relatively little. The result is likely to be at least some self-silencing by precisely those groups most vulnerable to governmental regulation.

II. The state lacks an interest in the broad request regarding state questions.

In addition to the disproportionate burdens of the event-triggered disclosure in Section 1, that Section's provisions regarding educational information regarding a state question lack a sufficiently important governmental interest to meet First Amendment scrutiny. Outside of mentioning a candidate right before an election, the Supreme Court has never upheld a law stifling discussion of public issues unless it was "unambiguously campaign related."[20] When a law is unambiguously campaign related, it "reach[es] only funds used for communications that *expressly advocate* the election or defeat of a clearly identified candidate," or that *expressly advocate* the passage or rejection of a clearly identified state question.[21]

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[15] S.B. 579 § 2.
[16] S.B. 579 § 2(B.)(6).
[17] *MCFL*, 479 U.S. 238.
[18] *Id*. at 253-54 (Brennan, J., plurality opinion).
[19] *Id*. at 266 (O'Connor, J. concurring).
[20] *Buckley*, 424 U.S. at 81.
[21] *Buckley*, 424 U.S. at 80 (emphasis added); *see McIntyre v. Ohio Elections Comm'n*, 514 U.S. 334, 347 (1995) (noting that principles regarding candidate elections apply to state questions).

The provision of Section 1 that extends the disclosure regime over speech "offering educational information regarding a state question" utterly fails this standard.[22] Education is not advocacy. Thus, for example, the League of Women Voters would trigger the disclosure regime if it creates a voting guide that presents points for and against a state question that have been provided by other parties. The disclosure of the League's donors, however, would not be part of the state's informational interest, which informs voters "concerning those who support [or oppose] candidates" and state questions.[23] Furthermore, unscrupulous parties could use such a law to permanently foreclose unfettered public discussion of a controversial issue, say, for example, by repeatedly pushing initiatives or referendum petitions concerning abortion or same-sex marriage.

The provision of Section 1 on "expenditures for the purpose of advocating the approval or defeat of a state question" is little better.[24] This provision at least requires that communications be related to advocacy, and thus potentially lead to information about those supporting or opposing state questions. Nevertheless, the Supreme Court has rejected similar phrases, whose vagueness failed to distinguish unambiguously campaign related activity from other, more protected speech. For instance, the Court has held that the vagueness of phrases merely limiting regulation to advocacy – such as "relative to a clearly identified candidate"[25] and "for the purpose of . . . influencing an election"[26] – unconstitutionally chill protected speech.

III. Sections 3 and 4 extend disclosure that is already insufficiently tailored to the informational interest.

The language of Oklahoma Ethics Commission Rule 2.107, concerning independent expenditures, and Rule 2.108, concerning electioneering communications, also demands disclosure not tailored to the state's informational interest. The donor disclosure under Rules 2.107 and 2.108 extends only to donors who have made more than $50 in contributions earmarked for an independent expenditure or electioneering communication.[27] But, the rules go on to demand information not related to the informational interest: they request not just the amount of those donors' *earmarked* contributions, but disclosure of *all* the funds given by such a donor.[28] Such disclosure does not further the government's informational interest, as it confuses rather than informs voters as to the level of support others may have for a candidate or state question. Furthermore, the rules impose a donor threshold far below the $1,000 trigger that the Supreme Court approved in *Citizens United*.[29]

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[22] S.B. 579 § 1(B.)(3) (triggering the disclosure regime whenever any person or entity "makes [over $5,000 in] expenditures publishing or otherwise offering educational information regarding a state question").
[23] *Buckley*, 424 U.S. at 81.
[24] S.B. 579 § 1(B.)(2).
[25] *Buckley*, 424 U.S. at 39 – 40.
[26] *Id*. at 79.
[27] *See* Rule 2.107(E) ("received funds . . . for the purpose of"); Rule 2.108(E) (same).
[28] Rule 2.107(E) of the Rules of the Ethics Commission requires the "cumulative total of all contributions made by each person," as does Rule 2.108(E). Under the definition at Rule 2.2, the meaning of "contribution" encompasses "any gift, . . . payment, . . . or anything of value given." There is no restriction there, or at Rules 2.107(E) or 2.108(E), that the total contributions reported be limited to earmarked funds.
[29] *See Independence Institute*, 2016 U.S. Dist. LEXIS 152623, at *34, 38 (noting importance of earmarking and the large-donor requirement).

And, while these problems already exist in the current rules, Senate Bill 579 would extend these disclosure requirements to individuals, not just entities, making independent expenditures and electioneering communications. Thus, given the broad definition of "contribution" under the Rules of the Ethics Commission, such reporting for individuals could quickly reach the realm of the absurd. One could imagine, for example, an Oklahoma State University student who is environmentally conscious asking his parents and friends for money to help put an advertisement about fracking in the student newspaper, and the law then requiring him to divulge "any gift, . . . loan, . . . conveyance, . . . or anything of value" his parents or roommates had given him.[30]

IV. Senate Bill 579's disclosure requirements may materially harm organizations in Oklahoma and their donors.

The disclosure advanced by Senate Bill 579 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 Oklahomans.

A. Ideological opponents use disclosure to harass donors and silence speech.

The reporting requirements proposed in Senate Bill 579 facilitate harassment of donors based on their beliefs. In today's polarized political environment, more and more individuals have suffered threats, harassment, and property damage because 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 who dare to speak on unpopular issues. Donors to the Americans For Prosperity Foundation ("AFPF") "faced threats, attacks, and harassment, including death threats."[31] And those threats extended broadly to AFPF's "employees, supporters and donors."[32] For example, a "technology contractor working inside AFP 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."[33] The individual making the threats was seen "in AFP's parking garage, taking pictures of employees' license plates."[34] 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.[35] Compelling the public disclosure of the names, addresses, occupations, and employers 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, the Court finds that AFP supporters have been subjected to abuses"[36] warranting protection from public disclosure.

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[30] Rules of the Ethics Commission, Rule 2.2 (6).
[31] *Ams. for Prosperity Found. v. Harris*, 182 F. Supp. 3d 1049, 1056 (C.D. Cal. 2016).
[32] *Id*. at 1055.
[33] *Id*. at 1056.
[34] *Id*.
[35] *Id*.
[36] *Id*.

But AFPF's woes are not unique. Individuals who contributed to Hillary Clinton's campaign faced death threats.[37] Supporters of a ballot measure endorsing traditional marriage in California have endured death threats.[38] Employees at the New York Civil Liberties Union and free market Goldwater Institute faced threats and harassment at their workplaces – and at their homes – due to their organizations' positions.[39] Newspaper staff have faced death threats for their employer's political endorsements.[40] Even delegates to both major political parties' national nominating conventions have faced death threats.[41] 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 to and employees of organizations speaking on hot button issues.

Presumably, if the private information of donors to similar groups in Oklahoma were forcibly reported to the government, these citizens would also be at risk.

B. The bill will produce "junk disclosure" that associates a donor with a communication he or she has no knowledge of, may not support, and may even oppose.

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."[42] Senate Bill 579 departs from this informational interest and will produce two primary types of "junk disclosure." First, the bill requires reporting of very minor donors, making it more difficult to detect major donors. Second, the bill incorrectly assumes that giving to an organization, without earmarking or some other indicia of support for a particular communication, is support for *all* speech made by that organization.

Turning to the first form of junk disclosure, muddying up a report's contents with many relatively small donors runs counter to the aim of informing voters about major sources of financial support. Such junk disclosure benefits other groups looking for potential donors, gossips prying into their neighbors' political activity and affiliations, and those seeking to avenge support for an

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[37] *See, e.g.*, Casey Sullivan, "After Clinton Donation, Legal Recruiter Complains of Death Threat," *Bloomberg Law*. Retrieved on April 3, 2017. Available at: https://bol.bna.com/after-clinton-donation-legal-recruiter-complains-of-death-threat/ (October 11, 2016).

[38] *See, e.g.*, Brad Stone, "Prop 8 Donor Web Site Shows Disclosure Law Is 2-Edged Sword," *The New York Times*. Retrieved on April 3, 2017. Available at: http://www.nytimes.com/2009/02/08/business/08stream.html (February 7, 2009).

[39] *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 April 3, 2017. Available at: http://www.nyclu.org/content/contents-of-lobbyists-statement-of-registration (April 11, 2007); Tracie Sharp and Darcy Olsen, "Beware of Anti-Speech Ballot Measures," *The Wall Street Journal*. Retrieved on April 3, 2017. Available at: http://www.wsj.com/articles/beware-of-anti-speech-ballot-measures-1474586180 (September 22, 2016).

[40] *See, e.g.*, Kelsey Sutton, "Arizona Republic receives death threats after Clinton endorsement," *Politico*. Retrieved on April 3, 2017. Available at: http://www.politico.com/blogs/on-media/2016/09/arizona-republic-receives-death-threats-for-clinton-endorsement-228889 (September 29, 2016).

[41] *See, e.g.*, Alan Rappeport, "From Bernie Sanders Supporters, Death Threats Over Delegates," *The New York Times*. Retrieved on April 3, 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 April 3, 2017. Available at: http://www.politico.com/story/2016/04/delegates-face-death-threats-from-trump-supporters-222302 (April 22, 2016).

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

unpopular position. But, if the goal is to find out those who are really affecting candidates and state questions, Senate Bill 579 drowns that data in a sea of low-level donors.

A simple test is this: in all of the stories about money in politics in the past two elections, did anyone express alarm about persons donating $50 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, Senate Bill 579 creates "junk disclosure" by associating donors with speech over which they have no control. By mandating general donor disclosure, and not just listing 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 Oklahoma oil rig tool pusher: a proud, life-long Democrat, who donates to the Oklahoma Independent Petroleum Association ("OIPA"). This tool pusher then finds himself listed as a supporter of Republican candidates in news accounts because the OIPA 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 don't agree with everything their trade association or labor union does, but they donate because, at least some of the time, these organizations provide a voice for their views. But, under Senate Bill 579, they may be listed as supporting communications they disagree with, simply because they broadly support the organization making the advertisement.

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.

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Thank you for the opportunity to provide these comments on Senate Bill 579. Should you have any further questions regarding this legislation, please do not hesitate to contact me at (703) 894-6835 or by e-mail at mnese@campaignfreedom.org.

Respectfully,

Matt Nese
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Center for Competitive Politics