



April 4, 2017

**VIA ELECTRONIC MAIL**

Representative Mike Foote  
 Chair, House State, Veterans, and  
 Military Affairs Committee  
 Colorado General Assembly  
 Room 307  
 200 E Colfax Avenue  
 Denver, CO 80203

Representative Susan Lontine  
 Vice Chair, House State, Veterans, and  
 Military Affairs Committee  
 Colorado General Assembly  
 Room 307  
 200 E Colfax Avenue  
 Denver, CO 80203

**RE: Constitutional and Practical Issues with House Bills 17-1261 and 17-1262**

Dear Chair Foote, Vice Chair Lontine, and Members of the House State, Veterans, and Military Affairs Committee:

On behalf of the Center for Competitive Politics (“the Center”),<sup>1</sup> we respectfully submit the following comments on constitutional and practical issues with portions of House Bill 17-1261<sup>2</sup> and House Bill 17-1262,<sup>3</sup> both of which are scheduled for a hearing before the House State, Veterans, and Military Affairs Committee on April 5, 2017. Both bills touch on fundamental First Amendment rights of speech, petition, and private association. The bills, therefore, are 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. Both bills expand 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

<sup>1</sup> The Center 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.

<sup>2</sup> Disclaimers Large Electioneering Communications, H.B. 17-1261, 71st Gen. Assemb., First Reg. Sess. (CO 2017) (“H.B. 17-1261”).

<sup>3</sup> Expand Disclosure Electioneering Communications, H.B. 17-1262, 71st Gen. Assemb., First Reg. Sess. (CO 2017) (“H.B. 17-1262”).

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.”<sup>4</sup>

Colorado’s electioneering communication definition is broader than its federal counterpart. Colorado regulates more media types, such as billboards and handbills. The aim of Colorado’s electioneering communication provision is disclosure of the funders of communications,<sup>5</sup> particularly large broadcast advertisements.<sup>6</sup> 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).<sup>7</sup> And, unlike its federal analogue,<sup>8</sup> 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.<sup>9</sup>

House Bills 17-1261 and 17-1262 will change the constitutional balance presently enshrined in the state Constitution, and may fail First Amendment scrutiny because they make the electioneering communications window too long and separate it from the state’s interest in knowing who is speaking about a candidate shortly before an election.

### **I. Campaign finance regulations for 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.”<sup>10</sup> This heightened scrutiny is required because, under the First Amendment, “compelled disclosure... cannot be justified by a mere showing of some legitimate governmental interest.”<sup>11</sup> Therefore, the Supreme Court has long demanded a nexus between campaign finance

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<sup>4</sup> Colo. Const. art. XXVIII, § 2(7)(a).

<sup>5</sup> 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...”).

<sup>6</sup> Colo. Const. ar. 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).

<sup>7</sup> *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.”).

<sup>8</sup> 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).

<sup>9</sup> 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”).

<sup>10</sup> *Buckley*, 424 U.S. at 64.

<sup>11</sup> *Id.*

disclosure and actual campaign-related activity in order to protect organizations merely discussing questions of public policy.<sup>12</sup>

Candidate committees (and, in the state law context, issue committees focused on ballot measures and ballot questions<sup>13</sup>) obviously support or oppose electoral outcomes and are campaign-related.<sup>14</sup> Organizations with the “major purpose” of supporting or opposing candidates or ballot measure questions are also subject to campaign finance disclosure.<sup>15</sup> 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.”<sup>16</sup> The more disclosure is divorced from the interest of who is speaking about candidates or ballot measures, the greater the threat to protected issues speech under the First Amendment. The state bears the burden of proving the asserted state interest.<sup>17</sup>

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.”<sup>18</sup> Exacting scrutiny is “not a loose form of judicial review.”<sup>19</sup> Rather, as a “strict test,”<sup>20</sup> 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.”<sup>21</sup>

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*.”<sup>22</sup> It is sometimes mistakenly said that the Supreme Court’s decision in *Citizens United v. Federal Election Commission*<sup>23</sup> 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. The

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<sup>12</sup> *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*).

<sup>13</sup> 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.”).

<sup>14</sup> *Buckley*, 424 U.S. at 79.

<sup>15</sup> *Id.*

<sup>16</sup> *Buckley*, 424 U.S. at 81.

<sup>17</sup> *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).

<sup>18</sup> *Shelton v. Tucker*, 364 U.S. 479, 488 (1960) (internal citations omitted).

<sup>19</sup> *Wisc. Right to Life v. Barland*, 751 F.3d 804, 840 (7th Cir. 2014).

<sup>20</sup> *Buckley*, 424 U.S. at 66.

<sup>21</sup> *McCutcheon v. Fed. Election Comm’n*, 572 U.S. \_\_\_, \_\_\_, 134 S. Ct. 1434, 1456 (2014).

<sup>22</sup> *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*).

<sup>23</sup> 558 U.S. 310, 369 (2010).

Court merely upheld the disclosure of specific reporting for electioneering communications, which disclose the *entity making the expenditure* and the purpose of the expenditure.<sup>24</sup>

Additionally, the federal report only discloses contributors giving over \$1,000 *for the purpose of furthering* the communication.<sup>25</sup> This has been interpreted by the Federal Election Commission to mean contributions earmarked for these independent expenditures,<sup>26</sup> an interpretation recently upheld by the United States Court of Appeals for the District of Columbia Circuit in a case involving analogous “electioneering communication” reporting requirements.<sup>27</sup>

In *Independence Institute v. Williams*, the Secretary of State asserted 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.”<sup>28</sup> 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.”<sup>29</sup>

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, the disclosure only applies to communications run either thirty days before a primary or sixty days before a general election. But H.B. 17-1261 and H.B. 17-1262 will upset this tailoring and burden the First Amendment rights of Colorado’s citizens.

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.<sup>30</sup> 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.”<sup>31</sup> That ruling was reinforced just last year, when the Center 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.<sup>32</sup> As a result of *Coalition for Secular Government*, the General Assembly was forced to change Colorado’s campaign finance

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<sup>24</sup> 52 U.S.C. § 30104(f)(2)(A)-(D); *see also Independence Institute v. Fed. Election Comm’n*, 2016 U.S. Dist. LEXIS 152623 (D.D.C. 2016) (three-judge court) *sum. aff’d* 580 U.S. \_\_\_, 197 L. Ed. 2d 243 (2017) (upholding federal electioneering communications regime as applied to specific advertisement concerning pending legislation). The Center represented the Institute in both this and the Tenth Circuit decision cited in footnote 22, *supra*.

<sup>25</sup> 52 U.S.C. § 30104(f)(2)(E)-(F); *Citizens United*, 558 U.S. at 366-367.

<sup>26</sup> 11 C.F.R. § 104.20(c)(9).

<sup>27</sup> *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)).

<sup>28</sup> 812 F.3d 787, 790 n.1 (10th Cir. 2016).

<sup>29</sup> *Id.* at 797.

<sup>30</sup> *Sampson v. Buescher*, 625 F.3d 1247 (10th Cir. 2010).

<sup>31</sup> *Id.* at 1260.

<sup>32</sup> *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 Center represented the Coalition.

law,<sup>33</sup> and Colorado was ordered to pay attorney's fees.<sup>34</sup> As those cases demonstrate, tailoring the law to the state's interest is paramount.

## II. Both H.B. 17-1261 and H.B. 17-1262 extend the electioneering communications window beyond the state's interest.

Both H.B. 17-1261 and H.B. 17-1262 would substantially expand the electioneering communications window, extending the period during which organizations must run disclaimers<sup>35</sup> and otherwise disclose<sup>36</sup> certain of their donors to periods *between* elections, rather than just shortly before a particular election. This expansion would likely fail 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) and takes Colorado's regulatory regime out of the safe harbor provided by Federal practice.

H.B. 17-1262 is the primary vehicle for expanding the electioneering communications window. Section 1 of the bill changes the Fair Campaign Practices Act's definition of "electioneering communication" to include the months between the primary and general elections.<sup>37</sup> H.B. 17-1262, Section 2 specifically extends Colorado's registration and disclosure burden to speakers during the same timeframe.<sup>38</sup> To be sure, H.B. 17-1262 is the more worrisome of the two bills discussed in these comments. But even if H.B. 17-1262 were to fail, H.B. 17-1261 expands when disclaimers are mandated for merely mentioning candidates for office.<sup>39</sup> Therefore, H.B. 17-1261 needs some modification and still may be constitutionally acceptable, while H.B. 17-1262 is suspect in its entirety.

Not every mention of a candidate is regulable as campaign speech. 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.<sup>40</sup>

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

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<sup>33</sup> S.B. 16-186, codified at C.R.S. § 1-45-108(1.5).

<sup>34</sup> *Coal. for Secular Gov't v. Williams*, 71 F. Supp. 3d 1176, 1184 (D. Colo. 2014).

<sup>35</sup> H.B. 17-1261 § 1.

<sup>36</sup> H.B. 17-1262 § 2.

<sup>37</sup> H.B. 17-1262 § 1.

<sup>38</sup> H.B. 17-1262 § 2.

<sup>39</sup> H.B. 17-1261 § 1.

<sup>40</sup> *Buckley*, 424 U.S. at 42.

and trim” their preferred message.<sup>41</sup> 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.”<sup>42</sup>

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”<sup>43</sup> and restricted federal campaign law to regulating “communications that include explicit words of advocacy of election or defeat of a candidate.”<sup>44</sup> 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.”<sup>45</sup>

Over time, “[c]orporations, unions, and political parties” began using this distinction to run communications, “which were functionally equivalent to express advocacy but comfortably skirted [federal] disclosure requirements.”<sup>46</sup> In response to these “sham issue” ads, Congress passed the Bipartisan Campaign Reform Act of 2002 (“BCRA”), which included the current federal electioneering communication regime. A facial challenge to BCRA ensued in *McConnell v. Federal Election Commission*, and the government assembled a robust record that demonstrated “that BCRA’s application to pure issue ads [was not] substantial,”<sup>47</sup> and that the vast majority of electioneering communication ads were “clearly intended to influence the election.”<sup>48</sup> But that finding was based on an extensive record – over 100,000 pages,<sup>49</sup> including examples of ads run right before the election to sway voters. *McConnell* established that the mere mention of a candidate may trigger campaign finance registration and reporting, but only when a candidate is discussed right before an election. Later, the Supreme Court found “the public has an interest in knowing who is speaking about a candidate *shortly before an election*,”<sup>50</sup> but it has not blessed expansion of the electioneering communications window to times between elections, as these bills would do.

Colorado should keep in mind that “electioneering communication” is a term of art for a very carefully-defined type of speech intended to impact speakers 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

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<sup>41</sup> *Id.* at 43.

<sup>42</sup> *Id.* at 75.

<sup>43</sup> *Id.* at 80.

<sup>44</sup> *Id.* at 43.

<sup>45</sup> *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’”).

<sup>46</sup> *Van Hollen*, 811 F.3d at 489.

<sup>47</sup> *McConnell v. Fed. Election Comm’n*, 540 U.S. 93, 207 (2003).

<sup>48</sup> *Id.* at 193.

<sup>49</sup> *McConnell v. Fed. Election Comm’n*, 251 F. Supp. 2d 176, 209 (D.D.C. 2003) (three-judge court) (per curiam); see also *Citizens United*, 558 U.S. at 332 (“That inquiry into the facial validity of the statute was facilitated by the extensive record, which was over 100,000 pages long, made in the three-judge District Court.”) (internal quotation marks omitted).

<sup>50</sup> *Citizens United*, 558 U.S. at 369 (emphasis added). The Court recently affirmed a federal district court ruling upholding BCRA’s electioneering communications provisions, which include the temporal windows currently reflected in Colorado law, in the context of a genuine issue ad. *Independence Institute v. Fed. Election Comm’n*, *supra*, n. 24.

electioneering communications window beyond the 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. The state cannot simply rely on *McConnell*'s record, which focused only on the relatively limited window in federal law.

H.B. 17-1261 and H.B. 17-1262 will significantly expand the electioneering communication window – almost doubling it.<sup>51</sup> 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 for each even-numbered year.”<sup>52</sup> For the next election, the primary will therefore be held on June 26, 2018. The general election is held “on the Tuesday succeeding the first Monday of November in each even-numbered year,”<sup>53</sup> and will be held on November 6, 2018. 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 blessed by the Supreme Court in *McConnell*.

Under both bills, however, the law will regulate speech for *one-hundred sixty-four days* – almost double the current window.<sup>54</sup> 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. Yet there is no evidence that speech mentioning candidates in July are “shame issue ads” or otherwise designed to affect the election. The courts require the State to provide some evidence to justify this restriction on First Amendment rights. Since the bill offers none, it fails the First Amendment’s exacting scrutiny.

Additionally, the proposed legislation upsets the will of the Colorado electorate in adopting Article XXVIII into the state constitution. Currently, the Colorado Constitution defines an “electioneering communication” as “any communication” that “unambiguously refers to any candidate” run sixty days before a general election or thirty days before a primary election.<sup>55</sup> The current version of the Fair Campaign Practices Act simply incorporates this definition<sup>56</sup> 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.

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<sup>51</sup> Compare H.B. 17-1261 § 1 (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 H.B. 17-1262 § 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).

<sup>52</sup> C.R.S. § 1-1-104(32).

<sup>53</sup> C.R.S. § 1-1-104(17).

<sup>54</sup> If these bills pass, the regulation of speech in 2018 will run from May 27, 2018 (thirty days before the 2018 primary) to Election Day, November 6, 2018.

<sup>55</sup> Colo. Const. art. XXVIII, § 2(7)(a).

<sup>56</sup> C.R.S. § 1-45-103(9).

**III. In addition to removing the expansion of the electioneering communications window, H.B. 17-1261 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 House Bill 17-1261 attempts to incorporate the required disclaimers for issue committees, and apply those same rules to electioneering communications<sup>57</sup> 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"<sup>58</sup> about who is running the electioneering communication, and to clarify that "the ads are not funded by a candidate or political party."<sup>59</sup> The Supreme Court has upheld laws requiring the speaker to dedicate up to "four seconds of each advertisement to [a] spoken disclaimer."<sup>60</sup>

Colorado's current disclaimer provisions, as incorporated by reference in H.B. 17-1261, are fairly close to the federal analogue approved in *Citizens United*. Under H.B. 17-1261, electioneering communications will need to run disclaimers as outlined in C.R.S. § 1-45-107.5(5).<sup>61</sup> While the Center 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.<sup>62</sup> The state law even incorporates by reference the standards created by the Federal Communications Commission.<sup>63</sup>

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.<sup>64</sup> Under Secretary Wayne Williams, the Campaign Finance Regulations mandate 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."<sup>65</sup> The Secretary's rules contain an express exemption for "bumper stickers, pins, buttons, pens, and similar small items upon which the disclaimer cannot be reasonably printed."<sup>66</sup> But such rules can be changed by the Secretary's successor. More permanence is needed. H.B. 17-1261 should be

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<sup>57</sup> H.B. 17-1261 § 1.

<sup>58</sup> *Citizens United*, 558 U.S. at 368 (quoting *Buckley*, 424 U.S. at 76) (describing an "informational" interest in disclaimers).

<sup>59</sup> *Id.*

<sup>60</sup> *Id.* (citing *McConnell*, 540 U.S. at 230-231); compare with 52 U.S.C. § 30120 (federal disclaimer statute) and 11 C.F.R. § 110.11 (federal regulations on disclaimers).

<sup>61</sup> H.B. 17-1261 § 1.

<sup>62</sup> C.R.S. § 1-45-107.5(5)(a)(I)-(II).

<sup>63</sup> C.R.S. § 1-45-107.5(5)(b).

<sup>64</sup> C.R.S. § 1-45-107.5(5)(c).

<sup>65</sup> 8 C.C.R. § 1505-6, Rule 5.1.1.

<sup>66</sup> 8 C.C.R. § 1505-6, Rule 5.1.2.

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.<sup>67</sup> 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.

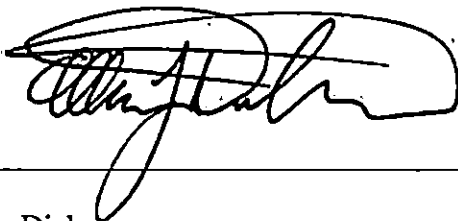
The Committee may wish to consider amending the Fair Campaign Practices Act to incorporate both exemptions found in federal law – for small items and where disclaimers are impracticable – into the text of H.B. 17-1261. Doing so will improve Colorado's disclaimer laws.

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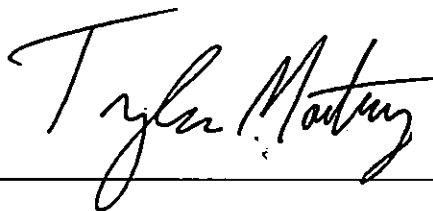
Colorado has not built a record sufficient to justify doubling the size of the electioneering communication window. While the state may have an interest in who is speaking shortly before an election, the operative word is "shortly." Colorado's existing electioneering communications window is the same 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, H.B. 17-1261 should be amended to incorporate the reasonable "small item" and "impracticable" exceptions to campaign disclaimers.

Thank you for allowing us to submit comments on House Bill 17-1261 and 17-1262. We hope you will 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 the undersigned at (703) 894-6800 or by e-mail at [adickerson@campaignfreedom.org](mailto:adickerson@campaignfreedom.org).

Respectfully submitted,



Allen Dickerson  
Legal Director  
Center for Competitive Politics



Tyler Martinez  
Attorney  
Center for Competitive Politics

<sup>67</sup> 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).