CENTER for COMPETITIVE POLITICS
Congress shall make no law...
WWW.CAMPAIGNFREEDOM.ORG

February 16, 2016

The Honorable Mary Kay Papen
Room 105
State Capitol
Santa Fe, NM 87501

The Honorable Stuart Ingle
Room 109A
State Capitol
Santa Fe, NM 87501

Re: Significant Constitutional and Practical Issues with Senate Bill 11

Dear President Pro Tempore Papen, Minority Floor Leader Ingle, and members of the Senate:

On behalf of the Center for Competitive Politics, I respectfully submit the following comments on constitutional and practical issues with portions of Senate Bill 11, as amended by the Senate Rules Committee. Among other things, this legislation amends the state's Campaign Reporting Act to create new reporting requirements for individuals and organizations that make broadly defined "independent expenditures" or publish information that simply mentions the name of a candidate in a specified window before a primary or general election.

The Center for Competitive Politics is a nonpartisan, nonprofit 501(c)(3) organization that promotes and protects the First Amendment political rights of speech, assembly, and petition. It was founded in 2005 by Bradley A. Smith, a former Chairman of the Federal Election Commission. In addition to scholarly and educational work, the Center is actively involved in targeted litigation against unconstitutional laws at both the state and federal levels. For instance, we presently represent nonprofit, incorporated educational associations in challenges to state campaign finance laws in Colorado, Delaware, and Utah. We are also involved in litigation against the state of California.

The provisions of S.B. 11 would ultimately chill protected speech by mandating the disclosure of donors to organizations that are engaged solely in issue advocacy – that is, speech about public policy issues, and not speech that advocates for or against candidates for office.

The legislation proposes new and burdensome reporting requirements for organizations. It purports to cover only "independent expenditures," but the definition of independent expenditure is so broad that it would cover many activities that have no relation to express advocacy for or against a candidate. Worse still, S.B. 11 creates a vague and constitutionally problematic "coordination" standard.

In short, the new reporting requirements proposed by S.B. 11 inappropriately extend the logic of the Supreme Court's holdings in *Citizens United v. Federal Election Commission* and other important cases, could deter donors from contributing to organizations by violating their right to freedom of association, would perversely generate less informative disclosure than a more narrowly tailored measure, and may subject individuals to harassment based on their political beliefs. As

currently drafted, this bill even appears to force certain 501(c)(3) charitable organizations to report the names and home addresses of their significant supporters to the government, even though (c)(3)s by their very nature are forbidden from engaging in political activity.

I outline these four issues surrounding S.B. 11 in greater detail below.

I. S.B. 11 misapplies the Supreme Court's endorsement of disclosure in its *Citizens United* decision and runs contrary to federal jurisprudence in several cases.

While the Supreme Court upheld certain disclosure in *Citizens United v. Federal Election Commission*,[1] it addressed only a narrow and far less burdensome form of disclosure than that contemplated by S.B. 11. The Court merely upheld the disclosure of an 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 expenditure*.[2] This limitation was upheld just last month by the U.S. Court of Appeals for the D.C. Circuit, which stated that to do otherwise would raise "important constitutional questions."[3]

By contrast, this legislation proposes, in many cases, open-ended disclosure of the names and addresses of those who contribute over $5,000 to an entity that makes public communications over $1,000 – *regardless of whether or not its major purpose is to influence elections, and regardless of those donors' relationship to the organization's contributions or expenditures*. These are communications that simply mention the name of a candidate.

In contrasting the disclosure burdens dealt with by the Court in the 1986 case of *Massachusetts Citizens For Life, Inc. v. Federal Election Commission* ("*MCFL*"),[4] the *Citizens United* Court specifically held that the limited disclosure of an independent expenditure report is a "less restrictive alternative to more comprehensive regulations of speech," such as those proposed in S.B. 11.[5]

In *MCFL*, both the plurality and the concurrence were troubled by the burdens placed upon nonprofit corporations by certain disclosure requirements. The plurality was concerned with the detailed record keeping, reporting schedules, and limitations on solicitation of funds to only "members" rather than the general public.[6] Likewise, Justice O'Connor was concerned with the "organizational restraints," including "a more formalized organizational form" and a significant loss of funding availability.[7]

If this bill becomes law, it will create conditions that raise the very concerns addressed by the Supreme Court in *MCFL*. S.B. 11 would mandate detailed record keeping and force groups to create multiple bank accounts and solicitations. The bill would require many groups to collect and report information that is commonly collected by political parties and candidates in an election, but not by nonprofit organizations or charities, which might incidentally speak on a topic before voters. Indeed, charities often receive anonymous donations because of donors' religious views – a fact that is generally praised. Thus, the bill would likely place a heavy burden of accounting and record keeping

[1] *Citizens United v. FEC*, 558 U.S. 310 (2010).

[2] 72 Fed. Reg. 72899, 72911 (Dec. 26, 2007); 52 U.S.C. § 30104(f); *Citizens United*, 558 U.S. 366-67.

[3] *Van Hollen v. Federal Election Commission*, 2016 U.S. App. LEXIS 1005, at *37 (D.C. Cir. Jan. 21, 2016).

[4] *Massachusetts Citizens For Life, Inc. v. Federal Election Commission*, 479 U.S. 238 (1986).

[5] *Citizens United*, 130 S. Ct. at 915 (contrasting independent expenditure reports with the burdens discussed in *MCFL*).

[6] *MCFL*, 479 U.S. at 253 (Brennan, J., plurality opinion).

[7] *Id.* at 266 (O'Connor, J., concurring).

on any entity that speaks using the name of a candidate, including charities. Beyond administration, however, the bill would also affect fundraising, as now every nonprofit, church, and charity will have to reject anonymous donations over $100 individually or over $1,000 or $3,000 in the aggregate, depending on the election, and reassure nonpublic funders that they have procedures in place to avoid falling into the snare of S.B. 11.

Essentially, the proposed bill would force a nonprofit to either form what is functionally a separate PAC, face disclosure to the government of significant donors as well as other extensive regulatory costs, if the groups spends more than $1,000 on communications that merely mention the name of a candidate, or avoid all speech that mentions the name of a candidate. *MCFL* noted that these sorts of "incentives" serve to "necessarily produce a result which the State [cannot] command directly. It only result[s] in a deterrence of speech which the Constitution ma[de] free."[8]

Additionally, in *Sampson v. Buescher*, the Tenth Circuit, which includes New Mexico, examined burdensome disclosure requirements for small ballot issue organizations under neighboring Colorado's campaign finance disclosure scheme.[9] 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."[10] If S.B. 11 is signed into law and challenged, it is likely that the Tenth Circuit will view the burdens imposed on small ballot issue organizations by this bill with the same skepticism. In 2014, the federal district court in Colorado applied *Sampson* and held that an organization's planned activity of $3,500 was too low for state regulation of an organization as an "issue committee," striking down reporting requirements similar to those proposed in S.B. 11.[11]

Finally, the Tenth Circuit has stated that only organizations having the "major purpose" of influencing elections may be forced to register with the state at this level of detail. It is likely that subjecting both campaign committees and political committees, who have this "primary purpose," and independent expenditure committees, who do not have this "primary purpose," to the same reporting burdens would be unconstitutional under the law of this Circuit.[12]

II. The type of disclosure mandated by organizations making independent expenditures under S.B. 11 could deter individuals from contributing to organizations by impinging on their right to freedom of association.

Under the provisions of this bill, an "independent expenditure," among other meanings, is broadly defined as an expenditure "made to pay for an advertisement that…refers to a clearly identified candidate or ballot measure and is published and disseminated to the relevant electorate in New Mexico within thirty days before the primary election or sixty days before the general election at which the candidate or ballot measure is on the ballot."[13] The phrase "to the relevant electorate" is also undefined, leaving speakers to guess as to how their public communications will be regulated under the law.

This definition is misleading. The term "independent expenditure" usually refers to a communication that urges voters to cast a vote for or against a candidate. The deceptively worded

[8] *MCFL*, 479 U.S. at 256 (plurality opinion).
[9] *Sampson v. Buescher*, 625 F.3d 1247 (10th Cir. 2010).
[10] *Id*. at 1260.
[11] *Coalition for Secular Government v. Gessler*, No. 1:12-cv-01708, slip op. at 10-11 (D. Colo. Oct. 10, 2014).
[12] *New Mexico Youth Organized v. Herrera*, 611 F.3d 669, 677 (10th Cir. 2010).
[13] S.B. 11, Sec. 3(N)(3)(c).

definition in this legislation will trap many nonprofit groups that simply mention the name of a candidate in communications with the public on legislative issues. To take one of many examples, a simple scorecard rating of legislator votes published on a website would be a regulated activity.

Furthermore, S.B. 11 requires any organization that pays for a so-called "independent expenditure" from its general treasury funds, aggregating more than $3,000 during a twelve-month period, to report all its donors who gave an aggregate of more than $5,000 during the preceding twelve months. Alternatively, the proposed legislation allows organizations to pay for "independent expenditures" out of a segregated account for the purpose of "making independent expenditures." If a group creates a segregated account, all donors whose funds are deposited into the account who gave an aggregate of more than $200 during the prior twelve months would still need to be reported, provided the organization pays out of said account for independent expenditures aggregating more than $3,000 during a twelve-month period.

Taken together, under the proposed legislation, if an organization planned to sponsor an issue advocacy communication or communications in New Mexico identifying a candidate in the 30 or 60-day window before a primary or general election in excess of $3,000, in order to avoid having to report all its donors who give more than $5,000 in the aggregate during a twelve-month period preceding the communication or communications, the organization would have to either:

1) Limit its total spending on all issue ads during a twelve-month period in New Mexico to $3,000 or less; or
2) Pay for issue ads in New Mexico using a segregated account, which would be funded solely through solicitations from donors specifically for the purpose of paying for those ads – and those donors would still have to be reported if they gave more than $200 into the account during the prior twelve months; or
3) Cancel the planned communication or communications.

While the courts have generally upheld these types of reporting requirements for political committees – whose main purpose is to ensure the election or defeat of candidates – these reporting burdens are inappropriate given the government's lesser interest in imposing such requirements on organizations engaging in non-electoral speech about policy issues and matters of importance to the public. Moreover, the deterrent effect of having donors' names and addresses publicly reported encroaches on the organizations' and the donors' First Amendment right to freedom of association.

Indeed, when faced with the knowledge that their full name and residential address will be reported to the government and made publicly available on the Internet for journalists, employers, and nosy neighbors to access, it is quite plausible that many of these would-be donors will decide not to donate, preferring instead to maintain their privacy. This could lead to the demise of many societally important nonprofit groups.

III. The proposed reporting thresholds for organizations making independent expenditures would often uncouple the disclosed "donor" from the actual speech funded, resulting in "junk disclosure" by associating a donor with a communication they have no knowledge of and may not support.

The proposed reporting regime in S.B. 11 may well confuse rather than enlighten voters.

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 organizations and other forms of incorporated advocacy groups, some of which are likely to fall under the snare of independent expenditure 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 starting at the low level of $1,001, all or many of its donors over a $200 threshold could potentially be made public – if they earmarked the donations for making independent expenditures – and the private information of all donors over $5,000 will be reported to the government, regardless of whether the donations were earmarked for the purpose of furthering an independent expenditure.

This is problematic, as many of these donors will have given for very different reasons. Imagine the Santa Fe hotel operator, who is a proud Democrat, contributing to the Santa Fe Hispanic Chamber of Commerce as his professional association. Then, suddenly Democrats in the Legislature introduce a bill providing for additional regulation of community colleges in the Santa Fe area, and the Chamber opposes these regulations as well as the local legislators or candidates who support the bill. *This hotel operator finds himself listed as contributing to ads that were run by the group opposing regulations that would not affect him, and opposing legislators or candidates he may actually support*; it is "junk disclosure" – disclosure that is primarily used by other parties to look for potential donors and by prying neighbors to search their fellow citizens' political activity and affiliations.

Consider also the following example cited in the U.S. Court of Appeals for the D.C. Circuit's January 2016 opinion in *Van Hollen v. FEC*:

> "Imagine the following not unlikely scenario. A Republican donates $5,000 to the American Cancer Society (ACS), eager to fund the ongoing search for a cure. Meanwhile, Republicans in Congress, aware of a growth in private donations to ACS, push for fewer federal grants to scientists studying cancer in order to reduce the deficit. In response to their push, the ACS runs targeted advertisements against those Republicans, leading to the defeat of several candidates in the upcoming election. Wouldn't a rule requiring disclosure of ACS's Republican donor, who did *not* support issue ads against her own party, convey some misinformation to the public about who *supported* the advertisements?[14] … For instance, an American Cancer Society donor who supports cancer research but not ACS's political communications must decide whether a cancer cure or her associational rights are more important to her. This is categorically distinct from deciding whether a political issue, such as tax reform, is as important as one's associational right. Cancer research isn't a political issue, but disclosure rules of this sort would undeniably transform it into one. These disclosure rules also burden privacy rights in another crucial way: modest individuals who'd prefer the amount of their charitable donations remain private lose that privilege the minute their nonprofit of choice decides to run an issue ad."[15]

As both examples illustrate, people give to trade associations and nonprofits not because they agree with everything the organization does, or particular political positions a group may take, but

[14] *Van Hollen v. Federal Election Commission,* 2016 U.S. App. LEXIS 1005, at *25-26 (D.C. Cir. Jan. 21, 2016).
[15] *Id.* at *34-35.

because on balance they believe the group provides a valuable service. To publicly identify contributing individuals with so-called "independent expenditures" that are not, in fact, express advocacy and of which they had no advance knowledge is both unfair to members and donors and will often be misleading to the public. Neither our hotel operator in the above hypothetical nor the ACS supporter in the *Van Hollen* opinion take issue with the legislation and elected officials they are publicly identified as opposing.

This problem is further exacerbated by temporal issues with donations to nonprofits. The Santa Fe hotel operator in the above example may have given his donation in July of 2015, well before the June 2016 primary election, and long before the nonprofit to which he contributed decided to engage in political activity. Thus, he is being reported as an opponent of a candidate *who may not have even declared their candidacy* when he contributed to the organization and therefore could not have factored into his motivation for contributing. This, once more, amounts to "junk disclosure."

It is difficult to argue that public reporting on contributions to organizations speaking on issues, which do not advocate for or against a candidate, advances the legitimate purposes of informing the public or preventing corruption.

IV. Disclosure information can result in the harassment of individuals by their political opponents and should be carefully balanced with the public's "right to know."

In considering this bill, it's worth noting that disclosure laws implicate both citizen privacy rights and touch on Supreme Court precedent. 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. This is seen particularly in the Court's decision in *NAACP v. Alabama*, in which the Court recognized that the government may not compel disclosure of a private organization's general membership or donor list.[16] In recognizing the sanctity of privacy in free speech and association, the Court asserted that "it is hardly a novel perception that compelled disclosure of affiliation with groups engaged in advocacy may constitute as effective a restraint on freedom of association as [other] forms of governmental action."[17] This is why the privacy of citizens when speaking out about government officials and actions has been protected in certain contexts.[18]

Much as the Supreme Court sought to protect African Americans in the Jim Crow South and those citizens who financially supported the cause of civil rights from retribution, donors and members of groups supporting unpopular causes still need protection today. It is hardly impossible to imagine a scenario in 2016 in which donors to controversial causes that make independent expenditures – for or against same-sex marriage; 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.

This danger illustrates the fundamental problem with the approach taken. The assumption seems to be that citizens are dangerous to government, and the government must be protected from

[16] *NAACP v. Alabama*, 357 U.S. 449 (1958).
[17] *NAACP v. Ala. ex rel. Patterson*, 357 U.S. at 462.
[18] *See McIntyre v. Ohio Elections Commission*, 514 U.S. 334, 337-338 (1995).

them. Little thought is given to protecting the citizens from government or other citizens, as is required by the First Amendment. Worse still, little can be done once individual contributor information – a donor's full name and street address – is made public under government compulsion. It can then immediately be used by non-governmental entities and individuals to harass, threaten, or financially harm a speaker or contributor to an unpopular cause. We believe, therefore, that the problem of harassment is best addressed by limiting the opportunities for harassment, and that this 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 New Mexico.

Ultimately, the Court has made clear that 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 the provision of only such information as is particularly important to voters. It is questionable that the monetary disclosure threshold mandated by S.B. 11 for an individual who donates to an organization speaking about a particular issue is sufficient to meet this standard.

* * *

Senate Bill 11 seeks to improve transparency, but ultimately falls short in this effort by discouraging donors and workers from contributing to societally important nonprofit organizations, making disclosure information less meaningful overall by broadly capturing activity that is not related to the election or defeat of candidates, and subjecting these donors and workers to potential harassment. Coupled with the bill's serious overreach in justifying its provisions based on the Court's holding on disclosure in *Citizens United*, members of the Senate should carefully consider the provisions within S.B. 11.

Thank you for allowing me to submit comments on Senate Bill 11. I hope you find this information helpful. Should you have any further questions regarding this legislation or any other campaign finance proposals, please do not hesitate to contact me at (703) 894-6835 or by e-mail at mnese@campaignfreedom.org.

Respectfully yours,

Matt Nese
Director of External Relations
Center for Competitive Politics