INSTITUTE FOR FREE SPEECH

March 12, 2019

*Via Electronic Mail*

The Honorable Tom Brewer
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**RE: Constitutional and Practical Issues with Legislative Bill 210 ("Electioneering Communication" Reporting)**

Dear Chairperson Brewer and Members of the Senate Government, Military and Veterans Affairs Committee:

On behalf of the Institute for Free Speech,[1] I am writing you today to respectfully submit the following comments regarding the constitutional and practical impact of the provisions contained in Legislative Bill 210,[2] which proposes amendments to Nebraska's campaign finance laws, and is scheduled for a hearing before the Senate Government, Military and Veterans Affairs Committee on March 13.

If Legislative Bill 210 becomes law as written, there is a high likelihood that the law will be found unconstitutional if challenged in court. Any potential legal action will cost the state a great deal of money defending the case, and will distract the Attorney General's office from meritorious legal work. Additionally, it is probable that the state will be forced by the courts to award substantial legal fees to successful plaintiffs.

Various sections of this measure are unconstitutionally overbroad. As drafted, Legislative Bill 210 will regulate an expansive amount of speech, including presumably books, websites, text messages, and e-mails. The bill's unequal treatment of electioneering communication reporting requirements based on the identity of the speaker flouts Supreme Court precedent, and the bill imposes onerous burdens on individuals and small organizations in particular. In addition, an overly burdensome 48-hour reporting requirement for electioneering communications will further chill the speech of those speakers that attempt to comply with this overbroad measure.

[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] Change independent expenditure reporting requirements and require electioneering reporting, L.B. 210, 106th Leg., 1st Sess. (Neb. 2019) (as Introduced on Jan. 11, 2019). ("L.B. 210").

## I. L.B. 210 unconstitutionally limits the ability of corporations and unions to make independent expenditures or electioneering communications, including nonprofit corporations.

L.B. 210 § 7 amends Section 49-1469 of the Revised Statutes of Nebraska to incorporate the new definition of "electioneering communication." Section 49-1469, Subsection (1)(d) is amended to read "[a] corporation, labor organization, industry, trade, or professional association, limited liability company, or limited liability partnership, which is organized under the laws of the State of Nebraska or doing business in this state and which is not a committee, may… make an electioneering communication." The Revised Statutes of Nebraska § 49-1469(3) requires that, "[a]ny entity specified in subsection (1) of this section may not receive contributions unless it establishes and administers a separate segregated political fund…"

Such a requirement for the funding of electioneering communications is unconstitutional under *Citizens United.* In that case, the Supreme Court flatly rejected the argument that communications made with only separate segregated funds (in that case, corporate PAC funds) are equivalent to funds from an organization's general treasury. The Court held that "[e]ven if a PAC could somehow allow a corporation to speak – and [as a PAC is a separate legal entity] it does not – the option to form PACs does not alleviate the First Amendment problems…"[3] In 2012, the U.S. Court of Appeals for the Eighth Circuit, a court whose precedent would control a federal challenge to Nebraska law, struck down a law that tried to force independent speakers to create a separate legal entity.[4] Contrary to *Citizens United* and on-point Eighth Circuit precedent, L.B. 210 would require organizations wishing to make electioneering communications to fund that speech only from segregated accounts. The burdens of maintaining such accounts – including the enormous effort required to validate potentially tiny contributions passing innocently through multiple organizations – are likely to be similar to those imposed upon PACs and held unconstitutional in *Citizens United*.

## II. Perversely, L.B. 210 imposes more severe reporting requirements on natural people and non-incorporated groups than on large corporations.

L.B. 210 creates a new, two-track reporting regime for those making "electioneering communications." L.B. 210 § 6(1) requires that "[a]ny person, other than a committee, who makes an electioneering communication in an amount of more than one thousand dollars shall file a report of the electioneering communication, within two days, with the [Nebraska Accountability and Disclosure C]ommission." Conversely, L.B. 210 § 7(1)(d) allows "[a] corporation, labor organization, industry, trade, or professional association, limited liability company, or limited liability partnership" to "make an electioneering communication." The measure further provides under this Section that "[a]ny such entity shall not be required to file reports of independent expenditures or electioneering communications pursuant to section 49-1467 or section 6 of this act."[5]

Taken together, these sections have the bizarre effect of levying stricter reporting requirements on natural persons and non-incorporated groups than on incorporated entities. For example, an individual who wants to put up one $1,000 billboard that mentions the name of a candidate or ballot question in a specified window prior to an election must file a report within *two* days of the billboard's erection detailing: (1) the date the billboard will run; (2) what the billboard says; (3) the cost of the billboard; (4) the name and address of anyone who received funds for the billboard; (5) the name and

[3] *Citizens United v. Fed. Election Comm'n*, 558 U.S. 310, 337 (2010).
[4] *Minn. Citizens Concerned for Life, Inc. v. Swanson*, 692 F.3d 864 (2012) (en banc).
[5] L.B. 210 § 7(2).

address of the individual filing the report; and (6) the name, address, occupation, employer, and principal place of business of every contributor who gave donations over $250 for the billboard.[6] A union, however, who wanted to erect 500 identical billboards across the state of Nebraska is required only to file a report *ten* days after the end of the month in which the billboards began to appear, stating "[t]he nature, date, and value of the electioneering communication and the name of the candidate or identity of the ballot question that is the subject of the electioneering communication."[7]

The end result, perversely, is that individuals, who are likely to have less knowledge of the law and to lack the resources required to comply with the measure, will be forced to meet a higher reporting burden than many larger, more sophisticated organizations. Simply put, groups that can hire campaign finance lawyers will receive easier regulatory deadlines than a lone citizen spending her own money.

## III. The legislation's "electioneering communication" definition is stunningly broad, unworkable, and highly susceptible to legal challenge.

Equally troubling, the bill's over-inclusive "electioneering communication" definition will undoubtedly cause L.B. 210 to sweep far more broadly than is constitutionally appropriate. Section 3 of the bill defines an "electioneering communication" as "any communication" referring to a clearly identified candidate or ballot question that is distributed within thirty days of any election that is "directed to the electorate of the office sought by the clearly identified candidate" or those eligible to "vot[e] on the clearly identified ballot question."[8]

The legislation does not require that a communication include an appeal to vote before it can be subject to regulation and disclosure rules. Electioneering communication provisions, such as those at the federal level, have been upheld in some circumstances, but generally only as applies to broadcast communications, such as television and radio ads. The Supreme Court's *McConnell* ruling upheld such a provision only after an enormous volume of fact finding by Congress.[9]

L.B. 210's extension of electioneering communication language to "any communication" would put Nebraska on dangerous constitutional ground. The phrase presumably includes newspapers, periodicals, books, and leaflets as well as phone calls, billboards, e-mails, text messages, and Facebook messages – without any evidence that such communications pose a risk of corruption. The state needs to tailor the law to legitimate, weighty interests that are not based on mere conjecture or speculation, and that includes the identification of specific means of communication – and the exclusion of those mediums that may inadvertently capture non-campaign communications.

For example, if a corporation funded a book, which incidentally named a candidate for office, that corporation could find itself subject to Nebraska's electioneering communications laws if the book were published or distributed within the 30-day pre-election window. This could conceivably force major publishers such as Penguin Books, Simon & Schuster, or McGraw-Hill to file electioneering communications reports.

Forcing book publishers to be wary of when they print and distribute books is in and of itself an obvious constitutional harm. Books should not be regulated just because an election is close at hand. Elections happen often, and the law would require publishers to change distribution dates every other

[6] *Id.* § 6(2)(a)-(f).
[7] *Id.* § 7(2)(b).
[8] *Id.* § 3(1).
[9] *See, e.g.*, *Citizens United*, 558 U.S. at 332 (citing *McConnell v. Fed. Election Comm'n*, 251 F. Supp. 2d 176, 209 (D.D.C. 2003) (three-judge court) (per curiam)).

year. But it gets worse. The bill's language applies to *any* election, including presumably special elections – which are, by their nature, usually unplanned. Books that discuss the workings of Nebraska government, or even mention the wrong state senator, could be accidentally regulated under the law.

Worse still, the definition likely would cover e-mail and text messaging communications. Would this provision cover messages sent through Twitter or Snapchat that name a candidate or ballot question? How does this provision affect messages mentioning a candidate or ballot question on a public Facebook event page hosted by a group advertising an upcoming political gathering within a senator's district? By regulating "any communication" that "is publicly distributed," the bill could be applied to any of these communications. This stunningly broad dragnet will inevitably chill speech by leaving would-be speakers in the dark concerning the statute's application.

In short, nearly any mention of a candidate or ballot question in a covered communication may be regulated under the legislation. This excessively far-reaching definition would even appear to cover listings of votes cast by lawmakers if distributed to the public by organizations during periods that would be regulated by the bill. Such provisions will act to silence many speakers during the electioneering communication period and deprive voters of vitally important nonpartisan information.

On a positive note, L.B. 210 exempts from the definition of electioneering communication "[a] communication while the Legislature is in session about specifically named pending legislation."[10] The Institute commends the Legislature for this apparent attempt to exempt issue speech from Nebraska's electioneering communications regime. Indeed, this carve-out recognizes that legislation is often about issues, and speech about issues is undoubtedly protected by the First Amendment. Sitting senators propose, discuss, and vote on legislation. Thus, debate about issues being considered by the Legislature necessitates the mention of those legislators. However, we recommend that this exemption apply to all discussion of specifically named legislation, regardless of whether the Legislature is in session at any given moment.

In addition, unlike the federal electioneering communications provisions, there is no objective way for a speaker to determine whether a communication "[i]s directed to the electorate of the office sought" by a candidate or those "voting on the clearly identified ballot question." The federal electioneering communications statute requires the Federal Communications Commission to establish and maintain an online electioneering communications database,[11] so that speakers can know whether a given communication can be heard by 50,000 or more persons in a state or district.[12] L.B. 210 provides no such directive to any state agency, nor is there any objective way to determine whether a specific communication is "directed" to a particular electorate. Since online communications also appear to be covered by the new electioneering communication definition, and online communications, by their nature, can be viewed by anyone with an internet connection, arguably *any* online communication that mentions a Nebraska candidate or ballot question could be covered under this bill.

One of the reasons why the federal electioneering communications statute has survived constitutional review is because it narrowly regulates a specific type of ad: broadcast communications

[10] L.B. 210 § 3(2)(d).
[11] "The Electioneering Communications Database," Federal Communications Commission. Retrieved on March 8, 2019. Available at: http://apps.fcc.gov/ecd/ (February 28, 2016).
[12] *See* 52 U.S.C. § 30104(f)(3)(C) ("a communication which refers to a clearly identified candidate for Federal office is 'targeted to the relevant electorate' if the communication can be received by 50,000 or more persons … in the district the candidate seeks to represent … or … in the State the candidate seeks to represent, in the case of a candidate for Senator").

that reach a large audience of voters.[13] The same analysis would plainly not extend to a statute that seeks to regulate books, e-mails, text messages, or Facebook posts released in close proximity to a state election that may only reach a voter or two.

Unlike its federal analogue, L.B. 210 has no apparent *de minimis* limitation upon the audience that makes something an electioneering communication. Even reaching one person counts. Yet the United States Supreme Court has specifically protected hearty souls who pass out handbills of their own accord (as opposed to being funded by a formal campaign) from disclosure.[14]

## IV. The two-day reporting requirement for electioneering communications will severely burden less sophisticated speakers and will increase the likelihood of inaccurate disclosure reports.

The statute requires individuals and less-formalized organizations that engage in electioneering communications to fill out reports within just 48 hours of triggering the statute.[15] For less sophisticated speakers, who are not used to complying with campaign finance laws – and therefore have not registered with the Nebraska Accountability and Disclosure Commission – aggregating records, verifying donor information, and filing for the first time will inevitably be a difficult endeavor. Lengthening the reporting time to involve less immediate disclosure will shield these less sophisticated actors from inadvertently filing incorrect reports, likely in an endeavor to comply with the burdensome deadline, or from incurring fines for late or inaccurate filing.

The combination of such a relatively low reporting threshold and the need for immediate reporting will necessarily dictate a significant number of inadvertent violations of L.B. 210. At the very least, this combination will far exceed the capacity of the Nebraska Accountability and Disclosure Commission to enforce the statute evenly. This is a recipe for selective enforcement. Such selective enforcement through expansive regulatory power has, in other states and nationally, enabled politicians and bureaucrats to harass, intimidate, and persecute their political opponents in order to silence those with which they disagree. Nebraska would be wise to avoid following this dangerous trend.

* * *

Thank you for allowing me to submit comments on Legislative Bill 210. I'd appreciate it if you could include this letter in the Committee's public hearing record. Should you have any further questions regarding this legislation or any other campaign finance proposals, please do not hesitate to contact me at (703) 894-6800 or by e-mail at mnese@ifs.org.

Respectfully submitted,

Matt Nese
Director of External Relations

[13] *McConnell v. Fed. Election Comm'n*, 540 U.S. 93, 194 (2003) ("The term 'electioneering communication' applies *only* (1) to a broadcast (2) clearly identifying a candidate for federal office, (3) aired within a specific time period, and (4) targeted to an identified audience of at least 50,000 viewers or listeners.") (emphasis added).
[14] *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.").
[15] L.B. 210 § 6(1).