



January 28, 2019

VIA ELECTRONIC MAIL

Senator Mike Foote
Chair, Senate State, Veterans, and
Military Affairs Committee
Colorado General Assembly
Room 346
200 E Colfax Avenue
Denver, CO 80203

Senator Lois Court
Vice Chair, Senate State, Veterans, and
Military Affairs Committee
Colorado General Assembly
200 E Colfax Avenue
Denver, CO 80203

RE: Constitutional and Practical Issues with Senate Bill 19-068

Dear Chair Foote, Vice Chair Court, and Members of the Senate State, Veterans, and Military Affairs Committee:

On behalf of the Institute for Free Speech (“the Institute”),¹ we respectfully submit the following comments on constitutional and practical issues with portions of Senate Bill 19-068,² which is scheduled for a hearing before the Senate State, Veterans, and Military Affairs Committee on January 30, 2019. This legislation touches on fundamental First Amendment rights of speech, petition, and private association. S.B. 19-068 is, therefore, 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 bill expands the regulation of “electioneering communications” to include speech *between* elections, divorcing the law from the state’s interest and burdening those wishing to speak.

In Colorado, an “electioneering communication” is defined as “any communication broadcasted by television or radio, printed in a newspaper or on a billboard, directly mailed or delivered by hand to personal residences or otherwise distributed” that “[u]nambiguously refers to any candidate” run sixty days before a general election or thirty days before a primary election, and is targeted to “an audience that includes members of the electorate for such public office.”³

Colorado’s electioneering communication definition is already broader than its federal counterpart. For example, Colorado regulates more media types, such as billboards and handbills. The aim of Colorado’s electioneering communication provision is disclosure of the funders of

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. The Institute is currently involved in litigation against California, Connecticut, Missouri, Massachusetts, South Dakota, Tennessee, and the federal government.

² Expand Disclosure Electioneering Communications, S.B. 19-068, 72nd Gen. Assemb., First Reg. Sess. (CO 2019) (as Introduced on January 10, 2019) (“S.B. 19-068”).

³ Colo. Const. art. XXVIII, § 2(7)(a).

communications,⁴ particularly large broadcast advertisements.⁵ Yet the United States Supreme Court has specifically protected from disclosure hearty souls who pass out handbills of their own accord (as opposed to those being paid by a formal campaign).⁶ And, unlike its federal analogue,⁷ there is no *de minimis* limitation upon the audience: reaching even two people who may vote in the relevant jurisdiction may trigger Colorado’s registration and reporting requirements.⁸

Senate Bill 19-068 will change the constitutional balance presently enshrined in the state Constitution and may fail First Amendment scrutiny because it makes the electioneering communications window too long and separates it from the state’s interest in knowing who is speaking about a candidate *shortly* before an election.

I. Campaign finance regulations requiring disclosure and disclaimers are subject to exacting scrutiny.

Under the First Amendment and United States Supreme Court guidance, campaign finance disclosure and disclaimers 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,” which demands there be “a ‘relevant correlation’ or ‘substantial relation’ between the governmental interest and the information required to be disclosed.”⁹ This heightened scrutiny is required because, under the First Amendment, “compelled disclosure ... cannot be justified by a mere showing of some legitimate governmental interest.”¹⁰ 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.¹¹

Candidate committees (and, in the state law context, issue committees focused on ballot issues and ballot questions¹²) obviously support or oppose electoral outcomes and are campaign-

⁴ See Colo. Const. art. XXVIII, § 6(1) (“[a]ny person who expends one thousand dollars or more per calendar year on electioneering communications shall submit reports to the secretary of state...”).

⁵ Colo. Const. art. XXVIII, § 1 (“the interests of the public are best served by... timely disclosure of campaign contributions, independent expenditures, and funding of electioneering communications”); see also *id.* (expressing concern over “the advent of significant spending on electioneering communications,” including the “vast majority of *televised* electioneering communications”) (emphasis added).

⁶ *Talley v. Calif.*, 362 U.S. 60 (1960) (striking down a disclosure statute regulating genuine issue speech); *McIntyre v. Ohio Elections Comm’n*, 514 U.S. 334 (1995) (striking down a disclosure statute regulating small-scale issue advocacy); see also *Buckley v. Valeo*, 424 U.S. 1, 14 (1976) (per curiam) (“Discussion of public issues...[is] integral to the operation of the system of government established by our Constitution.”).

⁷ Federal electioneering communications must also be “targeted to the relevant electorate,” 52 U.S.C. § 30104(f)(3)(A)(i)(III), meaning in practice that the communication “can be received by 50,000 or more persons” in the relevant jurisdiction. 52 U.S.C. § 30104(f)(3)(C).

⁸ Colo. Const. art. XXVIII, § 2(7)(a)(III) (an electioneering communication is any communication that “[i]s broadcasted to, printed in a newspaper distributed to, mailed to, delivered by hand to, or otherwise distributed to an audience that includes members of the electorate for such public office.”).

⁹ *Buckley*, 424 U.S. at 64.

¹⁰ *Id.*

¹¹ *Id.* at 14 (noting “there is practically universal agreement that a major purpose of that Amendment was to protect the free discussion of governmental affairs... of course includ[ing] discussions of candidates...”) (quoting *Mills v. Alabama*, 384 U.S. 214, 218 (1966)) (brackets and ellipses in *Buckley*).

¹² See Colo. Const. art. XXVIII, § 2(10)(a)(II) (defining an issue committee as “any person, other than a natural person, or any group of two or more persons, including natural persons... [t]hat has accepted or made contributions or expenditures in excess of two hundred dollars to support or oppose any ballot issue or ballot question.”).

related.¹³ Organizations with the “major purpose” of supporting or opposing candidates or ballot issues or ballot questions are also subject to campaign finance disclosure.¹⁴ 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.”¹⁵ The more disclosure is divorced from the interest of who is speaking about candidates, ballot issues, or ballot questions, the greater the threat to protected issues speech under the First Amendment. The state bears the burden of proving the asserted state interest.¹⁶

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. As far back as 1960, the Supreme Court held that “even though the governmental purpose be legitimate and substantial, that purpose cannot be pursued by means that broadly stifle fundamental personal liberties when the end can be more narrowly achieved.”¹⁷ Exacting scrutiny is “not a loose form of judicial review.”¹⁸ Rather, as a “strict test,”¹⁹ 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.”²⁰

In the regulation of “electioneering communications,” the Supreme Court has found “the public has an interest in knowing who is speaking about a candidate *shortly before an election*.”²¹ It is sometimes mistakenly said that the Supreme Court’s decision in *Citizens United v. Federal Election Commission*²² upheld the constitutionality of “disclosure” in general, but, in fact, the Court approved only a particular, narrow type of disclosure subject to a large array of statutory and regulatory limitations. It did not reverse a long line of precedent placing limits on disclosure. Rather, the Court merely upheld the disclosure of specific reporting for electioneering communications, which disclose the *entity making the expenditure* and the purpose of the expenditure.²³

Additionally, the federal report only discloses contributors giving over \$1,000 *for the purpose of furthering* the communication.²⁴ This has been interpreted by the Federal Election Commission to mean contributions earmarked for these independent expenditures,²⁵ an

¹³ *Buckley*, 424 U.S. at 79.

¹⁴ *Id.*

¹⁵ *Buckley*, 424 U.S. at 81.

¹⁶ *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.”) (emphasis added).

¹⁷ *Shelton v. Tucker*, 364 U.S. 479, 488 (1960) (internal citations omitted).

¹⁸ *Wis. Right to Life v. Barland*, 751 F.3d 804, 840 (7th Cir. 2014).

¹⁹ *Buckley*, 424 U.S. at 66.

²⁰ *McCutcheon v. Fed. Election Comm’n*, 572 U.S. 185, 218 (2014) (Roberts, C.J., controlling opinion).

²¹ *Citizens United v. Fed. Election Comm’n*, 558 U.S. 310, 369 (2010) (emphasis added); see also *Independence Institute v. Williams*, 812 F.3d 787, 795 (10th Cir. 2016) (citing *Citizens United*).

²² 558 U.S. 310, 369 (2010).

²³ 52 U.S.C. § 30104(f)(2)(A)-(D); see also *Independence Institute v. Fed. Election Comm’n*, 216 F. Supp. 3d 176 (D.D.C. 2016) (three-judge court) *sum. aff’d* 580 U.S. ___, 137 S. Ct. 1204 (2017) (upholding federal electioneering communications regime as applied to specific advertisement concerning pending legislation). The Institute for Free Speech represented the Independence Institute in both this and the Tenth Circuit decision cited in footnote 21, *supra*.

²⁴ 52 U.S.C. § 30104(f)(2)(E)-(F); *Citizens United*, 558 U.S. at 366-367.

²⁵ 11 C.F.R. § 104.20(c)(9).

interpretation upheld by the United States Court of Appeals for the District of Columbia Circuit in a case involving analogous “electioneering communication” reporting requirements.²⁶

In *Independence Institute v. Williams*, the Secretary of State noted that disclosure for Colorado electioneering communications “appl[ies] only to donations specifically earmarked for electioneering communications. In other words, the donor must intend the donations be used for electioneering communications and not for other activities of the speaker.”²⁷ The Tenth Circuit upheld Colorado’s existing electioneering communications law and specifically noted that “it is important to remember that the Institute need only disclose those donors who have specifically earmarked their contributions for electioneering purposes.”²⁸

Thus, both the Colorado and federal electioneering communication regulation are tied to who is speaking about candidates *shortly* before an election. The laws are tailored to only reach donors of \$1,000 or more who specifically earmark their money for a particular communication. Currently, disclosure only applies to communications run either thirty days before a primary or sixty days before a general election. But if S.B. 19-068 becomes law, it would upset this tailoring and burden the First Amendment rights of Colorado residents.

Tailoring should not be ignored, for failure to do so can cause a campaign finance law to be struck down by the courts and require the state to pay attorney’s fees by those needing to vindicate their First Amendment rights. In 2010, the Tenth Circuit also examined burdensome disclosure requirements for small ballot measure organizations under Colorado’s campaign finance disclosure scheme.²⁹ 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.”³⁰ That ruling was reinforced just three years ago, when the Institute represented the challenger in *Coalition for Secular Government v. Williams*. In that case, the Tenth Circuit held that an organization’s planned activity of \$3,500 was too minimal to permissibly trigger Colorado’s regulation of an organization as an “issue committee” with attendant reporting requirements.³¹ As a result of *Coalition for Secular Government*, the General Assembly was forced to change Colorado’s campaign finance law,³² and Colorado was ordered to pay attorney’s fees.³³ As those cases demonstrate, tailoring the law to the state’s interest is paramount.

II. S.B. 19-068 extends the electioneering communications window beyond the state’s interest.

S.B. 19-068 would substantially expand the electioneering communications window, extending the period during which organizations must run disclaimers³⁴ and otherwise disclose³⁵

²⁶ *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)).

²⁷ 812 F.3d at 790 n.1.

²⁸ *Id.* at 797.

²⁹ *Sampson v. Buescher*, 625 F.3d 1247 (10th Cir. 2010).

³⁰ *Id.* at 1260.

³¹ *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). The Institute represented the Coalition.

³² C.R.S. § 1-45-108(1.5).

³³ *Coal. for Secular Gov’t v. Williams*, 71 F. Supp. 3d 1176, 1184 (D. Colo. 2014).

³⁴ S.B. 19-068 § 3.

³⁵ S.B. 19-068 § 2.

certain of their donors to periods *between* elections, rather than just shortly before a particular election. This expansion would be difficult to defend under appropriate First Amendment scrutiny. While the state may have an interest in who is mentioning candidates shortly before an election, the state has failed to articulate a similar interest in regulating when people speak *after* the primary election, when the general election is months away. Finally, expanding the window creates a conflict with the definition of “electioneering communication” found at Article XXVIII, § 2(7) of the Colorado Constitution and takes Colorado’s regulatory regime out of the safe harbor provided by Federal practice.

Not every mention of a candidate is regulable as campaign speech, and the courts’ blessing of “electioneering communications” – which, by definition, need not contain electoral candidacy – is a narrow exception to the general rule that the discussion of public policy does not trigger political reporting burdens. After all, organizations speaking about public policy often mention candidates, especially incumbent candidates who hold the power to change policy. As the Supreme Court recognized in 1976:

[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. Not only do candidates campaign on the basis of their positions on various public issues, but campaigns themselves generate issues of public interest.³⁶

The *Buckley* Court 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.³⁷ 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.”³⁸ The *Buckley* Court substantially narrowed the wide-ranging federal disclosure requirement before it to ensure that the law did “not reach all partisan discussion,” much less genuine issue speech. Accordingly, the Court limited the reach of donor disclosure to financiers of speech “advocat[ing] a particular election result”³⁹ and restricted federal campaign law to regulating “communications that include explicit words of advocacy of election or defeat of a candidate.”⁴⁰ This narrowing construction limited disclosure to speech about *candidates* – that is, speech with an unambiguous interest in the outcome of a political campaign. Such speech became known as “express advocacy.”⁴¹

Colorado legislators should keep in mind that “electioneering communications” are a narrow exception to the general rule that only express advocacy may be regulated as campaign speech. It is a term of art for a very carefully defined type of speech intended to impact speakers

³⁶ *Buckley*, 424 U.S. at 42.

³⁷ *Id.* at 43.

³⁸ *Id.* at 75.

³⁹ *Id.* at 80.

⁴⁰ *Id.* at 43.

⁴¹ *Id.* at 44, n.52 (defining “express words of advocacy of election or defeat” to include phrases “such as ‘vote for’... ‘support,’ [and] ‘reject.’”); 11 C.F.R. § 100.22(a) (noting that express advocacy includes phrases “such as ‘vote for the President’ [and] ‘Bill McKay in ‘94’”).

during only a small slice of the calendar. The government’s interest is only in who is speaking shortly before an election, not who mentions a candidate – often an incumbent officeholder – the rest of the year. Expanding the electioneering communications window beyond the current thirty/sixty-day timeframe will require the state to amass an extensive record to articulate and justify its interest in regulating that speech, which by definition is more likely to be directed at legislative and policy debates, rather than elections.

S.B. 19-068 would significantly expand the electioneering communication window – almost doubling it.⁴² If passed, burdensome disclosure and disclaimers will become a general requirement for anyone speaking about candidates – often themselves officeholders – throughout much of the year.

By law, the Colorado primary is set for “the last Tuesday in June of each even-numbered year.”⁴³ For the next election, the primary will therefore be held on June 30, 2020. The general election is held “on the Tuesday succeeding the first Monday of November in each even-numbered year,”⁴⁴ and will be held on November 3, 2020. Currently, the electioneering communications window in Colorado is only ninety days total – thirty days before the primary and sixty days before the general election – the same duration adopted by Congress and blessed by the Supreme Court.

Under S.B. 19-068, however, the law will regulate speech for *one-hundred fifty-six days* – almost double the current window.⁴⁵ From May until November, the citizens of Colorado will not be able to mention candidates in ads, including printed material, without burdensome disclosure and disclaimer requirements.

Additionally, the proposed legislation upsets the will of the Colorado electorate in adopting Article XXVIII of the State Constitution. Currently, the Colorado Constitution defines an “electioneering communication” as “any communication” that “[u]nambiguously refers to any candidate” run sixty days before a general election or thirty days before a primary election.⁴⁶ The current version of the Fair Campaign Practices Act simply incorporates this definition⁴⁷ and thus implements the voters’ instructions. Without a clear mandate from the Colorado electorate, the General Assembly should be cautious in overruling a constitutional provision in order to double the burdens placed on Colorado’s citizens.

⁴² Compare S.B. 19-068 § 3 (for disclaimer purposes, expanding the scope of “electioneering communication” to include “any communication that... is broadcast, printed, mailed, delivered, or distributed between the primary election and the general election.”) and S.B. 19-068 § 2 (adding similar language for disclosure requirements) with Colo. Const. art. XXVIII, § 2(7)(a) (setting a window thirty days before the primary and sixty days before a general election, leaving the time between elections free from regulation).

⁴³ C.R.S. § 1-1-104(32).

⁴⁴ C.R.S. § 1-1-104(17).

⁴⁵ If this bill passes, the regulation of speech in 2020 will run from May 31, 2020 (thirty days before the 2020 primary) to Election Day, November 3, 2018.

⁴⁶ Colo. Const. art. XXVIII, § 2(7)(a)(I)-(II).

⁴⁷ C.R.S. § 1-45-103(9).

III. In addition to removing the expansion of the electioneering communications window, S.B. 19-068 should be amended to codify reasonable exemptions for disclaimer requirements.

While expanding the window for electioneering communications disclaimers is constitutionally suspect, not all disclaimers on electioneering communications, properly defined, are problematic. To the extent that S.B. 19-068 attempts to incorporate the required disclaimers for issue committees and apply those same rules to electioneering communications,⁴⁸ the burdens may survive the First Amendment’s exacting scrutiny. Fortunately, this is because Colorado’s existing disclaimer requirements closely resemble their federal counterpart.

The Supreme Court has found such disclaimers are designed to “insure that the voters are fully informed”⁴⁹ about who is running the electioneering communication, and to clarify that “the ads are not funded by a candidate or political party.”⁵⁰ The Supreme Court has upheld laws requiring the speaker to dedicate up to “four seconds of each advertisement to [a] spoken disclaimer.”⁵¹

Colorado’s current disclaimer provisions, as incorporated by reference in S.B. 19-068, are fairly close to the federal analogue approved in *Citizens United*. Under S.B. 19-068, electioneering communications will need to run disclaimers as outlined in C.R.S. § 1-45-107.5(5).⁵² While the Institute objects to the current bill’s requirement that these disclaimers apply to ads not run in close proximity to an election, the manner prescribed for disclaimers is comparable to those present in federal law. Colorado requires only that the speaker state that “[t]he communication has been ‘paid for by (full name of the person paying for the communication)’” and, if the speaker is a group or organization, identify “a natural person who is the registered agent” for the speaker.⁵³ The state law even incorporates by reference the standards created by the Federal Communications Commission.⁵⁴

That said, Colorado law would benefit from an additional safeguard where such disclaimers are patently impractical. Current law leaves the regulation of non-broadcast electioneering communications up to the Secretary of State.⁵⁵ Under former Secretary Wayne Williams, the Campaign Finance Regulations mandated that disclaimers be “printed in text that is no less than 15 percent of the size of the largest font used in the communication, or at least eight-point font.”⁵⁶ The Secretary’s rules contained an express exemption for “bumper stickers, pins, buttons, pens, and similar small items upon which the disclaimer cannot be reasonably printed.”⁵⁷ But such rules can be changed by the current Secretary or a future one. More permanence is needed. S.B. 19-068

⁴⁸ S.B. 19-068 § 3.

⁴⁹ *Citizens United*, 558 U.S. at 368 (quoting *Buckley*, 424 U.S. at 76) (describing an “informational” interest in disclaimers).

⁵⁰ *Id.*

⁵¹ *Id.* (citing *McConnell v. Fed. Election Comm’n*, 540 U.S. 93, 230-231 (2003)); compare with 52 U.S.C. § 30120 (federal disclaimer statute) and 11 C.F.R. § 110.11 (federal regulations on disclaimers).

⁵² S.B. 19-068 § 3.

⁵³ C.R.S. § 1-45-107.5(5)(a)(I)-(II).

⁵⁴ C.R.S. § 1-45-107.5(5)(b).

⁵⁵ C.R.S. § 1-45-107.5(5)(c).

⁵⁶ 8 C.C.R. § 1505-6, Rule 5.1.1.

⁵⁷ 8 C.C.R. § 1505-6, Rule 5.1.2.

should be amended to incorporate the small items exception currently found in the Code of Colorado Regulations.

Because the state’s definition of “electioneering communication” includes other media, like billboards and other outdoor advertising, an “impracticable” exception is warranted as well. In federal law, disclaimers are not required where including them would be “impracticable” – for example, when printed on T-shirts or painted on water towers.⁵⁸ Presumably, the wearer of the T-shirt will be able (and likely willing) to supply information on who produced the apparel if asked on the street – that invitation is one advantage to having speech on one’s clothing. As for other media, if the water tower on the Gates Rubber plant bears a message qualifying as an “electioneering communication,” the disclaimer should not be written in a way to distract drivers on I-25 trying to read who paid for the message.

The Committee may wish to consider amending the Fair Campaign Practices Act to incorporate both exemptions found in federal law – for small items and where disclaimers are impracticable – into the text of S.B. 19-068. Doing so will improve Colorado’s disclaimer laws.

* * *

Colorado has not built a record sufficient to justify doubling the size of the electioneering communication window. While the state may have an interest in who is speaking shortly before an election, the operative word is “shortly.” Colorado’s existing electioneering communications window is the same as the federal counterpart blessed by the Supreme Court, and adequately addresses its true disclosure interests. The state will do well to keep to the federal model. In that vein, S.B. 19-068 should be amended to incorporate the reasonable “small item” and “impracticable” exceptions to campaign disclaimers.

Thank you for allowing us to submit comments on Senate Bill 19-068. Should you have any further questions regarding this legislation or any other campaign finance proposals, please do not hesitate to contact the undersigned at (703) 894-6800 or by e-mail at adickerson@ifs.org.

Respectfully submitted,



Allen Dickerson
Legal Director
Institute for Free Speech



Tyler Martinez
Attorney
Institute for Free Speech

⁵⁸ In federal law, disclaimers need not be printed on “[s]kywriting, water towers, wearing apparel, or other means of displaying an advertisement of such a nature that the inclusion of a disclaimer would be impracticable.” 11 C.F.R. 110.11(f)(1)(ii).