INSTITUTE FOR FREE SPEECH

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VIA ELECTRONIC MAIL

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RE: Constitutional and Practical Issues with S.B. 5991

Dear Chair Hudgins, Vice Chair Dolan, Ranking Minority Member McDonald, Assistant Ranking Minority Member Kraft, and Members of the House State Government, Elections and Information Technology Committee:

On behalf of the Institute for Free Speech ("the Institute"),[1] I respectfully submit the following comments concerning constitutional and practical issues with portions of Senate Bill 5991, as passed by the Senate.[2] Specifically, I write to note several significant legal concerns raised by the bill, which proposes amendments to Washington's campaign finance laws. The bill touches on fundamental First Amendment rights of speech, petition, and private association. S.B. 5991, 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.

This legislation proposes a new, broad definition of "incidental committee" – by definition, organizations that only minimally involve themselves in electoral politics – and proposes to treat these organizations similarly to "political committees" – by definition, groups organized specifically to involve themselves in electoral politics. S.B. 5991 is of dubious constitutionality under the First Amendment for four primary reasons: (1) it fails to protect the First Amendment rights to speak on public policy and to privately associate with others; (2) it overlooks decades of jurisprudence applying "the major purpose" test for campaign finance regulation; (3) it dilutes the

[1] The Institute 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] Washington state DISCLOSE Act of 2018, S.B. 5991, 65th Leg., 2018 Reg. Sess. (Wa. 2018) ("S.B. 5991").

value of disclosure by creating "junk disclosure"; and (4) it may subject individuals to harassment based on what may be inferred about donors due to the bill's broad disclosure rules.

As currently drafted, this bill forces certain § 501(c)(3) charitable organizations to report the names and home addresses of their significant supporters to the government, even though such charities are forbidden by the federal tax code from intervening in elections.[3] Moreover, because the measure references other vague provisions in existing state law, such as the definitions of "contribution," "election campaign," "expenditure," and "political advertising," and the undefined terms "support" and "opposition," the measure suffers from additional weaknesses not present on its face.

Speakers who are attempting to comply with these reporting requirements may opt not to speak, rather than risk running afoul of the law. If they do speak and attempt to comply with the measure's reporting mandates, they will face the very real possibility of tripping over the unclear wording of the law and incurring costly financial penalties. This is a significant weakness because the Supreme Court has consistently stated that such lengthy and confusing requirements chill speech: "Prolix laws chill speech for the same reason that vague laws chill speech: People of common intelligence must necessarily guess at the law's meaning and differ as to its application."[4] This danger is especially pronounced in Washington, where private parties may bring campaign finance complaints for minor reporting violations[5] and may even be awarded attorney's fees in some circumstances.[6]

The expanded disclosure of donors to nonprofits is not only an *effect* of S.B. 5991, it is the *very purpose* of the bill. The preamble of the bill notes that existing Washington law allows "nonprofit organizations [to] form political committees using the funds contributed only by those members wishing to further the organization's campaign activity."[7] The existing law is already better tailored to the state's interests in disclosure: namely, determining which individuals *actually* support a candidate. But S.B. 5991 will go beyond those who give "to further the organization's campaign activity" to include donors who only give to an organization generally and did not earmark their funds for electoral use.[8] The First Amendment cannot tolerate such an attempt to

[3] *See* 26 U.S.C. § 501(c)(3) (prohibiting "participat[ion] in, or interve[ntion] in (including the publishing or distributing of statements), any political campaign on behalf of (or in opposition to) any candidate for public office"). It is important to note, however, that the Internal Revenue Service specifically recognizes that "[s]ection 501(c)(3) organizations may take positions on public policy issues" so long as the issue advocacy does not "function[] as political campaign intervention." Rev. Rul. 2007-41, 2007-25 I.R.B. 1421, 1424.

[4] *Citizens United v. Fed. Election Comm'n*, 558 U.S. 310, 324 (2010).

[5] Rev. Code. Wash. §42.17A.765(4).

[6] Under statute, if the attorney general or county prosecuting attorney fail to timely bring an enforcement action, a private complainant may bring a "citizen action." Rev. Code. Wash. §42.17A.765(4)(a). If the private citizen prevails, "the judgment awarded shall escheat to the state, but [the private citizen] shall be entitled to be reimbursed by the state of Washington for costs and attorneys' fees he or she has incurred." Rev. Code. Wash. §42.17A.765(4)(b).

[7] S.B. 5991 § 2.

[8] *See id*. at § 5(1).

regulate the activity of everyday citizens. What the bill calls a "loophole"[9] is the very "breathing space" First Amendment freedoms need to survive.[10]

I. 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 relation' between the governmental interest and the information required to be disclosed."[11] This heightened scrutiny is required because, under the First Amendment, "compelled disclosure . . . cannot be justified by a mere showing of some legitimate governmental interest."[12] 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.[13]

Candidate committees (and, in the state law context, issue committees focused on ballot propositions)[14] obviously support or oppose electoral outcomes and are campaign related.[15] Organizations with the "major purpose" of supporting or opposing candidates or ballot propositions are also subject to campaign finance disclosure.[16] 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."[17] The more disclosure is divorced from identifying 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.[18]

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."[19] Rather, as a

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[9] *Id*. at § 2.

[10] *Keyishian v. Bd. of Regents*, 385 U.S. 589, 604 (1967) ("Because First Amendment freedoms need breathing space to survive, government may regulate in the area only with narrow specificity.") (citation omitted).

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

[12] *Id*.

[13] *Id*. at 42.

[14] S.B. 5991 §3(4) (defining "ballot proposition" for the purposes of the bill).

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

[16] *Id*.

[17] *Id*. at 81.

[18] *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).

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

"strict test,"[20] 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."[21]

II. The new definition of "incidental committee" impermissibly reaches groups that cannot be regulated as political committees under the First Amendment.

The bill's explicit purpose is to mandate disclosure of those who do not give to campaigns or campaign related activity.[22] Far from closing a "loophole,"[23] the bill will unbound the disclosure from those who actually support or oppose a candidate to those who gave to a nonprofit – for whatever reason. Failure to account for the First Amendment rights of Washingtonians makes S.B. 5991 constitutionally suspect. Essentially, the bill states that *any organization* that spends, or "has the expectation of"[24] spending, $10,000 on (poorly defined) activities is a political committee, regardless of the character and scope of its other activities. This blurs the distinction between groups that exist for political purposes, and groups that do not, but happen to incidentally engage in political speech. Such a distinction is a bedrock principle of First Amendment law.

S.B. 5991 proposes a new definition of "incidental committee," defined as "any nonprofit organization not otherwise defined as a political committee but that may incidentally make a contribution or an expenditure . . . directly or through a political committee."[25] Under the bill, if a group makes "contributions" or "expenditures" – vaguely and broadly defined[26] – of $10,000 or more, it is subject to functionally-similar reporting requirements to those of a political committee.[27] Of course, political committees have, by definition, "the expectation of receiving contributions or making expenditures in support of, or opposition to, any candidate or any ballot proposition."[28]

For decades, the Supreme Court has consistently shielded organizational donors and supporters from generalized donor disclosure. Called the privacy of association, this important right 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, from disclosure of an organization's contributors and members – by subjecting "state

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

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

[22] S.B. 5991 § 2 (stating purpose of the bill is to specifically mandate disclosure beyond those who "contribute[] only . . . to further the organization's campaign activity").

[23] *Id*.

[24] *Id*. at § 4(1)(a)(i).

[25] *Id*. at § 3(25).

[26] *See id*. at § 3(13)(a)(i) (defining "contribution", in part, as "anything of value"); *id*. at § 3(20) (defining "expenditure", in part, as the "transfer of anything of value . . . for the purpose of assisting, benefiting, or honoring any public official or candidate, or assisting in furthering or opposing any election campaign").

[27] *Id*. at §4.

[28] *Id*. at § 3(38).

action which may have the effect of curtailing the freedom to associate . . . to the closest scrutiny."[29] 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,"[30] and that there is a "vital relationship between freedom to associate and privacy in one's associations."[31] 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, the 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.[32]

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"[33] – now referred to as "issue advocacy"[34] 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.[35]

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.[36] 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."[37]

The *Buckley* Court confronted a statute that "require[d] direct disclosure of what an individual or group contributes or spends."[38] 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

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

[30] *Id*. at 460.

[31] *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").

[32] *Bates v. City of Little Rock*, 361 U.S. 516, 523 (1960); *see also NAACP v. Button*, 371 U.S. 415, 433 (1963) (noting that the freedoms of speech and association are "delicate and vulnerable" to "[t]he threat of sanctions [which] may deter their exercise almost as potently as the actual application of sanctions").

[33] 424 U.S. at 14.

[34] *See, e.g., McConnell v. Fed. Election Comm'n*, 540 U.S. 93, 190 (2003).

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

[36] *Id*. at 43.

[37] *Id*. at 75.

[38] 424 U.S. at 75.

NAACP v. Alabama derives from the rights of the organization's members to advocate their personal points of view in the most effective way."[39] Thus, the Court required that "the subordinating interests of the State . . . survive exacting scrutiny."[40] 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."[41]

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."[42]

By making no distinction between organizations that do and *do not* have a major purpose of supporting or opposing the election of candidates or the passage of defeat of ballot propositions, S.B. 5991 imposes significant reporting requirements on "incidental committees." These requirements subject such groups to functionally similar reporting requirements to those imposed on political committees, simply because they make vaguely defined "contributions" or "expenditures" of $10,000 or greater. This statutory scheme likely would not survive constitutional scrutiny, for the reasons given below.

III. It is improper to use a monetary trigger, rather than an analysis of an organization's major purpose, to regulate an organization under campaign finance law.

S.B. 5991 fails to consider the major purpose of "incidental committees" – indeed, the very name betrays the fact that the bill does not care if it regulates the speech of those not primarily engaged in politics.[43] Doing so contravenes Supreme Court guidance on how to properly tailor a statute to reach only those who are clearly supporting or opposing a candidate. This test, called "the major purpose" test, comes from *Buckley* and helps assure that a law demands disclosure only of those who give to an organization or for a communication that is "unambiguously campaign related."[44]

Even if the U.S. Court of Appeals for the Ninth Circuit approved S.B. 5991, regulating "incidental committees" in this manner widens a split with other federal courts of appeal, namely the Tenth, Eighth, and Fourth Circuits, which require the major purpose test. Some recent case law in the Ninth Circuit may support regulating "incidental committees" at the threshold proposed in the bill – but only at the cost of increasing the chance that the Supreme Court will eventually review Washington's law and impose a uniform, nationwide rule.

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[39] *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").

[40] *Id*. at 64 (collecting cases).

[41] *Id*.

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

[43] *See also* S.B. 5991 § 2 (claiming that the purpose of the bill is to regulate such incidental speech).

[44] *Buckley*, 424 U.S. at 80-81.

a. The Supreme Court protects issue speech by looking for "the major purpose" of an organization or the *earmarked* donations given 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."[45] This ensures that laws do not "cover[] so much speech" as to undermine "the values protected by the First Amendment."[46] In particular, *Buckley* limited disclosure only to donors who would know that a group would be speaking "unambiguously" about campaign related material, and the Court acted explicitly to prevent disclosure regulations from swallowing issue speech that merely mentioned a candidate.[47]

The Supreme Court's tailoring analysis in *Buckley* was straight forward: organizations with the "major purpose" of supporting or opposing candidates are also subject to campaign finance disclosure.[48] Thus candidate committees, political committees, and issue committees are all founded and focused on engaging in electoral politics. 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."[49] 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."[50] Such limited disclosure is appropriate because it involves "spending that is unambiguously related" to electoral outcomes.[51] Thus, *Buckley* held that comprehensive disclosure can be required of groups only insofar as those groups exist to engage in unambiguously campaign related speech.[52]

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 S.B. 5991. 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. Such a report only disclosed contributors giving over $1,000 *for the purpose of furthering* the electioneering communication.[53] The *Citizens United* Court specifically held that the limited disclosure of an electioneering

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

[46] *Id*. at 165-166.

[47] *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").

[48] *Id*.

[49] *Id*. at 81.

[50] *Id*. at 80 (emphasis added). 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).

[51] *Id*. at 80-81.

[52] *Id*. at 81.

[53] 52 U.S.C. §§ 30104(f)(2)(E) and (F); *Citizens United*, 558 U.S. 366-67.

communications 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.[54] 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 general donors of the organization.

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.[55] Similarly, Colorado's electioneering communications provision was recently upheld precisely because it was similarly limited to the federal standard – including only reporting earmarked contributions.[56]

S.B. 5991 is designed *explicitly* to go further than the federal or Colorado laws. In contrast to the tailored disclosure reviewed in *Citizens United*, this legislation would mandate disclosure of the names and mailing addresses of the top ten aggregate "contributions"[57] received by a nonprofit of $10,000 or more and all contributors who have given $100,000 or more in a calendar year to the organization if that entity makes expenditures of $10,000 – regardless of whether its major purpose is to influence elections, and regardless of those donors' relationship to the organization's contributions or expenditures.[58] Accordingly, any disclosure requirements imposed on "incidental committees" that compel generalized donor disclosure, as in S.B. 5991, 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.[59]

If this bill becomes law, it will raise the very concerns addressed by *Buckley* and its progeny. S.B. 5991 is specifically designed to pursue nonprofits, such as educational § 501(c)(3) charities. So take, for example, the Washington State Budget & Policy Center, a fiscal policy-focused nonprofit in Seattle that regularly speaks on the state's budget and tax priorities. Such a nonprofit is at its best when it can analyze such complex issues and educate citizens on policy ideas that promote an inclusive economy for all Washingtonians. Even if the Washington State Budget & Policy Center does not advocate a direct yes or no on ballot propositions or legislation, if it runs a report, praising members of the House on the budget bill, that is mailed to the general public,[60] then its donors would be subject to possible disclosure. This is an absurd result for an

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

[55] *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)).

[56] *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").

[57] *See, e.g.*, S.B. 5991 § 4(1)(a)(i). To the extent the Legislature intends the term "payments" to encompass *pro bono* legal advice, accounting services, or other functions performed by an "incidental committee," the reach of the reporting requirements poses serious constitutional problems that would generate legal challenges. *See* Or. Granting Summ. J., *Inst. for Justice v. State of Wash.*, No. 13-2-10152-7, slip op. at 3 (Wa. Spr. Ct. Feb. 20, 2015) (holding "treatment of free legal assistance to a political committee . . . as a 'contribution' . . . is unconstitutional").

[58] S.B. 5991 § 5(1).

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

[60] The definition of an "incidental committee" depends on the making of contributions or expenditures. S.B. 5991 § 3(25). The bill states that "'[e]xpenditure' also includes . . . anything of value for the purpose of assisting, benefiting,

organization that educates in an area of complex policy – the state budgeting process. The organization's donors and employees should not be subject to "campaign finance disclosure" that is not tied to any campaign.

While the major purpose test is constitutionally requited, 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 Washington, initially applied "the major purpose" test as well, though recent cases have weakened that standard. This possible split between the circuit courts of appeal may soon garner Supreme Court attention.

b. 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*"),[61] the neighboring Tenth Circuit held that New Mexico campaign finance law's definition of "political committee" must satisfy "the major purpose test."[62] Significantly, *NMYO* dealt with political committee registration and disclosure,[63] similar to what S.B. 5991 will mandate for "incidental committees."

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.[64] The mailings suggested that certain legislators were beholden to health insurance interests, and highlighted that the legislators' donors included health insurance companies.[65] 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.[66] It's worth noting that these spending amounts are similar in scope to the $10,000 monetary threshold proposed in S.B. 5991.

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

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or honoring any public official or candidate, or assisting in furthering or opposing any election campaign." *Id*. at § 3(20). Similarly, an "electioneering communication" can be a mailing under this bill. *Id*. at § 3(19)(a).

[61] 611 F.3d 669 (10th Cir. 2010).

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

[63] *Id*. at 672.

[64] *Id*. at 671.

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

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

is the nomination or election of a candidate."[67] The court found that because neither group spent "a *preponderance* of its expenditures on express advocacy or contributions to candidates,"[68] 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*,[69] and held the $500 trigger unconstitutional.[70] There are now two major Tenth Circuit cases rejecting monetary triggers as stand-ins for an organization's "major purpose," which is what S.B. 5991 purports to do.

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 PACs.[71] In that case, "Minnesota ha[d], in effect, substantially extended the reach of PAC-like regulation to *all* associations that *ever* make independent expenditures."[72] This included having to file periodic reports, even if the fund no longer engaged in political activity.[73] 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.[74]

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.'"[75] 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.[76]

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

[68] *Id.* at 678.

[69] 498 F.3d 1137, 1154 (10th Cir. 2007).

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

[71] 692 F.3d 864, 872 (8th Cir. 2012) (en banc).

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

[73] *Id.* at 873.

[74] *Id.* at 877.

[75] 525 F.3d 274, 287 (4th Cir. 2008) (quoting *Buckley*, 424 U.S. at 80) (ellipsis in *Leake*).

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

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.[77]

S.B. 5991 would fail "the major purpose" test, as used by the Tenth, Eighth and Fourth Circuits. As discussed below, it may well run afoul of the Ninth Circuit's case law as well, but recent developments have made application of precedent unclear. In any event, even if the Ninth Circuit upheld S.B. 5991, such a ruling would create a circuit split and invite further review from the Supreme Court.

c. 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, which oversees federal courts in Washington, also applies "the major purpose" test, but recent Ninth Circuit's decisions have drifted away from *Buckley*'s guidance. Doing so invites lengthy litigation and increases the likelihood of a challenge to S.B. 5991 reaching full merits review in the Supreme Court.

In *Human Life of Washington, Inc. v. Brumsickle*, the Ninth Circuit, which has jurisdiction over Washington, examined the major purpose test in the context of an organization opposed to euthanasia.[78] 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 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.[79]

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[77] *Id*. (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 "provide[d] 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 quotation marks 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 *electioneering communications*. *Id*. at 558. Again, as discussed, *supra*, federal electioneering communications disclosure is for earmarked contributions only, not the generalized donor disclosure at issue in *Leake* and S.B. 5991. *See* 11 C.F.R. § 104.20(c)(9).

[78] 624 F.3d 990, 995 (9th Cir. 2010).

[79] *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.")).

And *Brumsickle* is in line with the Washington Supreme Court's understanding of state law. In *State v. (1972) Dan J. Evans Campaign Committee*, the state supreme court allowed for the possibility of multiple primary purposes[80] but rejected that a single expenditure of $500 was enough to create political committee disclosure when such activity was not the fund's *primary* purpose.[81] Given that *Brumsickle* addressed Washington state law on campaign finance disclosure and is in line with the state's supreme court, it is the most on-point decision in the Ninth Circuit.

But the Ninth Circuit has since tempered its use of the major purpose test. Two 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."[82] 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.[83] 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.[84] 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.[85]

Again, *Brumsickle* is the case that is more applicable to Washington, since it analyzed this state's campaign finance disclosure law. But even assuming that the *Snipes* opinion modified Ninth Circuit law, the opinion creates a split, not only from the prior decision analyzing Washington law in *Brumsickle*, but from its sister circuits in applying "the major purpose" test. This circuit split is a contributing factor for Supreme Court review,[86] and resolving such circuit splits is a significant portion of the Supreme Court's work.[87] 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

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[80] 546 P.2d 75, 79 (Wa. 1976) ("Where the surrounding facts and circumstances indicate that *the primary or one of the primary purposes* of the person making the contribution is to affect, directly or indirectly, governmental decision making by supporting or opposing candidates or ballot propositions, then that person becomes a 'political committee' and is subject to the act's disclosure requirements.") (emphasis in original).

[81] *Id*. ("The *primary* purpose of the Dan Evans Committee was not to influence the political process by supporting or opposing candidates or ballot propositions through expenditures of its funds, but to pay for miscellaneous expenses incurred by Governor Evans and his staff in connection with his position as a public official.") (emphasis in original).

[82] 786 F.3d 1182, 1198 (9th Cir. 2015).

[83] *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*.

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

[85] *Id*.

[86] 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").

[87] *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.").

approval of Washington's "primary purpose" tailoring rather than substantially expanding disclosure via S.B. 5991.

IV. S.B. 5991 would often produce "junk disclosure" by associating a donor with a communication they have no prior knowledge of or may not even support.

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."[88] Consequently, the Court restricted the government's informational interest to situations involving "spending that is unambiguously related to the campaign of a particular . . . candidate,"[89] because it was only in that context that disclosure would provide any information about a candidate's (or ballot proposition's) *supporters* or *opponents*.

S.B. 5991 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 gave 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 incidental committee regulation, according to the provisions of this bill. As a result, if a group decides to engage in the extremely broad types of communications covered in the bill at a $10,000 monetary threshold, many of its significant donors could potentially be made public, regardless of whether their donations were intended to be used for campaign related activity.

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

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

[89] *Id*. at 80.

members and donors and will often be misleading to the public. Our businesswoman in the above hypothetical does not take issue with this particular bill and those elected officials who support it; again, on those facts, the required disclosure is "junk."

This problem is further exacerbated by temporal issues with donations to nonprofits. The Yakima businesswoman in the above example may have given her donation in April of 2017, well before the 2018 election, and long before the nonprofit to which she contributed decided to engage in political activity. Thus, she is being reported as an opponent of a candidate who may not have even declared his or her candidacy[90] when she contributed to the organization and therefore could not have factored into her motivation for contributing. This, once more, amounts to "junk disclosure."

By contrast, limiting disclosure to the general donors of organizations with the major purpose of campaign activity does inform the public about who supports or opposes a particular candidate or ballot proposition. Without some unambiguous campaign related solicitation, the donor to a nonprofit organization should not be expected to know an organization's finances down to the $10,000 level. Part of the function of the major purpose test is to ensure that donors *know* and *intend* that their money be used for political purposes. The status quo of Washington law actually fits the state's interest better than any change proposed in S.B. 5991.

In short, ignoring the major purpose test and disclosure only for earmarked political contributions, as S.B. 5991 does, creates "junk disclosure." Such disclosure regimes fall outside the purview of legitimate state interests and go beyond reporting requirements approved by the Supreme Court. It is difficult to argue that such public reporting advances the legitimate purposes of informing the public and preventing corruption.

V. 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."[91] This is why the privacy of citizens when speaking out about government officials and actions has been protected in certain contexts.[92]

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

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[90] *See, e.g.*, Rev. Code Wash. § 29A.24.050 (setting timeline for declaring candidacy as "beginning the Monday two weeks before Memorial day and ending the following Friday in the year in which the office is scheduled to be voted upon"). In 2017, the first day the filing officer received candidate declarations by mail was May 1, 2017, though generally candidate filing was from May 15-19, 2017. *See* Washington Secretary of State, "Candidate Filing FAQ," https://www.sos.wa.gov/elections/candidates/Candidate-Filing-FAQ.aspx.

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

[92] *See, e.g., Talley v. California*, 362 U.S. 60 (1960); *McIntyre v. Ohio Elections Comm'n*, 514 U.S. 334, 337-38 (1995).

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

The danger is real. Recently, individuals who contributed to the Hillary Clinton campaign faced death threats.[93] Supporters of ballot measures in California also endured death threats.[94] Employees at the New York Civil Liberties Union and Goldwater Institute faced threats and harassment at their workplaces – and at their homes – due to their organizations' positions.[95] Nor is the media immune, for even newspaper staff faced death threats for their employer's political endorsements for Hillary Clinton.[96] Even delegates to both major political parties' national nominating conventions faced death threats.[97] 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.

If the private information of donors to similar groups in Washington were forcibly reported to the government, these citizens would also be at risk. To be clear, S.B. 5991 would facilitate these types of threats and harassment by requiring certain donors to nonprofit groups to be publicly identified 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. Notwithstanding all this, S.B. 5991 would require the names and addresses of donors, officers, and employees to be publicly reported and made available to the public on the Washington State Public Disclosure Commission's website for eternity. This disclosure is made all the more abhorrent because it may include donors that have nothing to do with a particular political message.

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

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[93] *See, e.g.*, Casey Sullivan, *After Clinton Donation, Legal Recruiter Complains of Death Threat*, Bloomberg Law, Oct. 11, 2016 *available at*: https://bol.bna.com/after-clinton-donation-legal-recruiter-complains-of-death-threat/.

[94] *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.

[95] *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. *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.

[96] *See, e.g.*, Kelsey Sutton, *Arizona Republic receives death threats after Clinton endorsement*, Politico, Sept. 29, 2016 *available at*: http://www.politico.com/blogs/on-media/2016/09/arizona-republic-receives-death-threats-for-clinton-endorsement-228889.

[97] *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, Apr. 22, 2016 *available at*: http://www.politico.com/story/2016/04/delegates-face-death-threats-from-trump-supporters-222302.

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 is best done by crafting reporting thresholds that capture just those donors who are truly contributing large sums to political candidates and express advocacy regarding such candidates – and not to organizations engaging in issue advocacy about a particular topic relevant to the voters of Washington.

Ultimately, 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 mere monetary disclosure threshold mandated by S.B. 5991 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.

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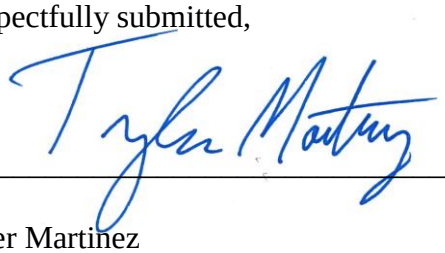
S.B. 5991 fails First Amendment scrutiny when (1) it fails to protect the First Amendment right to speak on public policy without disclosing one's general donors; (2) fails to use the major purpose test to tailor its campaign finance disclosure rules; (3) creates "junk disclosure"; and (4) opens Washingtonians to harassment based on what may be inferred about donors due to the bill's broad disclosure rules.

Thank you for allowing me to submit comments on S.B. 5991. 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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