INSTITUTE FOR FREE SPEECH

February 22, 2018

VIA ELECTRONIC MAIL

The Honorable Thomas F. Loertscher
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The Honorable Jason A. Monks
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RE: Constitutional and Practical Issues with H. 573 (2017 Campaign Finance Reform Legislative Work Group Recommendations)

Dear Chair Loertscher, Vice Chair Monks, and Members of the House State Affairs Committee:

On behalf of the Institute for Free Speech[1] ("the Institute") and Attorney Tyler Martinez, I respectfully submit the following comments on constitutional and practical issues with portions of H. 573,[2] which is currently under consideration by the House State Affairs Committee. H. 573 is a manifestation of the 2017 Campaign Finance Reform Legislative Work Group's recommendations to the Legislature. The Institute has closely followed the Work Group's progress since Idaho Secretary of State Lawerence Denney submitted six draft bills to that Group last year.

I've enclosed a detailed analysis of the constitutional and practical issues imposed by this legislation as prepared by Mr. Martinez. In particular, Mr. Martinez's comments highlight several significant legal concerns raised by H. 573, which touches on fundamental First Amendment rights of speech, petition, and private association.

With respect to several overbroad disclosure provisions in the bill, it's worth emphasizing that longstanding precedent in the Supreme Court and elsewhere has held that campaign finance disclosure must be tied to informing the public about groups engaging in actual campaign-related activity. To do so, the state must prove it has a substantial interest in doing so and prove that any law it enforces is properly tailored to that interest. Numerous provisions in H. 573 are not narrowly tailored to any interest articulated by the state and likely would not survive judicial scrutiny.

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[1] The Institute for Free Speech is a nonpartisan, nonprofit § 501(c)(3) organization that promotes and protects the First Amendment political rights of speech, press, assembly, and petition. Originally known as the Center for Competitive Politics, 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 Institute is actively involved in targeted litigation against unconstitutional laws at both the state and federal levels. Its attorneys have secured judgments in federal court striking down laws in Colorado, Utah, and South Dakota on First Amendment grounds. We are also currently involved in litigation against California, Missouri, Multnomah County, Oregon, and the federal government.

[2] House Bill No. 573, 64th Leg., 2d Reg. Sess. (Idaho 2018) ("H. 573").

Broadly speaking, the changes proposed in H. 573 are substantial and will impact many Idahoans in their day-to-day lives – especially as many provisions in the bill seek to bring local elections under the purview of the state. The increased penalties for campaign finance violations mandated by the bill and broader scope of Idaho's campaign finance laws are made all the worse by the other substantive changes proposed in the measure.

Taking each in turn: first and most worrisome, H. 573 imposes intrusive disclosure requirements that stretch the outer bounds of constitutional regulation of speech and should be revised. In particular, the measure broadens Idaho's already expansive "electioneering communication" definition to include posts on social media and e-mails as activities that trigger government reporting of the names and home addresses of those who support various groups. The bill only vaguely defines "social media" so its full reach is unclear. Writing on a blog, posting an educational YouTube video where others may comment, an errant tweet by an intern, and conversations in WhatsApp and Facebook Messenger could potentially trigger reporting mandates.

Such reporting requirements will inevitably generate "junk disclosure" that misleads rather than enlightens voters. This bill goes beyond demanding the names and home addresses of Idahoans who give with the intention of influencing politics, to those who give generally to nonprofits – gun rights' groups, pro-life organizations, groups working to end homelessness, and the like. Individuals give to such groups believing they provide a valuable service, not because they agree with everything the organization does or says. Publicly associating individuals with expenditures they had no prior knowledge of – and may oppose – is both unfair to donors and misleading to the public. Doing so also increases the risk of harassment for those who support causes with which some may disagree.

Also of concern, H. 573 imposes burdensome disclaimer requirements for speech mentioning candidates near an election. The bill also regulates the internal workings of campaigns: mandating minutiae by requiring, for instance, that treasurers be Idaho electors and limiting how many bank accounts a candidate may have. Finally, the bill turns over enforcement of these various provisions to private citizens – a dangerous recipe for abuse by political opponents that will inevitably harm many groups, especially those that are smaller and less well-funded.

For the above reasons, the Institute for Free Speech therefore recommends that H. 573 be set aside and that the House State Affairs Committee reconsider these suggested changes to Idaho's campaign finance code. Should you have any further questions regarding this legislation or any other campaign finance proposals, please contact me at (703) 894-6835 or by e-mail at mnese@ifs.org or Mr. Martinez at (703) 894-6800 or by e-mail at tmartinez@ifs.org.

Respectfully,

Matt Nese
Director of External Relations
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INSTITUTE FOR FREE SPEECH

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RE: Constitutional and Practical Issues with H. 573 (2017 Campaign Finance Reform Legislative Work Group Recommendations)

Dear Chair Loertscher, Vice Chair Monks, and Members of the House State Affairs Committee:

On behalf of the Institute for Free Speech ("the Institute"),[1] I respectfully submit the following comments on constitutional and practical issues with portions of H. 573,[2] which is currently under consideration by the House State Affairs Committee. H. 573 is a manifestation of the 2017 Campaign Finance Reform Legislative Work Group's recommendations to the Legislature. The Institute has closely followed the Work Group's progress since Idaho Secretary of State Lawerence Denney submitted six draft bills to that Group in August 2017.

In particular, I write to note several significant legal concerns raised by H. 573, which proposes sweeping amendments to Idaho's campaign finance laws. This bill touches on fundamental First Amendment rights of speech, petition, and private association. H. 573, therefore, is subject to "exacting scrutiny" – a heightened form of judicial review under which a state must demonstrate a substantial interest and proper tailoring of the law to that interest.

The changes proposed in H. 573 are substantial and will impact many Idahoans in their day-to-day lives. The bill will not only regulate state elections, but also impose rules upon local campaigns for school trustees, trustees of community colleges, local highway districts, and cities.[3] H. 573 goes one step further and requires centralized warehousing of donor information for all

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[2] House Bill No. 573, 64th Leg., 2d Reg. Sess. (Idaho 2018) ("H. 573").

[3] *See*, *e.g.*, *id.* § 2(13) (defining "local government office").

such races in the Secretary of State's office.[4] The Secretary is further ordered to put this information online in a publicly-searchable format.[5]

The penalties for failing to register and disclose are severe. H. 573 compels the Secretary of State to investigate alleged violations in statewide campaigns,[6] and refer the matter to the Attorney General.[7] Late filing of a required report triggers a $50 per day fine, with no cap on the fines.[8] But the bill goes beyond mere late fees. Under H. 573, *each violation* of the campaign finance laws may trigger the civil fine that is now increased tenfold,[9] and citizens may face up to six months in jail.[10]

The increased penalties and broader scope of Idaho's campaign finance laws are made all the worse by the other substantive changes proposed in the measure. Taking each in turn: first and most worrisome, H. 573 imposes intrusive disclosure requirements that stretch the outer bounds of constitutional regulation of speech and should be revised. Furthermore, the bill imposes burdensome disclaimer requirements for electioneering communications. H. 573 also regulates the internal workings of campaigns: mandating minutiae by requiring, for instance, that treasurers be Idaho electors and limiting how many bank accounts a candidate may have. Finally, the bill turns over enforcement of these various provisions to private citizens, a recipe for abuse by political opponents. The Institute therefore recommends that H. 573 be set aside and that the House State Affairs Committee reconsider these suggested changes to Idaho's campaign finance code.

I. The bill's new independent expenditure and electioneering communication disclosure provisions are broad and burdensome.

H. 573 broadens Idaho's "electioneering communication" definition to include more types of triggering activity. For example, the bill expands the term "electioneering communication" to include social media posting and e-mails.[11] Worse, the measure also seeks to greatly expand existing disclosure requirements to include the "Top Five" donors to the entity making the communication.[12] The disclosure provisions are not limited to wealthy contributors: anyone who

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[4] *Id*. at § 35(1)(g); *id*. at § 37(1).

[5] *Id*. at § 35(1)(g).

[6] *Id*. at § 35(1)(d); *see id*. at § 35(2) (directing county clerk to perform similar investigations for local offices and ballot measures).

[7] *Id*. at § 35(1)(e); *see id*. at § 35(2) (directing county clerk to refer violations to the county prosecutor).

[8] *Id*. at § 38.

[9] *Id*. at § 39(1) (increasing the civil penalty from $250 to $2,500). Worse, to levy such large fines, the state may only need to reach the minimal "preponderance of the evidence" standard. *Id*.

[10] *Id*. at § 39(2) ("knowingly and willfully" violating Idaho's campaign finance laws triggers the possibility of misdemeanor changes with a penalty of "not more than six (6) months" imprisonment or a fine, or both).

[11] H. 573 § 2(6)(a). Worse, "social media" is vaguely defined as "websites and applications that enable users to create and share content or to participate in social networking." *Id*. at § 2(19). "Create and share content" may mean anything on the web. Is a blog "social media"? What about a YouTube video where others may comment? This says nothing of the application of the definition to known social media platforms (the "obvious" instances). Is an errant tweet by an intern enough to bring an organization into the law's reach? If WhatsApp counted as a messaging service, how would Facebook Messenger fare in the test? H. 573 gives no guidance at all to these important questions.

[12] *Id*. at § 22(1).

gives $50 or more in the prior year[13] will be disclosed as if they were a big political contributor, listing their personal information on the Web[14] for all to see.

These concerns over generalized donor disclosure also apply to proposed changes to the reporting for independent expenditures – which are advertisements that expressly advocate for the election or defeat of a candidate or measure.[15] The reporting threshold for independent expenditures is just $100,[16] a figure easily met in printing costs for flyers, for example. Once triggered, an entity may have to "identify the ten (10) financial contributors who have contributed the largest sums of money in the aggregate to the person making the independent expenditure during the previous twelve (12) months."[17] This "Top Ten" requirement is in addition to any other reporting required of a political committee, and it applies to anyone contributing to the organization, not just those who gave for purposes of the triggering communication.

The bill's reach is made even worse by adding burdensome reporting requirements. H. 573 makes the first reports due within about fifteen days of making the first contribution or expenditure.[18] Monthly reporting follows.[19] But when an election is just fifteen days out, forty-eight-hour reporting is mandated for any outlay of $1,000 or more.[20] Nor does the election save a committee from further reporting. H. 573 outlines *post*-election *monthly* reporting, "until the account shows neither an unexpended balance of contributions nor a campaign expenditure deficit."[21] Only then may the entity file a termination statement.[22]

These untethered reporting requirements, seeking the "Top Five" or "Top Ten" donors of an entity and mandating near-endless reporting, are not properly tailored to the state's interest in campaign finance transparency. Such disclosure laws touch the very heart of the First Amendment: the discussion of candidates and office holders. Therefore, the Supreme Court has demanded that these laws survive "exacting scrutiny" – heightened review that mandates the government justify the intrusion on constitutional rights.

a. Campaign finance disclosure laws are subject to exacting scrutiny.

Under the First Amendment and United States Supreme Court precedents, 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 and other invasive disclosure under "exacting scrutiny." This test demands there be "a 'relevant correlation' or 'substantial

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[13] *Id.* ("Contents of the statement shall include . . . the names and addresses of any persons who contributed fifty dollars ($50.00) or more during the previous twelve (12) months . . .").

[14] *Id*. at § 35(1)(g).

[15] *Id*. at § 2(9).

[16] *Id*. at § 21(1).

[17] *Id*. at § 21(4).

[18] *Id*. at § 16(2).

[19] *Id*.

[20] *Id*. at § 16(3).

[21] *Id*. at § 18.

[22] *Id*.

relation' between the governmental interest and the information required to be disclosed."[23] This heightened scrutiny is required because, under the First Amendment, "compelled disclosure . . . cannot be justified by a mere showing of some legitimate governmental interest."[24] 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.[25]

Candidate committees (and, in the state law context, issue committees focused on ballot measures[26]) obviously support or oppose electoral outcomes and are campaign related.[27] Organizations with the "major purpose" of supporting or opposing candidates or ballot measures are also subject to campaign finance disclosure.[28] 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."[29] The more disclosure is divorced from people actually speaking about candidates or ballot propositions, the greater the threat to protected issues speech under the First Amendment. The state bears the burden of proving its asserted state interest.[30]

But tailoring the law to the state's interest matters too. Exacting scrutiny requires a fact-intensive analysis of the burdens imposed, and whether those burdens *actually* advance the government's interest. Exacting scrutiny is "not a loose form of judicial review."[31] Rather, as a "strict test,"[32] it demands careful review of both the asserted governmental interest *and* whether the law is tailored to that interest, because "[i]n the First Amendment context, fit matters."[33] Requiring the reporting of the "Top Five" (electioneering communications) or "Top Ten" (independent expenditure) donors – without some indicia of intent that the money go to political communications, is not properly tailored.

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[23] *Buckley v. Valeo*, 424 U.S. 1, 64 (1976) (per curiam).

[24] *Id*.

[25] *Id*. at 42.

[26] *See*, *e.g.*, H. 573 § 2(6)(a) (defining "electioneering communication," in part, as any communication that reaches "voters or potential voters for public office or ballot measure[s]"); *but see* Idaho Const. art. III, § 1 ("The people reserve to themselves the power to propose laws, and enact the same at the polls independent of the legislature. This power is known as the initiative . . . "").

[27] *Buckley,* 424 U.S. at 79.

[28] *Id*.

[29] *Id*. at 81.

[30] *Elrod v. Burns*, 427 U.S. 347, 362 (1963) (to survive exacting scrutiny "[t]he interest advanced must be paramount, one of vital importance, *and the burden is on the government* to show the existence of such an interest . . . it is not enough that the means chosen in furtherance of the interest be rationally related to that end.") (collecting cases) (emphasis added).

[31] *Wis. Right to Life, Inc. v. Barland*, 751 F.3d 804, 840 (7th Cir. 2014).

[32] *Buckley*, 424 U.S. at 66.

[33] *McCutcheon v. Fed. Election Comm'n*, 572 U.S. ___, ___, 134 S. Ct. 1434, 1456 (2014) (Roberts, C.J., controlling opinion).

b. Mandating generalized donor disclosure from non-political entities may not survive exacting scrutiny.

For decades, the Supreme Court has consistently shielded organizational donors and supporters from generalized donor disclosure. The important right to private association allows people to come together to speak collectively – particularly on unpopular topics that could invite harassment of the organization's donors and members. Hard won in the civil rights area, this doctrine has been specifically applied to campaign finance disclosure that seeks to go beyond unambiguous campaign activity.

In *NAACP v. Alabama*, the Supreme Court protected the right to privacy of association – in particular, the privacy 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."[34] Furthermore, 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,"[35] and that there is a "vital relationship between freedom to associate and privacy in one's associations."[36] Thus, the Court recognized that civic groups and associations implicate two foundational rights. First, the First Amendment protects the right to engage in debate concerning public policies and issues. Second, to protect that right, the Constitution protects the right to associational privacy. After all, freedom of association must be protected "not only against heavy-handed frontal attack, but also from being stifled by more subtle governmental interference," such as registration and disclosure requirements and the attendant sanctions for failing to disclose.[37]

In *Buckley v. Valeo*, the Supreme Court directly addressed both the associational rights discussed in *NAACP v. Alabama* and the "[d]iscussion of public issues"[38] – now referred to as "issue advocacy"[39] or "issue speech." Organizations speaking about public policy often mention candidates, especially incumbent candidates who hold the power to change policy. As the *Buckley* Court recognized:

> [T]he distinction between discussion of issues and candidates and advocacy of election or defeat of candidates may often dissolve in practical application. Candidates, especially incumbents, are intimately tied to public issues involving legislative proposals and governmental actions.[40]

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[34] *NAACP v. Alabama ex rel. Patterson*, 357 U.S. 449, 460-61 (1958) ("*NAACP v. Alabama*"); *see also id*. at 462.

[35] *Id*. at 460.

[36] *Id*. at 462; *id*. (further 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").

[37] *Bates v. City of Little Rock*, 361 U.S. 516, 523 (1960) (collecting cases); *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").

[38] 424 U.S. at 14.

[39] *See*, *e.g.*, *McConnell v. Fed. Election Comm'n*, 540 U.S. 93, 190 (2003), *overruled in part on other grounds*, *Citizens United v. Fed. Election Comm'n*, 558 U.S. 310, 365 (2010).

[40] *Buckley*, 424 U.S. at 42.

The *Buckley* Court further observed that laws regulating issue speech inevitably discourage speakers from speaking plainly, and that the First Amendment does not allow speakers to be forced to "hedge and trim" their preferred message.[41] The Court also expressed concern with the harm that overbroad disclosure could work to civic discourse, because "the right of associational privacy . . . derives from the rights of [an] organization's members to advocate their personal points of view in the most effective way."[42]

The *Buckley* Court confronted a statute that "require[d] direct disclosure of what an individual or group contributes or spends."[43] 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."[44] Thus, the Court required that "the subordinating interests of the State . . . survive exacting scrutiny."[45] 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."[46]

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."[47]

c. The Supreme Court protects issue speech by looking for "the major purpose" of an organization or the donations given *specifically* for speech that is "unambiguously campaign related."

The Supreme Court has insisted that for a law to "pass First Amendment scrutiny," it must be "tailored" to the government's "stated interests."[48] This ensures that laws do not "cover[] so much speech" as to undermine "the values protected by the First Amendment."[49] In particular, *Buckley* limited disclosure only to donors who would know that a group would be speaking "unambiguously" through campaign related material, and the Court acted explicitly to prevent disclosure regulations from swallowing issue speech that merely mentioned a candidate.[50]

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[41] *Id*. at 43 (quoting *Thomas v. Collins*, 323 U.S. 516, 535 (1946)).

[42] *Id*. at 75.

[43] *Id*.

[44] *Id*.; *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").

[45] *Id*. at 64.

[46] *Id*.

[47] *Citizens United*, 558 U.S. at 366-67 (quoting *Buckley*, 424 U.S. at 64, 66).

[48] *Watchtower Bible & Tract Soc'y of N.Y., Inc. v. Vill. of Stratton*, 536 U.S. 150, 168 (2002).

[49] *Id*. at 165-66.

[50] *Buckley*, 424 U.S. at 80 ("This reading is directed precisely to that spending that is unambiguously related to the campaign of a particular federal candidate").

The Supreme Court's tailoring analysis in *Buckley* was straight forward: organizations with the "major purpose" of supporting or opposing candidates are subject to campaign finance disclosure.[51] Candidate committees, political committees, and issue committees are all focused on engaging in electoral politics. Thus, generalized donor disclosure makes sense in the context of such organizations with "the major purpose" of politics because donors *intend* their funds to be used for political purposes.

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."[52] That is, unambiguously campaign related activity is when (1) the organization makes "contributions earmarked for political purposes . . . and (2) when [an organization] make[s] expenditures for communications that expressly advocate the election or defeat of a clearly identified candidate."[53] Such limited disclosure is appropriate because it involves "spending that is unambiguously related" to electoral outcomes.[54] Thus, *Buckley* held that comprehensive disclosure can be required of groups only insofar as those groups exist to engage in unambiguously campaign related speech.[55]

While the Supreme Court upheld certain disclosure in *Citizens United*, it addressed only a narrow and far less burdensome form of disclosure to that contemplated by H. 573. The Court merely upheld the disclosure of a federal electioneering communication report, which disclosed the *entity making the expenditure* and the purpose of the expenditure.[56] Such a report only disclosed contributors giving over $1,000 *for the purpose of furthering* the electioneering communication.[57] The *Citizens United* Court specifically held that the limited disclosure of an electioneering communication report is a "less restrictive alternative to more comprehensive regulations of speech," such as the regular reporting and generalized donor disclosure required of political committees.[58] What is "less restrictive" in *Citizens United* is that the disclosure was focused on the entity making the message and the donors who gave for that specific activity, not the organization's general donor list.

The disclosure required in federal statute has been interpreted by the Federal Election Commission to mean contributions *earmarked* for these expenditures, an interpretation recently upheld by the United States Court of Appeals for the District of Columbia Circuit in a case involving "electioneering communication" reporting requirements.[59] Similarly, Colorado's

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[51] *Id*. at 79.

[52] *Id*. at 81.

[53] *Id*. at 80. Of course, the *Buckley* Court narrowly defined "expressly advocate" to encompass only "express words of advocacy of election or defeat, such as 'vote for,' 'elect,' 'support,' 'cast your ballot for,' 'Smith for Congress,' 'vote against,' 'defeat,' [and] 'reject.'" *Id*. at 80 n.108 (incorporating by reference *id*. at 44 n.52).

[54] *Id*. at 80.

[55] *Id*. at 81.

[56] 52 U.S.C. §§ 30104(f)(2)(A) through (D).

[57] 52 U.S.C. §§ 30104(f)(2)(E) and (F); *Citizens United*, 558 U.S. at 366.

[58] *Citizens United*, 558 U.S. at 369.

[59] *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)).

electioneering communications provision was recently upheld precisely because it was similarly limited to the federal standard – including only reporting earmarked contributions.[60]

If this bill becomes law, it will raise the very concerns addressed by *Buckley* and its progeny. H. 573 is specifically designed to require generalized donor disclosure – not only the Top Five donors, but anyone who gave as little as $50 in the aggregate over 12 months,[61] regardless of whether they gave to further the specific electioneering communication. Accordingly, any disclosure requirements imposed on entities that compel generalized donor disclosure, as in H. 573, would likely be unconstitutional. Conversely, language that only requires the disclosure of those donations *specifically intended* for political contributions or expenditures would be constitutional, pursuant to an over forty-year-old unbroken chain of U.S. Supreme Court precedents.[62]

While the major purpose test is constitutionally required, there is some debate as to its precise contours. The Tenth, Eighth, and Fourth Circuits apply "the major purpose" test to properly tailor campaign finance disclosure to "unambiguously campaign related" speech and the donations that specifically support that speech. The Ninth Circuit, which covers Idaho, initially applied "the major purpose" test as well to neighboring Washington state's laws, though recent cases have weakened that standard. This possible split between the circuit courts of appeal may soon garner Supreme Court attention.

d. The Tenth, Eighth, and Fourth Circuits apply "the major purpose" test rigorously to protect the First Amendment rights of organizations and their donors.

Three circuits – the Tenth, Eighth, and Fourth – have followed *Buckley* and applied "the major purpose" test to state campaign finance laws that attempt to impose political committee-type status to groups only incidentally or indirectly speaking about candidates or ballot propositions. Each circuit demanded some nexus between compelled general donor disclosure and primary political activity. Dollar thresholds were not enough.

In *New Mexico Youth Organized v. Herrera* ("*NMYO*"),[63] the neighboring Tenth Circuit held that New Mexico campaign finance law's definition of "political committee" must satisfy "the major purpose test."[64] Significantly, *NMYO* dealt with political committee registration and disclosure,[65] similar to what H. 573 will mandate for those running electioneering communications. New Mexico law mandated generalized donor disclosure when an organization spent just $500 in a year "for political purposes."[66]

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[60] *Independence Inst. v. Williams*, 812 F.3d 787, 797 (10th Cir. 2016) ("[I]t is important to remember that the Institute need only disclose those donors who have specifically earmarked their contributions for electioneering purposes.").

[61] H. 573 § 22(1).

[62] *Buckley*, 424 U.S. at 80.

[63] 611 F.3d 669 (10th Cir. 2010).

[64] *Id*. at 677 (citing *Buckley*, 424 U.S. at 79).

[65] *Id*. at 672.

[66] *Id*. at 678 (citing N.M. Stat. § 1-19-26(L)).

The facts of the *NMYO* case were typical: one nonprofit organization, NMYO, worked with another nonprofit organization, Southwest Organizing Project, to disseminate mailings, as both nonprofits had a history of education on issues relating to youth, equality, and government transparency.[67] The mailings suggested that certain legislators were beholden to health insurance interests, and highlighted that the legislators' donors included health insurance companies.[68] Both nonprofit organizations spent a relatively small portion of their budget on the mailings: $15,000 out of a $225,000 budget for NMYO and $6,000 out of a $1.1 million budget for Southwest Organizing Project.[69]

The Tenth Circuit, using *Buckley* as a guide, held that a political committee may "only encompass organizations that are under the control of a candidate or *the major purpose* of which is the nomination or election of a candidate."[70] The court found that because neither group spent "a *preponderance* of its expenditures on express advocacy or contributions to candidates,"[71] neither could be regulated as a political committee. Furthermore, the *NMYO* court applied another Tenth Circuit decision, *Colorado Right to Life Committee, Inc. v. Coffman*,[72] and held the $500 trigger unconstitutional.[73] H. 573, in contrast, seeks to place political committee-type burdens on those who merely mention a candidate shortly before an election, even if the speakers do not have the major purpose of political advocacy.

Nor is the Tenth Circuit alone in applying *Buckley*'s "the major purpose" test. Both the Eighth and Fourth Circuits also use that test.

As recently as 2012, in *Minnesota Citizens Concerned for Life, Inc. v. Swanson*, the *en banc* Eighth Circuit struck down a law requiring independent expenditure funds to have "virtually identical regulatory burdens" to those imposed on political committees.[74] In that case, "Minnesota ha[d], in effect, substantially extended the reach of [political committee]-like regulation to *all* associations that *ever* make independent expenditures."[75] This included having to file periodic reports, even if the fund no longer engaged in political activity.[76] Ultimately, the *Swanson* court required "the major purpose" test to ensure that only political organizations face that burden – and not organizations that lack such a major purpose.[77]

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[67] *Id*. at 671.

[68] *Id*. at 671-72.

[69] *Id*. at 672. These figures amounted to approximately 6.7% of NMYO's budget and 0.5% of Southwest Organizing Project's budget.

[70] *Id.* at 677 (quoting *Buckley*, 424 U.S. at 79) (emphasis added).

[71] *Id*. at 678 (emphasis added).

[72] 498 F.3d 1137, 1153 (10th Cir. 2007).

[73] *NMYO*, 611 F.3d at 679.

[74] 692 F.3d 864, 872 (8th Cir. 2012) (en banc).

[75] *Id*. (emphasis in original).

[76] *Id*. at 873 ("Perhaps most onerous is the ongoing reporting requirement. Once initiated, the requirement is potentially perpetual regardless of whether the association ever again makes an independent expenditure."); *cf.* H. 573 § 18 (requiring similar post-election reporting).

[77] *Id*. at 877.

In *North Carolina Right to Life, Inc. v. Leake*, the Fourth Circuit followed *Buckley* and struck down a definition of "political committee" that reached groups without the "primary purpose" of supporting and opposing candidates. This ruling, which came down two years before the Supreme Court's *Citizens United* decision, began "with *Buckley v. Valeo*'s mandate that campaign finance laws must be 'unambiguously related to the campaign of a particular . . . candidate.'"[78] The *Leake* court continued, holding that:

> [T]he Court in *Buckley* did indeed mean exactly what it said when it held that an entity must have "*the* major purpose" of supporting or opposing a candidate to be designated a political committee. Narrowly construing the definition of political committee in that way ensures that the burdens of political committee designation only fall on entities whose primary, or only, activities are within the "core" of Congress's power to regulate elections.[79]

Based on this reasoning, the Fourth Circuit found North Carolina's law unconstitutional when it attached political committee disclosure and reporting to groups without the major purpose of electoral politics.[80]

e. The Ninth Circuit sometimes applies "the major purpose test" but has begun to split with its sister circuits in following *Buckley*.

The most on-point case law in the Ninth Circuit also applies "the major purpose" test, but recent Ninth Circuit decisions have drifted away from *Buckley*'s guidance. Doing so invites lengthy litigation and increases the likelihood of a challenge to H. 573 reaching full merits review in the Supreme Court.

In *Human Life of Washington, Inc. v. Brumsickle*, the Ninth Circuit examined the major purpose test in the context of a Washington-based organization opposed to euthanasia.[81] The court noted that the inclusion of a "primary purpose" requirement could satisfy the court's tailoring analysis:

> The Disclosure Law does not extend to all groups with "a purpose" of political advocacy, but instead is tailored to reach only those groups with a "primary" purpose of political activity. This limitation ensures that the electorate has information about groups that make political advocacy a priority, without sweeping

[78] 525 F.3d 274, 287 (4th Cir. 2008) (quoting *Buckley*, 424 U.S. at 80) (ellipsis in *Leake*).

[79] *Id*. at 288 (emphasis in original).

[80] *Id*. at 289 (striking N.C. Gen. Stat. § 163-278.6(14) as unconstitutional). It is sometimes said that a subsequent Fourth Circuit decision, *Real Truth About Abortion, Inc. v. Federal Election Commission*, 681 F.3d 544 (4th Cir. 2012), limited *Leake*'s applicability. But the *Real Truth* decision expressly distinguished *Leake* because North Carolina "provided absolutely no direction as to how [it] determine[d] an organization's major purpose and was implemented using unannounced criteria." *Id*. at 558 (internal citation and punctuation omitted). The *Real Truth* court further recognized that *Leake* focused on "expenditure ratios and organizational documents" in determining an organization's major purpose, but held that the Federal Election Commission could use other criteria in its regulation of federal electioneering communications. *Id*. at 557-58. Again, as discussed, *supra*, federal electioneering communications disclosure is for earmarked contributions only, not the generalized donor disclosure at issue in *Leake* and H. 573. *See* 11 C.F.R. § 104.20(c)(9).

[81] 624 F.3d 990, 995 (9th Cir. 2010).

> into its purview groups that only incidentally engage in such advocacy. Under this statutory scheme, the word "primary" – not the words "a" or "the" – is what is constitutionally significant . . . While we do not hold that the word "primary" or its equivalent is constitutionally necessary, we do hold that it is sufficient in this case to ensure that the Disclosure Law is appropriately tailored to the government's informational interest.[82]

But the Ninth Circuit has since tempered its use of the major purpose test. Three years ago, in *Yamada v. Snipes*, the Ninth Circuit upheld Hawaii's campaign finance disclosure rules because the law, in part, "avoid[ed] reaching organizations engaged in only *incidental* advocacy."[83] Indeed, "an organization that raises or expends funds for the sole purpose of producing and disseminating informational or educational communications . . . need not register as a noncandidate committee" if below Hawaii's $1,000 reporting threshold.[84] The *Snipes* court distinguished *Brumsickle* by noting that the earlier case "did not hold that an entity must have the sole, major purpose of political advocacy to be deemed constitutionally a political committee," but rather Washington's primary purpose rule was "sufficient" for the tailoring analysis.[85] And so the *Snipes* court allowed a "purpose" to be defined as meeting a monetary threshold of just $1,000 of contributions or expenditures, regardless of the relative spending of the organization.[86]

Assuming, for the sake of argument, that the *Snipes* opinion modified Ninth Circuit law, the opinion creates a split, not only with the prior decision in *Brumsickle*, but with its sister circuits in applying "the major purpose" test. This circuit split is a contributing factor for Supreme Court review,[87] and resolving such circuit splits is a significant portion of the Supreme Court's work.[88] Over-reliance on *Snipes* could compel long litigation with a substantial chance of Supreme Court review. The better course is to rely on *Brumsickle*'s approval of Washington's "primary purpose" tailoring rather than substantially expanding disclosure as this bill does. Idaho should be wary of setting up litigation that compels the Supreme Court to step back into campaign finance law to protect the First Amendment.

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[82] *Id*. at 1011 (citing *Leake*, 525 F.3d at 328 (Michael, J., dissenting)) ("The key word providing guidance to both speakers and regulators in 'the major purpose' test or 'a major purpose' test is the word 'major,' not the article before it.").

[83] 786 F.3d 1182, 1198 (9th Cir. 2015).

[84] *Id*. at 1199. In that case, an organization wished to spend $50,000 in the aggregate in contributions to candidates and $6,000 on political ads. *Id*.

[85] *Id*. at 1198. (internal quotation marks omitted).

[86] *Id*. at 1199.

[87] Sup. Ct. R. 10(a) (while "[a] writ of certiorari is not a matter of right," the Court considers if "a United States court of appeals has entered a decision in conflict with the decision of another United States court of appeals on the same important matter.").

[88] *See*, *e.g.*, *Mathis v. United States*, 579 U.S. ___, ___, 136 S. Ct. 2243, 2251 (2016) ("That decision added to a Circuit split. . . We granted certiorari to resolve that division."); *Fox v. Vice*, 563 U.S. 826, 832 (2011) ("The Fifth Circuit's decision deepened a Circuit split about whether and to what extent a court may award fees to a defendant under § 1988 . . . We granted certiorari to resolve these questions.").

f. Federal courts have held low reporting thresholds, like that found in this bill, to not be properly tailored to the state's interest.

For argument's sake, 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. Multiple federal courts have held that regulations cannot survive constitutional scrutiny if they reach small organizations spending little. Idaho's $0 reporting threshold for electioneering communications,[89] forty-eight-hour reporting requirement when $1,000 or more is spent on an electioneering communication in the days before an election,[90] and $100 threshold for reporting independent expenditures[91] are therefore suspiciously low.

In *Canyon Ferry Road Baptist Church of East Helena, Inc. v. Unsworth*, the Ninth Circuit held that the *de minimis* value of a Montana church copier and volunteer time was not sufficient to require generalized donor disclosure.[92] The *Canyon Ferry* court also specifically stated that it "[could] not say that the informational value derived by the citizenry is the same across expenditures of all sizes."[93] The Ninth Circuit held "[a]s the monetary value of an expenditure in support of a ballot issue approaches zero, financial sponsorship fades into support and then into mere sympathy."[94] Voters gain little information about "the *financial* backing" of a campaign when a group's "activities [are] of minimal economic effect."[95]

And the Ninth Circuit is in line with her sister circuit to the east. 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 Colorado's regulation of an organization as an "issue committee" with attendant reporting requirements similar to those proposed in this bill.[96] Colorado lost at every level of the federal judiciary, and ultimately needed to amend its campaign finance laws to comply with established Tenth Circuit precedent.[97]

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

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[89] H. 573 § 22(1).

[90] *Id*. at § 22(2).

[91] *Id*. at § 21(1).

[92] 556 F.3d 1021, 1024 (9th Cir. 2009); *id*. at 1034.

[93] *Id*. at 1033.

[94] *Id*.

[95] *Id*. (emphasis in original).

[96] *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).

[97] Colo. Rev. Stat. § 1-45-108(1.5) ("[I]n light of the opinion of the United States [C]ourt of [A]ppeals for the [T]enth [C]ircuit in the case of *Coalition for Secular Government v. Williams*, No. 14-1469 (10th [C]ircuit March 2, 2016), that affirmed the order of the federal district court in the case of *Coalition for Secular Gov't v. Gessler*, Case No. 12 CV 1708, the disclosure requirements… of this section shall not apply to a small-scale issue committee.").

Colorado's campaign finance disclosure scheme in *Sampson v. Buescher*.[98] 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."[99]

H. 573's low reporting thresholds are dangerously close to the "mere sympathy" or incidental support of a cause discussed in *Canyon Ferry*, and the extensive new reporting required by § 16 of H. 573 would clearly be unconstitutional under *Coalition for Secular Government* and *Sampson*. Under the proposed legislation, committee reports are due within fifteen days of making the first contribution or expenditure.[100] Monthly reporting is mandated thereafter, until fifteen days before an election, when forty-eight hour reporting is mandated for any contribution received of $1,000 or more.[101] Then, the bill mandates *post*-election *monthly* reporting, "until the account shows neither an unexpended balance of contributions nor a campaign expenditure deficit."[102] Even then, the burdens are not over because the entity must file a termination statement before finally being relieved of its reporting duties.[103] H. 573 combines low reporting thresholds with burdensome and frequent reporting, and therefore the legislation is likely not properly tailored to the state's limited disclosure interests.

Both the Ninth and Tenth Circuits recognize that the burdens placed by campaign finance reporting must be less than the information gleaned from the reports. By setting the reporting threshold so low, H. 573 places heavy burdens on organizations that are spending little. The bill then exacerbates the problem by *increasing* the reporting frequency and mandating every penny be spent before a committee is free from reporting, even if the election is long over. The burdens are mismatched to the knowledge gained from the information disclosed, and would likely fail the tailoring analysis of exacting scrutiny.

g. H. 573 will generate "junk disclosure" that confuses the electorate about who supports political messages.

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."[104] Consequently, the Court restricted the government's informational interest to situations involving "spending that is unambiguously related to the campaign of a particular . . . candidate,"[105] because it was only in that context that disclosure would provide any information about a candidate's (or ballot measure's) *supporters* or *opponents*.

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[98] 625 F.3d 1247 (10th Cir. 2010).

[99] *Id* at 1260.

[100] H. 573 § 16(2).

[101] *Id*. at § 16(3).

[102] *Id*. at § 18.

[103] *Id*.

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

[105] *Id*.

H. 573 will mislead rather than enlighten voters. "Junk disclosure" is produced when a campaign finance report demands more than the names of people who give to influence politics to include those who give to nonprofits that perform a variety of functions. Divorcing the disclosure from any actual intent that the money be used to influence an election implies agreement where there may be none. This is compounded when a donation is given far in advance of any decision by a nonprofit to speak and/or when a donor may oppose the nonprofit's specific electoral activity.

By contrast, when we speak of political committees and political parties, we can be reasonably assured that all donors to such organizations intend for their contributions to be used for political purposes. The same is not true of donors to 501(c) membership and business organizations, some of whom are likely to fall into the snare of electioneering communication or independent expenditure regulation provisions of this bill. As a result, if a group decides to engage in the extremely broad types of communications covered in the bill, many of its significant donors could potentially be made public, regardless of whether their donations were intended to be used for campaign related activity. A social media post should not be enough to compel general donor disclosure.

People give to trade associations and nonprofits not because they agree with everything an organization does, or every policy position a group may take, but because on balance they believe the group provides a valuable service. To publicly identify contributing individuals with expenditures of which they had no advance knowledge and may even oppose is both unfair to members and donors and potentially misleading to the public.

h. Disclosure can result in the harassment of individuals by their ideological opponents.

In considering this bill, legislators should remember that disclosure laws implicate citizen privacy rights. 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, which would "constitute as effective a restraint on freedom of association as [other] forms of governmental action."[106] This is why the privacy of citizens when speaking out about government officials and actions has been protected in certain contexts.[107]

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 a stretch to imagine a scenario in 2018 in which donors to controversial causes in Idaho – for or against immigration law reform; for or against Second Amendment freedoms; 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.

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[106] *NAACP v. Alabama*, 357 U.S. at 462.

[107] *See, e.g.*, *Talley v. California*, 362 U.S. 60, 65-66 (1960); *McIntyre v. Ohio Elections Comm'n*, 514 U.S. 334, 357 (1995).

The danger is real. Supporters of a pro-traditional marriage ballot measures in California also endured death threats.[108] Employees at the left-leaning New York Civil Liberties Union and center-right Goldwater Institute faced threats and harassment at their workplaces – and at their homes – due to their organizations' positions.[109] Delegates to both major political parties' national nominating conventions in 2016 faced death threats.[110] 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.

Likewise, the United States District Court for the Central District of California held a trial on the threats faced by organizations during these tumultuous times. Donors to the Americans For Prosperity Foundation ("AFP") "faced threats, attacks, and harassment, including death threats."[111] Those threats extended broadly to AFP's "employees, supporters and donors."[112] 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."[113] The individual making the threats was seen "in AFP's parking garage, taking pictures of employees' license plates."[114] Likewise, a major donor to AFP 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 AFP event.[115] 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 publicly associated with AFP, the Court finds that AFP supporters have been subjected to abuses," warranting protection from public disclosure.[116]

If the private information of donors to similar groups in Idaho were forcibly reported to the government, these citizens would also be at risk. To be clear, H. 573 would facilitate these types of threats and harassment by requiring certain donors to nonprofit groups to be publicly identified

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[108] *See*, *e.g.*, Brad Stone, *Prop 8 Donor Web Site Shows Disclosure Law Is 2-Edged Sword*, The New York Times, Feb. 7, 2009 *available at*: https://www.nytimes.com/2009/02/08/business/08stream.html.

[109] *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, April 11, 2007 *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, Sept. 22, 2016 *available at*: https://www.wsj.com/articles/beware-of-anti-speech-ballot-measures-1474586180.

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

[111] *Americans for Prosperity Found. v. Harris*, 182 F. Supp. 3d 1049, 1056 (C.D. Ca. 2016) (internal citation to hearing transcripts omitted).

[112] *Id*. at 1055.

[113] *Id*. at 1056 (citation omitted).

[114] *Id*. (citation omitted).

[115] *Id*. (citation omitted).

[116] *Id*.

with activities deemed to be "political" on campaign finance reports, even if such activities are only an incidental part of a group's overall activities, and the donors did not contribute to support those activities.

Worse still, little can be done once individual contributor information – a donor's full name and street address – is made public under government compulsion. It can then immediately be used by non-governmental entities and individuals to harass, threaten, or financially harm a speaker or contributor to an unpopular cause. Nor does the danger pass; because this information remains public in perpetuity, a change in culture or political fortunes can open citizens up to harassment for long-obsolete activity. The problem of harassment is best addressed by limiting the opportunities for harassment and by crafting reporting thresholds that capture just those donors who are truly contributing large sums to political candidates and express advocacy regarding such candidates – and not to organizations engaging in issue advocacy about a particular topic relevant to the voters of Idaho.

Ultimately, 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 provide the provision of only such information as is particularly important to voters. It is questionable that the broad triggering activity outlined by H. 573 for organizations that lack "the major purpose" of influencing elections is sufficient to meet this standard. The First Amendment demands a greater nexus, a showing that giving to an organization is "unambiguously campaign related" before a donor can be expected to have their name disclosed.

II. H. 573 creates burdensome disclaimer requirements for electioneering communications.

The First Amendment abhors compelled speech. "Mandating speech that a speaker would not otherwise make necessarily alters the content of the speech," and therefore is treated as "a content-based regulation of speech."[117] The Supreme "Court's leading First Amendment precedents have established the principle that freedom of speech prohibits the government from telling people what they must say."[118] This is because "the right of freedom of thought protected by the First Amendment against state action includes both the right to speak freely and the right to refrain from speaking at all."[119]

"Our political system and cultural life rest upon" the belief that the First Amendment allows "each person [to] decide for him or herself the ideas and beliefs deserving of expression, consideration, and adherence."[120] "Indeed," the Court has unequivocally upheld "this general rule,

[117] *Riley v. Nat'l Fed. of the Blind*, 487 U.S. 781, 795 (1988).

[118] *Rumsfeld v. Forum for Academic & Institutional Rights, Inc.*, 547 U.S. 47, 61 (2006) (citing examples).

[119] *Wooley v. Maynard*, 430 U.S. 705, 714 (1977); *see also Riley*, 487 U.S. at 797 (collecting cases).

[120] *Turner Broad. Sys. v. Fed. Communications Comm'n*, 512 U.S. 622, 641 (1994).

that the speaker has the right to tailor the speech, applies not only to expressions of value, opinion, or endorsement, but equally to statements of fact."[121]

In the campaign finance context, laws requiring the identification of a speaker in a political ad, also known as "disclaimer" requirements, have been upheld by the Supreme Court.[122] But such requirements "'insure that the voters are fully informed' about the person or group *who is speaking*"[123] and clarify that "the ads are not funded by a candidate or political party."[124] The Supreme Court has upheld laws requiring the speaker to dedicate up to "four seconds of each advertisement to [a] spoken disclaimer."[125]

What is odd about H. 573 is that the bill treats mere incidental mention of a candidate (an electioneering communication)[126] with more burdensome disclaimers than an ad that expressly advocates for or against a candidate (an independent expenditure).[127] The legislation provides "[e]very electioneering communication shall contain an authority line that states the name of the . . . person responsible for the communication."[128] The bill further mandates a specific, lengthy script for every electioneering communication:

> This message has been authorized and paid for by (name of payor or payor's organization), (name and title of treasurer or president). This message has not been authorized or approved by any candidate.[129]

The bill also specifically grants the Secretary of State the authority to adapt this disclaimer to other types of media.[130]

But in contrast, independent expenditures, which are, by definition, *overtly* political, need only identify "the person responsible for such communication."[131] So, running an overtly political advertisement does not require the committee to name its treasurer or other leadership. It is odd that express advocacy triggers a shorter, less burdensome disclaimer than merely mentioning a candidate shortly before an election. This discrepancy casts doubt on the proper tailoring of the law.

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[121] *Hurley v. Irish-American Gay, Lesbian and Bisexual Group of Boston*, 515 U.S. 557, 573 (1995) (collecting cases); *cf. Galvin v. Hay*, 374 F.3d 739, 750 (9th Cir. 2004) (applying *Hurley* and *Riley*).

[122] *Citizens United*, 558 U.S. at 369.

[123] *Id*. at 368 (quoting *Buckley*, 424 U.S. at 76) (emphasis added).

[124] *Id*.

[125] *Id*. (citing *McConnell*, 540 U.S. at 230-31); *compare with* 52 U.S.C. § 30120(a)(2) (federal disclaimer statute) *and* 11 C.F.R. § 110.11(c)(4) (federal regulations on disclaimers).

[126] H. 573 § 2(6).

[127] *Id*. at § 2(9).

[128] *Id*. at § 22(3).

[129] *Id*. at § 22(4).

[130] *Id*. at § 22(5).

[131] *Id*. at § 25.

III. The bill's proposed restrictions on contributions and political committees violates the rights of Idahoans and citizens who live outside Idaho.

Beyond the troublesome disclosure provisions in H. 573, the bill also adds new burdens on the actual financing of political activity in the state. To pass constitutional muster, Idaho must articulate why it chooses to require treasurers to be electors in the state, why political committee-to-political committee transfers are subject to prior registration with the Secretary of State, and why candidates cannot also control a political committee. Failing to do so will result in a court striking these novel provisions.

The Supreme Court has noted that "[t]here is no right more basic in our democracy than the right to participate in electing our political leaders."[132] Therefore, "it can hardly be doubted that the constitutional guarantee has its fullest and most urgent application precisely to the conduct of campaigns for political office."[133] To that end, the Supreme Court has long held that speech surrounding candidates for elected office and the speech and association rights implicated by political contributions "command[] the highest level of First Amendment protection."[134]

Additionally, in the context of the right of association in redistricting cases, the Supreme Court has held that the First amendment protects "citizens from official retaliation based on their political affiliation."[135] That is because "the freedom of political belief and association guaranteed by the First Amendment prevents the State, absent a compelling interest, from 'penalizing citizens because of their participation in the electoral process, . . . their association with a political party, or their expression of political views.'"[136] Where the state enacts legislation with the "effect of subjecting a group" to "disfavored treatment," the Court has consistently mandated close scrutiny of the legislation.[137]

Therefore, courts must apply heightened scrutiny's "closely drawn" test to restrictions on association in connection with the solicitation of campaign funds and other rules that limit how an organization may work in Idaho.[138] Additionally, the government may restrict and burden speech soliciting contributions "only if the restriction is narrowly tailored to serve a compelling interest."[139] Of course, "it is the rare case in which a State demonstrates that a speech restriction is

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[132] *McCutcheon*, 134 S. Ct. at 1440-41.

[133] *Buckley*, 424 U.S. at 15 (quoting *Monitor Patriot Co. v. Roy*, 401 U.S. 265, 272 (1971)).

[134] *Williams-Yulee v. Florida Bar*, 575 U.S. ___, ___, 135 S. Ct. 1656, 1665 (2015).

[135] *League of United Latin Am. Citizens v. Perry*, 548 U.S. 399, 461 (2006). The *League* Court further held that "The equal protection component of the Fourteenth Amendment requires actions taken by the sovereign to be supported by some legitimate interest, and further establishes that a bare desire to harm a politically disfavored group is not a legitimate interest." *Id*. at 461-62.

[136] *Id*. at 462 (quoting *Vieth v. Jubelirer*, 541 U.S. 267, 314 (2004) (Kennedy, J., concurring) (ellipsis in *League*).

[137] *Vieth*, 541 U.S. at 314 (Kennedy, J., concurring) ("Under general First Amendment principles those burdens in other contexts are unconstitutional absent a compelling government interest.") (collecting cases). The Supreme Court has the opportunity to refine or reaffirm these principles in a redistricting case this term in a case centered on political party gerrymandering. *Gill v. Whitford*, No. 16-1161 (U.S. 2018) (pending decision).

[138] *Williams-Yulee*, 135 S. Ct. at 1665; *cf. McConnell*, 540 U.S. at 136.

[139] *Williams-Yulee*, 135 S. Ct. at 1665.

narrowly tailored to serve a compelling interest."[140] It is the government's burden to show a compelling interest in regulating speech.[141]

The restriction's novelty will also increase how much the state must prove. The Supreme Court held in *Nixon v. Shrink Missouri Government PAC*: "[t]he quantum of empirical evidence" the government must provide "to satisfy heightened judicial scrutiny of legislative judgments will vary up or down with the novelty and plausibility of the justification" the government gives for a law.[142]

The Supreme Court has warned that contribution limits "themselves are a prophylactic measure."[143] That is "'because few if any contributions to candidates will involve *quid pro quo* arrangements.'"[144] And laws punishing bribery further deter actual and apparent corruption. In that context, therefore, the federal courts must "be particularly diligent in scrutinizing the law's fit" to make sure that the government "avoid[s] 'unnecessary abridgment' of First Amendment rights."[145]

H. 573's scheme is a departure from the normal regulation of contributions and campaign finance. First, the bill places onerous restrictions on treasurers of political campaigns. In particular, a "treasurer must be a registered elector of" Idaho.[146] The state has not articulated any compelling governmental interest in mandating that campaign treasurers be electors. And limiting the residence of a treasurer does not serve the anticorruption interest furthered by contribution limits. This "Idahoans only" provision should be struck like other measures aimed at harming those out of state.[147]

H. 573 is even more troubling because it limits the sources of money for contributions. Section 14(3) bans any "political committee" from "accept[ing] a contribution of more than one thousand dollars ($1,000), whether in a lump sum or in aggregate payments, . . . from another political committee" if the source committee has not registered with the Idaho Secretary of State. In effect, Idaho is mandating prior registration of all political committees if they wish to give money to an Idaho campaign, even if the money was reported elsewhere (such as in another state

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[140] *Id*. at 1665-66 (internal citation and quotation marks omitted).

[141] *McCutcheon*, 134 S. Ct. at 1452 ("'When the Government restricts speech, the Government bears the burden of proving the constitutionality of its actions.'") (quoting *United States v. Playboy Entm't Grp.*, 529 U.S. 803, 816 (2000)).

[142] 528 U.S. 377, 391 (2000).

[143] *McCutcheon*, 134 S. Ct. at 1458.

[144] *Id*. (quoting *Citizens United*, 558 U.S. at 357).

[145] *Id*. (citation omitted).

[146] H. 573 § 4(2) (requiring citizen status for candidate committee treasurers); *id*. at § 6(2) (requiring citizen status for political committee treasurers). A candidate may be her own treasurer. *Id*. at § 4(2).

[147] Even if the law were one involving mere commerce, the Constitution nonetheless does not permit states "to discriminate against interstate commerce either on its face or in practical effect," without the state clearly demonstrating "that the statute serves a legitimate local purpose, and that this purpose could not be served as well by available nondiscriminatory means." *Maine v. Taylor*, 477 U.S. 131, 138 (1986) (internal citations and quotation marks omitted) (applying the powers of the dormant commerce clause). Even if a legitimate local purpose may be articulated, "then the question becomes one of degree . . . and on whether it could be promoted as well with a lesser impact on interstate activities." *Pike v. Bruce Church*, 397 U.S. 137, 142 (1970).

or to the Federal Election Commission). The state has not articulated a compelling reason for doing so nor has it shown this to be a narrowly tailored solution to any problem.

The bill also limits what candidates may do. A candidate may not have a separate political committee in addition to her candidate committee.[148] The bill itself is silent on what interest it seeks to protect via this rule. Presumably, it is aimed at so-called "leadership PACs" run by incumbents to help their fellow party members also win election. But the language is broad enough to also apply to a candidate who cares about specific policy issues. For example, a challenger may seek a state house seat, in part, on a platform of improving Idaho's roads. But she may also wish to suggest a ballot measure that would help secure funding for her proposed road improvements. H. 573 would stand in her way, without articulating how doing so will fight *quid pro quo* corruption. Without a compelling interest, the bill's prohibition will fail.

Likewise, a candidate may not have more than one bank account for her campaign.[149] Alone, this rule may not overly hinder the operations of a candidate's campaign. But if it operates to hamper new ways of receiving donations – for example, via Venmo, PayPal, or other electronic funding services – then the House State Affairs Committee should reconsider the merits of adding this "one bank account" rule. Each restriction on a campaign's accounting must be tied to a state interest and properly tailored to that interest.

Idaho should carefully consider the nuts and bolts of how committees must operate in the state. While nativism is tempting, the First Amendment protects all speakers – even those from out of state – wishing to speak on matters of public importance. The bill's requirement that committees use Idahoan treasurers only adds overhead and paperwork to citizens' attempts to speak. Likewise, the small cap on political-committee-to-political-committee transfers also limits the ability of organizations to help their local allies. Idaho attempts to do so without a compelling state interest. Similarly, the "one bank account" rule may be read to limit the funding mechanisms of candidates, and should be clarified to assure new methods of contributing to candidates remain effective. Therefore, members of the House State Affairs Committee should reconsider these provisions of H. 573.

IV. Allowing anyone to start legal proceedings against speakers will chill constitutionally protected speech.

H. 573 allows for *private* complaints to allege violations of Idaho's campaign finance laws and even seek an injunction in court, regardless of whether the Secretary of State or county clerk believe the claim has merit. Anyone – including, perhaps especially, a speaker's ideological opponents – can allege a violation and trigger the adjudicative process. Anyone can force a speaker into all the accompanying time, effort, worry, and expense of a judicial proceeding, simply by filing a complaint. The cards are stacked in favor of the complainant and encourage misuse of the judiciary.[150]

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[148] H. 573 at § 4(3).

[149] *Id*. at § 4(4).

[150] Indeed, Colorado is defending a federal challenge to a similar private right of action system. *See Holland v. Williams*, No. 1:16-cv-00138-RM-CBS (D. Colo.).

Private parties may complain to either the Secretary of State (for statewide races) or the local county clerk (for local races).[151] Or the private individual, likely a political adversary, can skip the process of getting the Secretary's or county clerk's investigation and seek an injunction directly in state district court.[152]

This process is a major strain on small organizations who may not be able to afford adequate counsel well-versed in the minutia of Idaho's campaign finance law. Worse still, the complainant may get attorney's fees and costs if successful, but the defendant organization can recover fees only if the "action was without substantial merit."[153] This encourages politically-motivated private complaints and leaves defendants without recourse.

The Supreme Court has recognized the danger of such enforcement schemes. In *Susan B. Anthony List v. Driehaus*,[154] the Supreme Court held that a speaker had standing to raise a facial challenge to an election law when the law's private enforcement provisions created a substantial risk that the speaker would face criminal prosecution.[155] The Supreme Court held that, "[b]ecause the universe of potential complainants is not restricted to state officials who are constrained by explicit guidelines or ethical obligations, there is a real risk of complaints from, for example, political opponents."[156] By expanding the number of people who could bring a claim, the law created serious "burdens . . . on electoral speech."[157]

Even if the claim is meritless, it nonetheless forces "the target of a . . . complaint . . . to divert significant time and resources to hire legal counsel and respond to discovery requests in the crucial days leading up to an election."[158] This will undoubtedly chill speech, particularly controversial speech. Private rights of action for enforcing speech restrictions risk unduly chilling constitutionally protected speech. It is too easy to game the system for unfair advantage, or merely to punish one's ideological opponents. Idaho should reconsider giving political opponents such a potent weapon.

* * *

H. 573 fails First Amendment scrutiny when it (1) imposes new disclosure provisions that are broad and burdensome; (2) demands new disclaimer requirements for electioneering communications that are more onerous than that demanded of independent expenditures; (3) adds new burdens on financing and running political committees in the state; and (4) allows anyone to start legal proceedings against speakers via the private right of action. Any one of these issues

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[151] H. 573 § 37(2)(b) and (3)(b).

[152] *Id*. § 40.

[153] *Id*.

[154] 573 U.S. ___, ___, 134 S. Ct. 2334 (2014).

[155] *Id*. at 2345 ("The credibility of that threat is bolstered by the fact that authority to file a complaint with the Commission is not limited to a prosecutor or an agency. Instead, the false statement statute allows 'any person' with knowledge of the purported violation to file a complaint.").

[156] *Id*.

[157] *Id.* at 2346.

[158] *Id*.

compel careful reconsideration of H. 573. Taken together, the entirety of this bill should be set aside and reworked for better compliance with the First Amendment.

Thank you for allowing me to submit comments on H. 573. 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 me at (703) 894-6800 or by e-mail at tmartinez@ifs.org.

Respectfully submitted,

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