2017 SENATE GOVERNMENT AND VETERANS AFFAIRS

SB 2336

2017 SENATE STANDING COMMITTEE MINUTES

Government and Veterans Affairs Committee
Sheyenne River Room, State Capitol

SB 2336
2/3/2017
Job Number 27877

☐ Subcommittee
☐ Conference Committee

Committee Clerk Signature

Explanation or reason for introduction of bill/resolution:

A BILL for an Act to amend and reenact sections 16.1-08.1-03.1, 16.1-08.1-03.13, and 16.1-08.1-04 of the North Dakota Century Code, relating to contributions to and expenditures of campaigns for initiated or referred measures.

Minutes: Attachments: 1-9

Chairman Poolman: Opened the hearing on SB 2336.

Senator Kannianen, District 4: Testified to introduce and in support of the bill. I did have questions on constitutionality and loop holes before I agreed to sponsor the bill. I want to make sure that North Dakotans are the voices that are heard. I do not want to limit free speech. You can put things in law but sometimes that can be legally worked around anyway. I have learned some things since submitting the bill, and I am not saying this bill is the perfect solution but I feel it is a workable document. I hope we can look at it as a work in progress. I am open to ideas and I am open to amendments. I want to learn what is unconstitutional.

(2:15) Chairman Poolman: you alluded to some of the questions that we may have. Like it or hate it, the supreme court has said that the money we give is an extension of our free speech. Have you come up with any answers on that question. People may hate that corporations can donate money but they still, under the constitution, have that right.

Senator Kannianen: I understand that some states have pretty strict limits for candidates; the amount of money that you can donate to any given candidate. With corruption laws, maybe applying to candidates but not to committees dealing with initiated measures. I have learned that those are seen separately. Perhaps it would not apply the same way as far as being able to proportionality limit donations to the committee supporting or opposing and initiated measure or referendum.

(4:05) Dustin Gowrylow, North Dakota Watchdog Network: See Attachment #1 for testimony in support of the bill. See Attachment #2 for additional testimony provided to the committee.

(11:00) Chairman Poolman: We already have some issues in terms of being in conflict with that decision because we as legislators cannot take corporate donations. We have individual limits. Are those still here in North Dakota because no one has challenged?

Dustin Gowrylow: Yes, typically laws are constitutional until they are challenged and declared to be otherwise.

Chairman Poolman: This could very well fall in that same camp of something we could pass and have until someone challenged it.

Dustin Gowrylow: Correct.

(12:05) Pat Finken, Owner, Odney INC: See Attachment #3 for testimony in opposition to the bill.

(21:45) Andy Peterson, Greater North Dakota Chamber of Commerce: See Attachment #4 for testimony in opposition to the bill.

(25:15) Kayla Pulvermacher, North Dakota Farmers Union: See Attachment #5 for testimony in opposition to the bill.

(26:15) Jack McDonald, North Dakota Newspaper Association, North Dakota Broadcasters Association: See Attachment #6 for testimony in opposition to the bill.

(28:25) Waylon Hedegaard, President, North Dakota AFL-CIO: See Attachment #7 for testimony in opposition to the bill.

(32:10) Steve Andrist, Executive Director, North Dakota Newspaper Association: See Attachment #8 for testimony in opposition to the bill.

(33:15) John Arnold, Elections Director, Secretary of State's Office: Testified in a neutral capacity on this bill. I am testifying as the administrator of North Dakota campaign finance online. This bill would require a few changes to be made to the system:
1. Weekly statements for measure committees and sponsoring committees. It would have to be coded in and as the bill is drafted and it would have to be on the first working day of the week.
2. The 72-hour report of contributors of 200 or more, that would need to get added into major committees and sponsoring committees.
3. The year-end check would have to be added in for the 30% of a single donor, and 50% coming from in state.
I mention this because we were not asked for a fiscal note but these would require some coding changes into the system and there would be some cost involved with this bill. I cannot give you an estimate of what that would be because we have not talked to our developer.

(34:56) Chairman Poolman: At the end of the campaign, if they somehow have not made the proportions, who would be responsible for enforcing that or forcing them to give it back? Would it be the Secretary of State's office?

John Arnold: I do not see that addressed in the bill. I do know from experience that we get asked those questions. We would be sure to program in the 30 and 50 percent just as an alert for the filer as well as for the public. We do not know what we would do with that information after.

(36:05) Jim Silrum, Deputy Secretary of State: Testified in neutral capacity. Under state law, the North Dakota Secretary of State does not have any enforcement capabilities so we could not. We could only audit.

Chairman Poolman: Closed the hearing on SB 2336.

(See Attachment #9 for additional testimony provided to committee.)

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Minutes: No Attachments

Chairman Poolman: Opened SB 2336 for committee discussion. We had only Mr. Gowrylow speaking in favor.

Senator Meyer: Moved a Do Not Pass.

Senator Bekkedahl: Seconded.

Chairman Poolman: (Asked for discussion.) I think it had a number of issues from being too vague to not having consequences. There were constitutional issues. I agree with his sentiment; the idea that it is frustrating sometimes to be outspent and have out of state interests come in but it is a tough call.

Senator Bekkedahl: Was there any discussion of a study resolution for this issue so that it could be looked at in the interim, or was that not brought in committee discussion or testimony?

Chairman Poolman: What came up in testimony is that we have already passed that huge study resolution by forming a commission to study the issue. So, certainly this can be part of the discussion. To jump into a vague, and impossible to enforce system would be difficult.

Senator Bekkedahl: So this issue would be applicable to discussion in that other study resolution?

Chairman Poolman: Absolutely.

A Roll Call Vote Was Taken: 3 yeas, 2 nays, 1 absent.

Motion Carried.

Senator Poolman will carry the bill.

Date: 2/3
Roll Call Vote #: 1

2017 SENATE STANDING COMMITTEE
ROLL CALL VOTES
BILL/RESOLUTION NO. 2336

Senate Government and Veterans Affairs Committee

☐ Subcommittee

Amendment LC# or Description: _____

Recommendation: ☐ Adopt Amendment
☐ Do Pass ☒ Do Not Pass ☐ Without Committee Recommendation
☐ As Amended ☐ Rerefer to Appropriations
☐ Place on Consent Calendar

Other Actions: ☐ Reconsider ☐ _____

Motion Made By Meyer Seconded By Bekkedahl

Senators	Yes	No	Senators	Yes	No
Chairman Poolman			Senator Marcellais		✓
Vice Chairman Davison	AB				
Senator Bekkedahl	✓				
Senator Meyer	✓				
Senator Vedaa		✓			

Total (Yes) 3 No 2

Absent 1

Floor Assignment Poolman

If the vote is on an amendment, briefly indicate intent:

REPORT OF STANDING COMMITTEE

SB 2336: Government and Veterans Affairs Committee (Sen. Poolman, Chairman) recommends **DO NOT PASS** (3 YEAS, 2 NAYS, 1 ABSENT AND NOT VOTING). SB 2336 was placed on the Eleventh order on the calendar.

2017 TESTIMONY

SB 2336

SB 2336 – Testimony by Dustin Gawrylow (Lobbyist #215) North Dakota Watchdog Network

Senate Bill 2336 was written as a response to two separate forces:

1. A reaction to Measure 3, Marcy's Law, being bought and paid for by out of state interests using North Dakotans merely as figureheads.

2. A preventative against legislators wishing to meddle in the initiated measure process, to the detriment of the average citizen.

Earlier this session I spoke against Senate Bill 2135, which seeks to create a "study" committee to "fix" the initiated measure process:

As amended by this committee, that study committee only contains language "3 citizens" choses by the governor. It does not specify that those citizens shall have been involved in the initiated measure process. Nor does it grant equal footing to private citizens. It stacks the deck with legislators and special interest groups.

The State Constitution protects the process, the legislature should stay out of the business of altering the process and focus on the campaign finance side of the equation.

This committee should look at helping the system work for average citizens, and against out of state interests trying to hijack our legal system.

During the hearing on SB 2135 I mentioned there was a campaign finance bill works, this is that bill

The desire to revamp, fix, or blow up our initiated measure system mostly comes from the ability of out-of-state money to influence our laws via the initiated measure system.

In that spirit, and working with Senator Mathern and Representative Becker, we came up with concept which is before you.

This bill does two simple things:

1. Limits contributions to committees involved in initiated measures from taking more than 30% from one single donor.

2. Requires that all initiated measure campaigns receive at least 50% of their total funding from inside the state of North Dakota.

This bill is designed to weed out those legislators who would like to "blow up the system" from those who actually want to fix the system for North Dakotans.

I personally asked legislators to support this, and by looking at the bi-partisan list of sponsors you can see that this idea is not Republican, Conservative, Democrat, or Liberal.

It is a North Dakota First Policy Concept.

This is a diverse and bi-partisan group of legislators seeking to protect the initiated measure both from meddling legislators seeking to limit the powers reserved to the people, and from out-of-state money seeking to meddle with our state's laws.

The ultimate solution to prevent legislative meddling in the initiated measure system is to add a paragraph to the state constitution as follows:

"All constitutional, statutory, and administrative revisions to the initiated measure, recall, and referendum process shall originate within the petitioning power of people. The legislative assembly shall not be vested with the power to place any constitutional measures on any ballot altering the provisions of Article III of this constitution. All statutory regulations and administrative rules related to the initiated measure, recall, and referendum process must conform to the literal and plain reading of Article III of this constitution."

Opposition to SB 2336 will say it violates the Citizens United Supreme Court decision a few years ago.

A quick search of one of the preeminent summaries on Citizens United does address "proportional limits" when it comes to candidates, but it does not address that issue when it comes to initiated measures. It does not even talk about these issues.

There is a chance the law is silent on this issue. And the fact is, this bill does not ban out-of-state money - it just says that in-state money has to be raise to qualify for the out-of-state money.

There very well could be a 10th Amendment argument allowing states to regulate out-of-state money differently than in-state money when it comes to initiated measures.

In any case, North Dakota citizens should be able to protect their rights under the North Dakota Constitution from legislative meddling.

And if out-of-state influence on North Dakota's laws is to the price to pay to protect the citizens of North Dakota from meddling legislators, so be it.

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Port: ND needs to blow up the initiated measure process

By Rob Port on Nov 13, 2016 at 6:09 a.m.

Something happened on Tuesday which ought to give North Dakotans pause, and I'm not talking about the election of a tangerine-tinted reality television star to the White House.

Voters, after having been inundated with a heavy-handed marketing campaign that was long on slick production value and short on facts and nuance, cast their ballots overwhelmingly Nov. 8 for Marsy's Law.

Or "constitutional rights for victims," as the measure campaign's vapid slogans put it.

Because the measure passed, North Dakotans can now be less certain of just outcomes in the criminal justice system. It's an absolute travesty.

The whole production was the pet project of California billionaire Henry Nicholas who spent multiple millions of dollars on it.

He paid the signature collectors. He financed the commercials. On Oct. 28, just roughly a week before election day, he dropped another $320,000 into the effort, according to a disclosure filed with the Secretary of State's office, to pay for advertising that was inescapable for North Dakotans in the final days of the election.

And it worked. On election day the constitutional measure got over 206,000 votes, good for 62 percent.

The measure's supporters will tell us it's just the will of the people, which is true as far as that goes. But we should be concerned that a flood of money from one individual — not a single North Dakotan contributed money to the Marsy's Law campaign according to disclosures — drowned out the united voices of North Dakota's legal community.

The North Dakota Victim's Assistance Association, CAWS North Dakota, the North Dakota Women's Network, the North Dakota Association of Criminal Defense Lawyers, the North Dakota State's Attorneys' Association, the ND Association for Justice, the First Nations Womens Alliance, and the North Dakota Fraternal Order of Police all oppose it.

"The North Dakota Constitution should not be a hobby farm for an eccentric California billionaire," state Supreme Court Justice Dale Sandstrom told me about the measure back in October.

"Even for $2½ million dollars he should not be able to get the name of his deceased sister Marsy in the North Dakota Constitution, but under the measure he would," he continued. "And I'm concerned that a lot of scarce legal resources will be consumed trying to figure out what the measure means and perhaps having to defend it in federal court."

The people who actually work in and with North Dakota's criminal justice system — from prosecutors to defense attorneys to judges to victim advocates — opposed Marsy's Law because they view it as bad public policy.

But they didn't have a billionaire sugar daddy to help amplify their voices with television ads and a blizzard of mailers. So they got drowned out. Which is why North Dakota's initiated measure process has to change.

Because this isn't the first time powerful, deep-pocketed interests have tried to buy their way into our state constitution. During the 2014 cycle a coalition of conservation groups tried to create their own constitutional. I'm talking about that cycle's Measure 5 which was successfully defeated, but only after the millions spent by groups like

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Ducks Unlimited was countered by millions from the North Dakota Chamber of Commerce and other groups.

Unfortunately, the Marsy's Law opponents weren't so lucky.

This is not how good public policy is made. Our laws, our constitution, should not be beholden to the whims of campaign politics.

Lawmakers need to take a long, hard look at the initiated measure process. If it were up to me I'd get rid of every aspect of it outside of referendums. Giving voters an opportunity to refer questionable legislation to the ballot box makes sense.

What doesn't make sense is creating new policy at the ballot box, outside of the scrutiny of the exacting and arduous legislative process.

North Dakota Watchdog Network

SB 2336 Seeks To Fix The "Money" Issue On Initiated Measures, While Protecting the Process for Citizen Groups

January 31st, 2017

As we told you in November, **there has long been an ongoing effort to diminish the rights of the people under the state constitution when it comes to the initiated measure process.**

Earlier this session I spoke against Senate Bill 2135, **which seeks to create a "study" committee to "fix" the initiated measure process:**

As written, this committee contains no average citizens with connections to previous initiated measures.

The State Constitution protects the process, the legislature should stay out of the business of altering the process and focus on the campaign finance side of the equation.

This committee should look at helping the system work for average citizens,

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and against out of state interests trying to hijack our legal system.

That bill is still working its way through the committee, and will likely pass due to the desire by some to "blow up the initiated measure process".

As you can read below, this desire mostly comes from the ability of out-of-state money to influence our laws via the initiated measure system.

In that spirit, I asked legislators spanning the spectrum to introduce Senate Bill 2336

This bill does two simple things:

1. Limits contributions to committees involved in initiated measures from taking more than 30% from one single donor.

2. Requires that all initiated measure campaigns receive at least 50% of their total funding from inside the state of North Dakota.

This bill is designed to weed out those legislators who would like to "blow up the system" from those who actually want to fix the system for North Dakotans.

I personally asked legislators to support this, and by looking at the bi-partisan list of sponsors you can see that this idea is not Republican, Conservative, Democrat, or Liberal.

It is a North Dakota First Policy Concept.

Here is the list of sponsors:

Senator Jordan Kannianen (R - Stanley), Senator Shawn Vedaa (R - Velva), Senator Tim Mathern (D - Fargo), Representative Thomas Beadle (R- Fargo), Representative Rick Becker (R - Bismarck), and House Democratic Minority Leader Corey Mock (D - Grand Forks).

This is a diverse and bi-partisan group of legislators seeking to protect the initiated measure both from meddling legislators seeking to limit the powers reserved to the people, and from out-of-state money seeking to meddle with our state's laws.

The ultimate solution to prevent legislative meddling in the initiated measure system is to add a paragraph to the state constitution as follows:

"All constitutional, statutory, and administrative revisions to the initiated measure, recall, and referendum process shall originate within the petitioning power of people. The legislative assembly shall not be vested with the power to place any constitutional measures on any ballot altering the provisions of Article III of this constitution. All statutory regulations and administrative rules related to the initiated measure, recall, and referendum process must conform to the literal and plain reading of Article III of this constitution."

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There very well could be a 10th Amendment argument allowing states to regulate out-of-state money differently than in-state money when it comes to initiated measures.

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In any case, North Dakota citizens should be able to protect their rights under the North Dakota Constitution from legislative meddling.

And if out-of-state influence on North Dakota's laws is to the price to pay to protect the citizens of North Dakota from meddling legislators, so be it.

Senate Bill 2336 will be heard at 10am on February 3rd in the Senate Government and Veterans Affairs Committee.

Contact committee members by cutting and pasting these addresses into your email system:

npoolman@nd.gov, kdavison@nd.gov, bbekkedahl@nd.gov, rmarcellais@nd.gov, scottmeyer@nd.gov, svedaa@nd.gov

Donate Today!

Dustin Gawrylow, Managing Director

North Dakota Watchdog Network

Attack On The Initiative Process Is An Attack On The People Themselves

November 14th, 2016

Over the weekend, an article was written attacking the Initiative and Referendum (I&R) System that has been a part of North Dakota's constitution for almost 100 years. The article makes the claim that the system needs to be quote: "blown up."

This is a short-sighted and dangerous concept that strikes at the very heart of North Dakota's political system.

Article III Section 1 of the North Dakota Constitution explicitly states *"While the legislative power of this state shall be vested in a legislative assembly consisting of a senate and a house of representatives, the people reserve the power to propose and enact laws by the initiative, including the call for a constitutional convention; to approve or reject legislative Acts, or parts thereof, by the referendum; to propose and adopt constitutional amendments by the initiative; and to recall certain elected officials. This article is self-executing and all of its provisions are mandatory. Laws may be enacted to facilitate and safeguard, but not to hamper, restrict, or impair these powers."*

During the 2013 legislative session, the assembly passed two resolutions that would appear on the ballot in 2014. The first was to move the deadline for submitting initiated measures back 30-days, precluding measures seeking to be on the November ballot that year from using the state fair to collect signatures. The second measure would have prohibited any constitutional measure with an appropriation from being placed on the ballot. Those of us opposing theses ballot measures feared this would include tax reform efforts due to the fact that fiscal notes do not distinguish between spending and tax reductions.

In 2014, the public saw fit to pass the first measure, but not the second. Also in 2013, an effort was made to require signatures from all 53

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counties, and one to require 4% from each county. All told, the 2013 legislative session was highlighted by attempts to stymie those interested in using the initiate measure process.

In 2016, Marsy's Law came around, and despite nearly universal and bipartisan opposition, it passed after its supporter bankrolled a highly funded effort to pass the measure and put it in North Dakota's constitution – against the will of all the victims' rights organizations opposing it. While this is unfortunate, it is no reason to curtail the rights reserved to the people by the North Dakota state constitution.

You see, Measure 3, Marsy's Law was financed by a California billionaire, but the marketing work itself was done by Bismarck-based Odney Advertising. This is the same Odney Advertising that does all the marketing work for the Republican party of North Dakota, as well as its candidates. And, by extension as an homage to the old system of patronage and soft-corruption, Odney gets the vast majority of state contracts for North Dakota government agencies.

One prime example of that is the North Dakota Center for Tobacco Control and Prevention: this is the state agency created by an initiated measure in 2008.

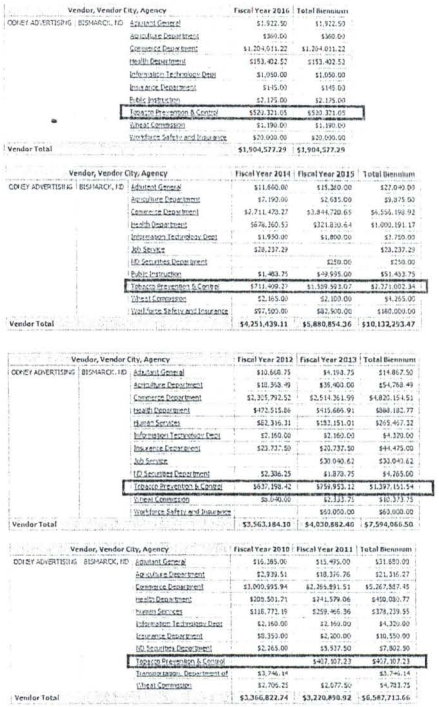
(Previously, we have told you about how the Center for Tobacco Control and Prevention acts essentially like a publicly-funded Super PAC.)

What marketing company gets most of the advertising work for this state agency that Republicans hate? Why, Odney Advertising, of course.

This is not just a wild claim, this is a documented and provable situation.

Below you will see an image of data retrieved from the state's transparency website showing how much money goes from the Center for Tobacco Policy and Control to Odney Advertising:

Over the course of the last 8 years, Odney Advertising has grossed a total of $4,207,993 from the Center for Tobacco Prevention and Control Policy.



Vendor, Vendor City, Agency		Fiscal Year 2016	Total Biennium
ODNEY ADVERTISING	BISMARCK, ND		
	Adjutant General	$1,922.50	$1,922.50
	Agriculture Department	$360.00	$360.00
	Commerce Department	$1,204,011.22	$1,204,011.22
	Health Department	$153,402.52	$153,402.52
	Information Technology Dept	$1,050.00	$1,050.00
	Insurance Department	$145.00	$145.00
	Public Instruction	$2,175.00	$2,175.00
	Tobacco Prevention & Control	$520,321.05	$520,321.05
	Wheat Commission	$1,190.00	$1,190.00
	Workforce Safety and Insurance	$20,000.00	$20,000.00
Vendor Total		$1,904,577.29	$1,904,577.29

Vendor, Vendor City, Agency		Fiscal Year 2014	Fiscal Year 2015	Total Biennium
ODNEY ADVERTISING	BISMARCK, ND			
	Adjutant General	$11,660.00	$15,320.00	$27,040.00
	Agriculture Department	$7,190.00	$2,685.00	$9,875.00
	Commerce Department	$2,711,470.27	$3,844,720.65	$6,556,190.92
	Health Department	$676,360.53	$321,830.64	$1,000,191.17
	Information Technology Dept	$1,930.00	$1,800.00	$3,730.00
	Job Service	$28,237.29		$28,237.29
	ND Securities Department		$250.00	$250.00
	Public Instruction	$1,403.75	$49,695.00	$51,403.75
	Tobacco Prevention & Control	$711,409.27	$1,309,993.07	$2,021,002.34
	Wheat Commission	$2,165.00	$2,100.00	$4,265.00
	Workforce Safety and Insurance	$97,500.00	$82,500.00	$180,000.00
Vendor Total		$4,251,439.11	$5,880,854.36	$10,132,253.47

Vendor, Vendor City, Agency		Fiscal Year 2012	Fiscal Year 2013	Total Biennium
ODNEY ADVERTISING	BISMARCK, ND			
	Adjutant General	$10,668.75	$4,198.75	$14,867.50
	Agriculture Department	$18,368.49	$36,400.00	$54,768.49
	Commerce Department	$2,305,792.52	$2,514,361.99	$4,820,154.51
	Health Department	$472,515.86	$415,686.91	$888,182.77
	Human Services	$62,316.31	$143,151.01	$205,467.32
	Information Technology Dept	$2,160.00	$2,160.00	$4,320.00
	Insurance Department	$23,737.50	$20,737.50	$44,475.00
	Job Service		$30,040.62	$30,040.62
	ND Securities Department	$2,306.25	$1,878.75	$4,185.00
	Tobacco Prevention & Control	$637,198.42	$759,953.12	$1,397,151.54
	Wheat Commission	$8,040.00	$2,323.75	$10,373.75
	Workforce Safety and Insurance		$60,050.00	$60,000.00
Vendor Total		$3,563,184.30	$4,030,882.40	$7,594,066.50

Vendor, Vendor City, Agency		Fiscal Year 2010	Fiscal Year 2011	Total Biennium
ODNEY ADVERTISING	BISMARCK, ND			
	Adjutant General	$16,385.00	$15,495.00	$31,880.00
	Agriculture Department	$2,939.51	$18,376.76	$21,316.27
	Commerce Department	$3,000,695.94	$2,266,891.51	$5,267,587.45
	Health Department	$209,501.71	$241,579.06	$450,080.77
	Human Services	$118,772.19	$259,466.36	$378,239.55
	Information Technology Dept	$2,160.00	$2,160.00	$4,320.00
	Insurance Department	$8,350.00	$2,200.00	$10,550.00
	ND Securities Department	$2,265.00	$5,537.50	$7,802.50
	Tobacco Prevention & Control		$407,107.23	$407,107.23
	Transportation, Department of	$3,746.14		$3,746.14
	Wheat Commission	$2,705.21	$2,077.50	$4,782.75
Vendor Total		$3,366,822.24	$3,220,890.92	$6,587,713.66

It should be noted that the state's Transparency Website does not break-down how much of that $4.2 million is destined for advertising ad-buys, but it constitutes roughly 12.5% of the $33.6 million state-dollars that have flowed through Odney Advertising in the last 8 years.

So let's review this: Odney Advertising gets paid by Republicans to help them get elected. Odney then uses that prestige and networking to obtain government contracts from state agencies, which allow Odney to make up on bulk what they might lose on political work. These very Republicans make it more difficult for average citizens to use their

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constitution rights to place initiated measures on the ballot. Then Odney takes contracts with the private sector partners that support things like a 400% increase on tobacco, and takes money from a California billionaire to pass Marsy's law. Then, after this is all complete, and Marsy's law passes, people like Rob Port denounce the initiated measure system and call for a repeal of The Powers Reserved to the People in our state constitution.

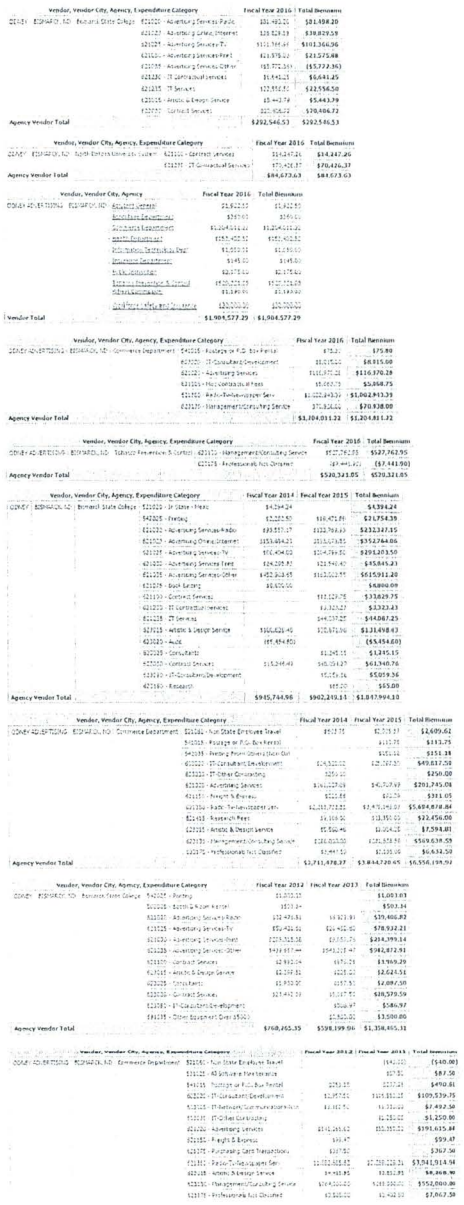
Click here to see the Measure #3 Disclosure report showing how much Odney received for promoting Marsy's Law.

Doesn't it seem like instead of attacking the people's right to petition their government, so-call conservative pundits should focus on the kind of crony capitalism and non-existent campaign laws that have created the problem in the first place?

No matter which way you look, Odney Advertising wins, and the taxpayers /citizens /voters lose.

Rob Port, we do not need to change the Initiated Measure system – we need to reform our campaign finance system – and also look at who is getting rich off government contracts.

The citizens of North Dakota cannot let the fact that Republican insiders profit from



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PG 1

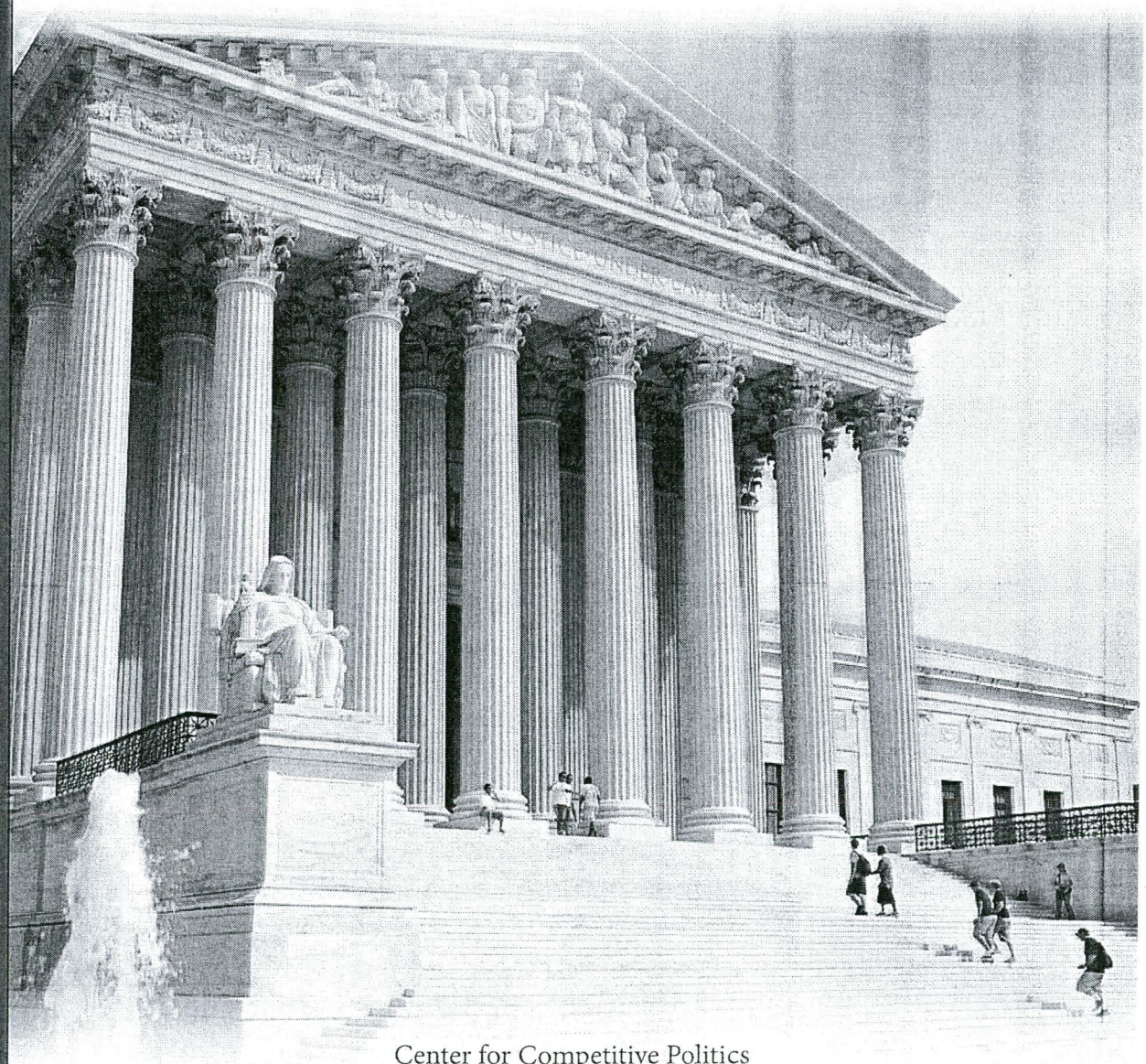
ISSUE REVIEW
July 2014

CENTER *for* COMPETITIVE POLITICS

Congress shall make no law...

State Aggregate Limits and Proportional Bans under *McCutcheon*: *Likely Unconstitutional or Highly Vulnerable*

By Matt Nese



Center for Competitive Politics
124 S. West Street, Suite 201
Alexandria, Virginia 22314
http://www.campaignfreedom.org

CENTER *for* COMPETITIVE POLITICS

Congress shall make no law...

WWW.CAMPAIGNFREEDOM.ORG

State Aggregate Limits and Proportional Bans under *McCutcheon*

Likely Unconstitutional or Highly Vulnerable

by Matt Nese

Executive Summary

- On April 2, 2014, the Supreme Court issued its decision in *McCutcheon v. Federal Election Commission*, which invalidated the federal aggregate limit on contributions by individuals to candidate campaigns and political committees as unconstitutional under the First Amendment.
- Nine states – Connecticut, Kentucky, Maine, Maryland, Massachusetts, New York, Rhode Island, Wisconsin, and Wyoming – and the District of Columbia impose aggregate limits in some form on the overall amount entities may contribute to candidates and causes. These limits appear to be unconstitutional, according to the precedent set in *McCutcheon*.
- Another ten states – Alaska, Arizona, Florida, Hawaii, Indiana, Louisiana, Minnesota, Montana, South Carolina, and Tennessee – impose other forms of limits that operate in a similar fashion to an aggregate limit, leaving them highly vulnerable to a legal challenge, according to the reasoning in the *McCutcheon* decision. In an illustration of the overwhelming complexity of campaign finance laws, these other limits fall into seven categories: (1) "First Come, First Served" Limits; (2) Aggregate Limits on Recipient Candidates (Party Version); (3) Aggregate Limits on Recipient Candidates (PAC Version); (4) Proportional Bans; (5) Non-Resident Aggregate Limits on Candidates, Parties, or PACs; (6) Aggregate Limits on PAC Donations; and (7) Aggregate Limits on Corporate or Union Donations.
- Because of the Supreme Court's ruling in *McCutcheon*, the aggregate limit statutes in nine states and D.C., in particular, appear to be unconstitutional. As of July 8, 2014, Connecticut, Kentucky, Maine, Maryland, Massachusetts, and New York's election law enforcement agencies have already announced that they will no longer enforce their aggregate limits. The Rhode Island State Board of Elections announced that it would support legislation that would repeal the state's aggregate limit provision, and the Wyoming Legislature is in the process of drafting a bill to repeal its aggregate limit statute for introduction in the 2015 legislative session. Additionally, Wisconsin's limit has been struck down in Court, and the State of Minnesota has been enjoined by a federal court from enforcing a portion of its "First Come, First Served" statute, as it undergoes a legal challenge.
- Three key aspects of the *McCutcheon* opinion render many of the different forms of aggregate limits harder for states to defend from a challenge in court: (1) the Court appeared to significantly narrow the basis for regulation of contribution limits; (2) *McCutcheon* clarified that even contribution limits are subject to a high level of

constitutional scrutiny; and (3) other language in the Court's opinion makes it difficult for states to defend aggregate or proportional limits.

- Following the actions of the seven states that have already announced non-enforcement of their aggregate limit provisions, policymakers in the District of Columbia and the remaining 12 states with aggregate limits and proportional bans should strongly consider repealing these speech-stifling regulations in order to comply with the precedent set in the *McCutcheon* decision and avoid a likely successful legal challenge. Additionally, repealing these regulations will also enhance the First Amendment freedoms of the citizens residing in each of these states.

Introduction

On April 2, 2014, the Supreme Court issued its decision in *McCutcheon v. Federal Election Commission*.[1] In that case, plaintiff Shaun McCutcheon challenged the overall federal limits imposed on contributions by individuals to candidate campaigns and political committees instituted as part of the Bipartisan Campaign Reform Act of 2002. These aggregate limits are separate from the individual limits enforced by the federal government and most states on contributions to each candidate, political party committee, or PAC. In the Court's 5-4 decision, it invalidated the federal aggregate limit as unconstitutional under the First Amendment.

[1] 572 U.S. __, No. 12-536 (April 2, 2014).

State Aggregate Limits, Proportional Limits, and Proportional Bans

Much like the federal aggregate limit ruled unconstitutional in *McCutcheon*, **nine states and the District of Columbia** impose aggregate limits in some form on the overall amount that entities may contribute to candidates and causes. These limits appear to be clearly unconstitutional, according to the precedent set in *McCutcheon*.

Another **14 states** – four of which also have aggregate limits on individual giving (Kentucky, Massachusetts, New York, and Wisconsin) – impose other forms of limits that operate in similar fashion to an aggregate limit, leaving these statutes highly vulnerable to a legal challenge, according to the reasoning in the *McCutcheon* decision. In an illustration of the overwhelming complexity of campaign finance laws, these other limits fall into seven categories, collectively classified as "proportional limits" or "proportional bans":

1) *"First Come, First Served" Limits* – the earliest donors to a candidate get to give the maximum allowed by law until a certain aggregate threshold is reached, while later supporters either are banned from donating any amount, must wait to give a donation until other donors make more donations, or face lower donation limits
2) *Aggregate Limits on Recipient Candidates (Party Version)* – candidates face limits on how much they can receive from all political party committees
3) *Aggregate Limits on Recipient Candidates (PAC Version)* – candidates face limits on how much they can receive from all PACs
4) *Proportional Bans* – limits on the amount candidates can receive from certain types of donors relative to their total fundraising
5) *Non-Resident Aggregate Limits on Candidates, Parties, or PACs* – limits on how much or what proportion of an entity's funds may be donated by non-residents
6) *Aggregate Limits on PAC Donations* – limits on how much each PAC may donate to all candidates, parties, and/or PACs
7) *Aggregate Limits on Corporate or Union Donations* – limits on how much each corporation or union may donate to all candidates and/or political parties

By contrast, the other 31 states do not impose aggregate limits or proportional bans of any kind. Taken together, these 19 states and D.C. with either aggregate limits and/or other limits that are highly vulnerable from the seven categories above are:

The Nineteen States with Aggregate or Proportional Limits or Bans		
States with Aggregate Limits that are Likely Unconstitutional (9 States Plus D.C.)		
Connecticut* [6]	Maine*	Rhode Island [6]
District of Columbia	Maryland*	Wisconsin* [1, 2, 3]
Kentucky* [1, 2, 3, 4]	Massachusetts* [1, 3, 6]	Wyoming
	New York* [7]	
Other States with Limits that are Highly Vulnerable (10 States)		
Alaska [1, 5]	Hawaii [1, 5]	Montana [1, 2, 3]
Arizona [1, 2]	Indiana [7]	South Carolina [1, 2]
Florida [1, 2]	Louisiana [1, 3]	Tennessee [1, 2, 3, 4]
	Minnesota [1, 2, 3, 4]	

Superscript numbers indicate the type of limit, as described in the seven categories above. An asterisk indicates that the state has announced it will no longer enforce some or all of its aggregate limits provisions, or the state lost in court in a challenge to its aggregate limit statute.

As the aggregate limit statutes in nine states and Washington, D.C. function slightly differently, we have summarized the effect of each limit, noted what entities it affects (individuals and/or PACs), and updated each limit's current status in the following table. (All "Aggregate Limit Descriptions" reflect current state statutes, located in the appendices below. More information on each state's "Aggregate Limit Status" can be found in the section labeled "State Responses to *McCutcheon*.")

Nine States and D.C. with Likely Unconstitutional State Aggregate Limits			
State	*Entities Affected*	*Aggregate Limit Description*	*Aggregate Limit Status*
Connecticut	Individuals PACs	- An individual may not contribute in excess of $30,000 in the aggregate to all candidates and committees per election cycle - A political committee established by a business entity ("Business PAC") may not contribute more than $100,000 in the aggregate to all candidates per election cycle - A political committee established by an organization ("Organization PAC") may not contribute more than $50,000 in the aggregate to all candidates per election cycle	The Connecticut State Elections Enforcement Commission issued an Advisory Opinion, in which it announced it would no longer enforce Connecticut's aggregate limit statute on individual giving to all candidates and committees.
D.C.	Individuals	- An individual may not contribute in excess of $8,500 in the aggregate to all candidates and political committees per election	Attorney General Irvin B. Nathan recommended to the City Council that D.C.'s aggregate limit statute should be repealed. The City Council has yet to act on Attorney General Nathan's recommendation.
Kentucky	Individuals PACs	- An individual may not contribute in excess of the following amounts in the aggregate per year: o $1,500 to all PACs - A PAC may not contribute in excess of the following amounts in the aggregate per year: o $1,500 to all PACs	The Kentucky Registry of Election Finance issued an Advisory Opinion indicating that its aggregate limit on individual giving to all PACs would not apply to the requestor.

Maine	Individuals	- An individual may not contribute in excess of $25,000 in the aggregate to all candidates per calendar year	The Maine Commission on Governmental Ethics and Election Practices released a policy statement indicating it will cease enforcement of its aggregate limit for the duration of the 2014 election cycle. Following the 2014 election cycle, the Commission will make a legislative recommendation to the Maine Legislature regarding the statute's enforceability.
Maryland	Individuals	- An individual may not contribute in excess of $10,000 in the aggregate to all campaign finance entities[2] per election cycle	The Maryland State Board of Elections issued guidance that it would no longer enforce the state's aggregate limit on individual giving.
Massachusetts	Individuals PACs	- An individual may not contribute in excess of $12,500 in the aggregate to all candidates per calendar year - An individual may not contribute in excess of $5,000 to all committees of a political party per calendar year - A PAC may not contribute in excess of $5,000 to all committees of a political party per calendar year	The Massachusetts Office of Campaign and Political Finance announced it will no longer enforce the state's aggregate limit on individual giving to all candidates. The Office is still reviewing the applicability of the *McCutcheon* decision to the state's aggregate limit on individual giving to all committees of a political party.
New York	Individuals	- An individual may not contribute in excess of $150,000 in the aggregate to all candidates and committees per calendar year	The New York State Board of Elections voted unanimously to cease enforcement of the state's aggregate limit on individual giving.
Rhode Island	Individuals PACs	- An individual may not contribute in excess of $10,000 in the aggregate to all candidates, political parties, and PACs per calendar year - A PAC may not contribute in excess of $25,000 in the aggregate to all candidates, political parties, and PACs per calendar year	The Rhode Island State Board of Elections voted to support legislation that would repeal the state's aggregate limit on individual giving. The General Assembly has yet to act on the Board's recommendation.

[2] A "campaign finance entity" means a political committee registered in the state of Maryland. MD. ELEC. LAW CODE ANN. § 1-101(h).

Wisconsin	Individuals	- An individual may not contribute in excess of $10,000 in the aggregate to all candidates, political parties, and PACs per calendar year	Following the *McCutcheon* decision, the state of Wisconsin settled a lawsuit and agreed it would no longer enforce its aggregate limit on individual giving.
Wyoming	Individuals	- An individual may not contribute in excess of $25,000 in the aggregate to all candidates per two-year period	The Wyoming Legislature's Joint Corporations, Elections and Political Subdivisions Interim Committee voted to have its staff draft a bill for introduction in the 2015 legislative session that repeals the state's aggregate limit.

As the 14 states with other aggregate or proportional limits or bans statutes differ significantly, we have summarized the effect of the regulation and noted what entities it affects (recipient candidates, individuals, political parties, PACs, corporations, and/or unions) in the following table. (All "Aggregate/Proportional Limit/Ban Descriptions" reflect current state statutes, located in the appendices below, unless otherwise noted.):

Fourteen States with other Aggregate or Proportional Limits or Bans		
State	*Entities Affected*	*Aggregate/Proportional Limit/Ban Description*
Alaska	Recipient Candidates Individuals (Non-Residents) Political Parties Groups Nongroup Entities	- Candidates are prohibited from accepting more than the following aggregate amounts from non-residents per calendar year: o $20,000 if a gubernatorial candidate o $5,000 if a State Senate candidate o $3,000 if a State House candidate - Political parties are prohibited from accepting more than 10% of their total contributions from non-residents per calendar year - Group and nongroup entities are prohibited from accepting more than 10% of their total contributions from non-residents per calendar year
Arizona	Recipient Candidates Political Parties	- Candidates for statewide office may not accept more than $100,110 in the aggregate from all political party committees and political organizations per election[3] - Candidates for legislative office may not accept more than $10,020 in the aggregate from all political party committees and political organizations per election[4]
Florida	Recipient Candidates Political Parties	- Candidates for statewide office may not accept more than $250,000 in the aggregate from all political party committees per election - Candidates for legislative office may not accept more than $50,000 in the aggregate from all political party committees per election
Hawaii	Recipient Candidates Individuals (Non-Residents)	- Candidates are prohibited from accepting more than 30% of their total contributions from non-residents per election period

[3] Pursuant to ARIZ. REV. STAT. § 16-941(B), the statutory aggregate limits in this section are reduced by 20 percent for statewide candidates who choose not to participate in Arizona's Clean Elections program. According to the Arizona Secretary of State's Office, nonparticipating statewide candidates may receive $91,040 in the aggregate from all political party committees and political organizations in the 2014 election. *See* Secretary of State Ken Bennett, "Campaign Contribution Limits 2014 General Election: Revised pursuant to Laws 2013, Chapter 98," State of Arizona Secretary of State. Retrieved on July 8, 2014. Available at: http://www.azsos.gov/election/2014/info/campaign_contribution_limits.pdf (January 29, 2014), p. 2.

[4] Pursuant to ARIZ. REV. STAT. § 16-941(B), the statutory aggregate limits in this section are reduced by 20 percent for legislative candidates who choose not to participate in Arizona's Clean Elections program. According to the Arizona Secretary of State's Office, nonparticipating legislative candidates may receive $9,112 in the aggregate from all political party committees and political organizations in the 2014 election. *See* Secretary of State Ken Bennett, "Campaign Contribution Limits 2014 General Election: Revised pursuant to Laws 2013, Chapter 98," State of Arizona Secretary of State. Retrieved on July 8, 2014. Available at: http://www.azsos.gov/election/2014/info/campaign_contribution_limits.pdf (January 29, 2014), p. 2.

Indiana	Corporations Unions	- A corporation or labor union may not contribute in excess of the following amounts in the aggregate per calendar year: o $5,000 to all statewide candidates o $2,000 to all State Senate candidates o $2,000 to all State House candidates - A corporation or labor union may not contribute in excess of $5,000 in the aggregate to all political parties per calendar year
Kentucky	Recipient Candidates Political Parties PACs	- Candidates may not accept more than 50% of their total contributions, or $10,000, whichever is greater, in the aggregate from all political party executive committees per election - Candidates may not accept more than 50% of their total contributions, or $10,000, whichever is greater, in the aggregate from all political party caucus committees per election - Candidates may not accept more than 50% of their total contributions, or $10,000, whichever is greater, in the aggregate from all PACs per election
Louisiana	Recipient Candidates PACs	- Candidates are prohibited from accepting more than the following aggregate amounts from all PACs per election cycle: o $80,000 if a statewide candidate o $60,000 if a legislative candidate
Massachusetts	Recipient Candidates PACs	- Candidates are prohibited from accepting more than the following aggregate amounts from all Regular PACs per calendar year: o $150,000 if a gubernatorial candidate o $18,750 if a State Senate candidate o $7,500 if a State House candidate

Minnesota[5]	Recipient Candidates Individuals Political Parties PACs	- Candidates may not accept more than 20% of the election cycle segment[6] expenditure limits for a specified office in the aggregate from all political committees, political funds, lobbyists, large contributors, and associations, currently[7]: o $730,200 if a gubernatorial candidate o $6,000 if a State Senate candidate o $12,500 if a State House candidate - Candidates may not accept more than ten times the amount of the base contribution limit for a specified office from all political party committees in the aggregate in an election cycle segment, currently[8]: o $40,000 if a gubernatorial candidate o $10,000 if a legislative candidate
Montana	Recipient Candidates Political Parties PACs	- Candidates are prohibited from accepting more than the following aggregate amounts from all political party committees per election, currently[9]: o $23,350 if a gubernatorial candidate o $1,350 if a State Senate candidate o $850 if a State House candidate - Candidates are prohibited from accepting more than the following aggregate amounts from all PACs per election, currently[10]: o $2,750 if a State Senate candidate o $1,650 if a State House candidate
New York	Corporations	- A corporation may not contribute in excess of $5,000 in the aggregate to all candidates per calendar year

[5] Minnesota's aggregate limit on candidate receipts from all political committees, political funds, lobbyists, large contributors, and associations is currently being challenged by the Institute for Justice's Minnesota Chapter. On May 19, 2014, U.S. District Judge Donovan W. Frank enjoined the State of Minnesota from enforcing this statute and ruled that the plaintiffs had a "substantial likelihood of success on the merits of their claim." The State of Minnesota has yet to appeal the case as of July 8, 2014. For more information, *see* "Minnesota Campaign Speech Limits: *Seaton v. Wiener*," Institute for Justice. Retrieved on July 8, 2014. Available at: https://www.ij.org/mn-special-sources-limit (2014).

[6] An "election cycle segment" is "the period from January 1 following a general election for an office to December 31 following the next general election for that office, except that 'election cycle' for a special election means the period from the date the special election writ is issued to 60 days after the special election is held. For a regular election, the period from January 1 of the year prior to an election year through December 31 of the election year is the 'election segment' of the election cycle. Each other two-year segment of an election cycle is a 'nonelection segment' of the election cycle. An election cycle that consists of two calendar years has only an election segment. The election segment of a special election cycle includes the entire special election cycle." MINN. STAT. § 10A.01, Subd. 16.

[7] Current office-specific aggregate contribution limit information available at: "2013-2014 Election Cycle Segment Contribution and Campaign Expenditure Limits," Minnesota Campaign Finance and Public Disclosure Board. Retrieved on July 8, 2014. Available at: http://www.cfboard.state.mn.us/campfin/Limits/CONTRIB_LIMITS_2013_2014.pdf (January 1, 2013), p. 2. More information about the office-specific expenditure limits relevant to this regulation can be found in MINN. STAT. § 10A.25.

[8] *Ibid*, p. 1.

[9] Current office-specific aggregate contribution limit information available at: "State of Montana Political Campaign Contribution Limit Summary – applicable to 2014 campaigns," Montana Commissioner of Political Practices. Retrieved on July 8, 2014. Available at: http://politicalpractices.mt.gov/content/5campaignfinance/2014ContributionLimitSummary (March 19, 2014).

[10] *Ibid.*

South Carolina	Recipient Candidates Political Parties	- Candidates are prohibited from accepting more than the following aggregate amounts from all political party committees per election cycle: o $50,000 if a statewide candidate o $5,000 if a legislative candidate
Tennessee	Recipient Candidates Political Parties PACs	- Candidates are prohibited from accepting more than the following aggregate amounts from all political party committees per election, currently[11]: o $374,300 if a statewide candidate o $59,900 if a State Senate candidate o $30,000 if a State House candidate - Candidates for statewide office may not accept more than 50% of their total contributions from all PACs per election - Candidates for legislative office may not accept more than $112,300 in the aggregate from all PACs per election[12]
Wisconsin	Political Parties PACs	- Candidates for state and local office may not accept more than 65% of the state-determined disbursement level[13] for a specified office from all political party committees per election cycle, currently[14]: o $700,830 if a gubernatorial candidate o $22,425 if a State Senate candidate o $11,212.50 if a State Assembly candidate - Candidates for state and local office may not accept more than 45% of the state-determined disbursement level for a specified office from all PACs per election cycle, currently[1516]: o $485,190 if a gubernatorial candidate o $15,525 if a State Senate candidate o $7,762.50 if a State Assembly candidate

[11] Current office-specific political party aggregate contribution limit information available at: "PAC FAQs," Tennessee Bureau of Ethics and Campaign Finance. Retrieved on July 8, 2014. Available at: http://www.tennessee.gov/tref/pacs/pacs_faq.htm#12 (2010).

[12] Current office-specific PAC contribution limit information available at: "PAC FAQs," Tennessee Bureau of Ethics and Campaign Finance. Retrieved on July 8, 2014. Available at: http://www.tennessee.gov/tref/pacs/pacs_faq.htm#12 (2010).

[13] The "state determined disbursement level" is calculated on an office-specific basis, pursuant to WIS. STAT. § 11.31(1).

[14] Current office-specific aggregate contribution limit information available at: "Contribution Limits: Partisan State Offices," Wisconsin Government Accountability Board. Retrieved on July 8, 2014. Available at: http://gab.wi.gov/sites/default/files/page/campaign_contribution_limits_partisan_state_pdf_13605.pdf (June 10, 2013).

[15] *Ibid.*

[16] Wisconsin's aggregate limit on candidate receipts from all political committees is currently being challenged by the Wisconsin Institute for Law & Liberty. The lawsuit was filed in on June 23, 2014 in the United States District Court for the Eastern District of Wisconsin. For more information, *see* Bruce Vielmetti, "Political action group sues over Wisconsin campaign money limits," *Milwaukee Journal Sentinel*. Retrieved on July 8, 2014. Available at: http://www.jsonline.com/news/statepolitics/political-action-group-sues-over-over-wisconsin-campaign-money-limits-b99297241z1-264267521.html (June 23, 2014).

State Responses to McCutcheon

Because of the Supreme Court's ruling in *McCutcheon*, the aggregate limit statutes in nine states and D.C., in particular, are highly likely to be deemed unconstitutional, if challenged. However, because of the nature of the regulations in the states with proportional limits, those statutes too face an uncertain future.

As a result of the Court's ruling, all nine states with aggregate limit statutes (and D.C) have already recognized *McCutcheon*'s applicability to their own law to varying degrees. Seven of these states (Connecticut, Kentucky, Maine, Maryland, Massachusetts, New York, and Wisconsin) have effectively officially announced that they will no longer enforce their aggregate limit statutes on individual giving.

On the day of the *McCutcheon* ruling, the Massachusetts Office of Campaign and Political Finance announced that it "will no longer enforce the $12,500 aggregate limit on the amount that an individual may contribute to all candidates."[17] Shortly thereafter, the Maryland State Board of Elections announced that "[t]he [Maryland] Attorney General has advised that based on the pronouncement in the *McCutcheon* decision, the aggregate contribution limit in [Maryland] Election Law Article § 13-226(b)(2) is unconstitutional and may not be enforced."[18] As a result of this announcement, much like Massachusetts, the state of Maryland will no longer enforce its $10,000 aggregate limit on what individuals may give to all campaign finance entities per election cycle.

Connecticut's State Elections Enforcement Commission issued an Advisory Opinion on May 14 noting that it would cease enforcement of its aggregate limit statute.[19] On May 15, the Attorney General for the District of Columbia, Irvin B. Nathan, testified before the City Council, recommending that the District's aggregate limit provision "is likely unconstitutional and should be considered for repeal."[20] At a May 22 meeting of the New York State Board of Elections, the Board voted unanimously that the state's aggregate statue was unenforceable and agreed to cease its enforcement.[21] The Maine Commission on Governmental Ethics and Election Practices announced in a policy statement after their May 28 meeting that it will cease enforcing the state's aggregate limit for the duration of the 2014 election cycle, and likely permanently thereafter.[22]

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[17] "OCPF's statement on today's Supreme Court decision, McCutcheon vs. FEC," Massachusetts Office of Campaign and Political Finance. Retrieved on July 8, 2014. Available at: http://www.ocpf.net/releases/statement.pdf (April 2, 2014).

[18] Bobbie S. Mack et al., "Contribution Limits," Maryland State Board of Elections. Retrieved on July 8, 2014. Available at: http://elections.maryland.gov/campaign_finance/documents/aggregate_limits_04112014_final.pdf (April 11, 2014).

[19] Anthony J. Castagno, "ADVISORY OPINION 2014-03: Application and Enforcement of Connecticut's Aggregate Contribution Limits from Individuals to Candidates and Committees after *McCutcheon*," State of Connecticut State Elections Enforcement Commission. Retrieved on July 8, 2014. Available at: http://www.ct.gov/seec/lib/seec/laws_and_regulations/ao_2014-03.pdf (May 14, 2014).

[20] Attorney General Irvin B. Nathan, "Letter to David Keating Re: *McCutcheon v. FEC* and its effect on District law," Office of the Attorney General of the District of Columbia (May 21, 2014).

[21] Michael Gormley, "State: No limit on individual political donations," *Newsday*. Retrieved on July 8, 2014. Available at: http://www.newsday.com/long-island/politics/state-no-limit-on-individual-political-donations-1.8186788 (May 26, 2014).

[22] "Policy Statement of the Maine Ethics Commission on Enforceability of Aggregate Contribution Limits," State of Maine Commission on Governmental Ethics and Election Practices. Retrieved on July 8, 2014. Available at: http://www.maine.gov/ethics/pdf/ProposedStatementNottoEnforceAggLimit.pdf (2014).

On June 5, the Kentucky Registry of Election Finance issued an Advisory Opinion indicating that its aggregate limit on individual giving to all PACs would not apply to the requestor.[23] That same day, the Wyoming Joint Corporations, Elections and Political Subdivisions Interim Committee voted to have its staff draft a bill for introduction in the 2015 legislative session that would repeal the state's aggregate limit provisions.[24] Similarly, the Rhode Island State Board of Elections voted in April to back legislation that would repeal the state's aggregate limit provision.[25]

Additionally, Wisconsin had its aggregate limit struck down in Court,[26] and a district judge temporarily blocked the State of Minnesota from enforcing the state's "first come, first served" limit, which caps the number of contributions candidates may receive from certain classes of donors.[27] It remains to be seen how the court will resolve this case, but, much like in Wisconsin, the Minnesota case has a strong chance of success.

Officials in Alaska, Arizona, Florida, Hawaii, Indiana, Louisiana, Montana, South Carolina, and Tennessee have not indicated how they intend to approach their aggregate and/or proportional limit statutes in the wake of the *McCutcheon* decision.

If other states do not issue similar statements to the eight states and D.C. described above, and any of these state aggregate limits are challenged in similar fashion to Minnesota and Wisconsin's provisions, it's highly likely that many, if not all of these aggregate limit statutes, would be eventually subject to a lawsuit and declared unconstitutional, according to the precedent set by the Court in *McCutcheon*.

The Court clarified in *McCutcheon* that contribution limits burden the First Amendment freedom of association and can only be justified to the extent they are "the least restrictive means" of preventing *quid pro quo* corruption – a form of corrupt exchange that goes beyond the mere creation of gratitude. Because the federal aggregate limits went beyond preventing *quid pro quo* corruption, the Court found aggregate limits to be invalid under the First Amendment. State limits would likely fall under the same rationale. Furthermore, states with proportional bans are also susceptible to legal challenges based upon the Court's reasoning.

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[23] Emily Dennis, "ADVISORY OPINION 2014-003," Kentucky Registry of Election Finance. Retrieved on July 8, 2014. Available at: http://kref.ky.gov/Contributions/2014_003_Opinion.pdf (June 5, 2014).

[24] Laura Hancock, "Wyoming lawmakers want to repeal caps to PAC spending," *Casper Star-Tribune*. Retrieved on July 8, 2014. Available at: http://trib.com/news/state-and-regional/govt-and-politics/wyoming-lawmakers-want-to-repeal-caps-to-pac-spending/article_9a4c8196-d5ff-5eb3-a99b-a53214e8e8d7.html (June 6, 2014).

[25] Michael P. McKinney, "R.I. Board of Elections backs repeal of 'total' campaign contribution limit," *Rhode Island Providence Journal*. Retrieved on July 8, 2014. Available at: http://www.providencejournal.com/breaking-news/content/20140417-r.i.-board-of-elections-backs-repeal-of-total-campaign-contribution-limit.ece (April 17, 2014).

[26] Scott Bauer, "Deal reached to kill campaign funding limits," *The Associated Press*. Retrieved on July 8, 2014. Available at: http://www.washingtontimes.com/news/2014/may/8/deal-reached-to-kill-wisconsin-campaign-limits/ (May 8, 2014).

[27] Devin Henry, "Judge halts Minnesota campaign finance law," *MinnPost*. Retrieved on July 8, 2014. Available at: http://www.minnpost.com/effective-democracy/2014/05/judge-halts-minnesota-campaign-finance-law (May 19, 2014).

The Impact of McCutcheon

Three key aspects of the *McCutcheon* opinion make many of the different forms of aggregate limits harder for states to defend from a challenge in court.

1) **The Court appeared to significantly narrow the basis for regulation of contribution limits.**

According to Chief Justice Roberts' opinion: "Any regulation must instead target what we have called '*quid pro quo*' corruption or its appearance. That Latin phrase captures the notion of a direct exchange of an official act for money.... **Campaign finance restrictions that pursue other objectives, we have explained, impermissibly inject the Government 'into the debate over who should govern.' And those who govern should be the *last* people to help decide who *should* govern."**[28]

Later in the opinion, the Court said: "This Court has identified only one legitimate governmental interest for restricting campaign finances: preventing corruption or the appearance of corruption. We have consistently rejected attempts to suppress campaign speech based on other legislative objectives....The First Amendment prohibits such legislative attempts to 'fine-tun[e]' the electoral process, no matter how well intentioned."[29] "As we framed the relevant principle in *Buckley*, 'the concept that government may restrict the speech of some elements of our society in order to enhance the relative voice of others is wholly foreign to the First Amendment.'"[30]

Further addressing the issue of corruption, the opinion states: "Moreover, while preventing corruption or its appearance is a legitimate objective, Congress may target only a specific type of corruption-'*quid pro quo*' corruption.... The definition of corruption that we apply today, however, has firm roots in *Buckley* itself.... The line between *quid pro quo* corruption and general influence may seem vague at times, but the distinction must be respected in order to safeguard basic First Amendment rights. In addition, '[i]n drawing that line, the First Amendment requires us to err on the side of protecting political speech rather than suppressing it.'"[31]

Clearly, this language in the opinion puts many restrictions on political giving in the form of aggregate or proportional limits on shaky constitutional ground.

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[28] *McCutcheon v. Federal Election Comm'n*, 572 U.S. __, No. 12-536 slip op. at 3 (2014) (Roberts, C.J. for the plurality) (emphasis added).
[29] *Ibid.* at 18. (citing *Davis v. Federal Election Comm'n*, 554 U. S. 724, 741 (2008); *Federal Election Comm'n v. National Conservative Political Action Comm.*, 470 U. S. 480, 496-97 (1985); and *Arizona Free Enterprise Club's Freedom Club PAC v. Bennett*, 564 U. S. ___, No. 10-238 slip op. at 21 (2011)).
[30] *Ibid.* (quoting *Buckley v. Valeo*, 424 U.S., 1, 48-49 (1976)).
[31] *Ibid.* at 19-20 (discussing *Buckley*, 424 U.S. at 26-27 and quoting *Federal Election Comm'n v. Wisconsin Right to Life*, 551 U.S. 449, 457 (2007) ("*WRTL II*")) (opinion of Roberts, C. J.).

2) ***McCutcheon* clarified that even contribution limits are subject to a high level of constitutional scrutiny.**

From the opinion: "Moreover, regardless whether we apply strict scrutiny or *Buckley*'s 'closely drawn' test, we must assess the fit between the stated governmental objective and the means selected to achieve that objective.[32] Or to put it another way, if a law that restricts political speech does not 'avoid unnecessary abridgement' of First Amendment rights, it cannot survive 'rigorous' review."[33]

In the opinion, the Court also said: "Importantly, there are multiple alternatives available to Congress that would serve the Government's anticircumvention interest, while avoiding 'unnecessary abridgment' of First Amendment rights."[34]

What was unusual about this case is that the opinion outlined several examples of how Congress could fashion alternative restrictions to prevent circumvention of the candidate contribution limits. For example, it said: "The most obvious might involve targeted restrictions on transfers among candidates and political committees," and then listed at least four other less harmful options before concluding that, "[t]he point is that there are numerous alternative approaches available to Congress to prevent circumvention of the base limits."[35]

If any of the states with these aggregate or proportional limits has any legitimate interest in the limit, then it appears they must show that other remedies that infringe on First Amendment rights to a lesser extent are inadequate to the task.

3) **Other language in the Court's opinion makes it difficult for states to defend aggregate or proportional limits.**

There is one quote from the opinion that is very helpful to challenges to these limits: "[W]e have made clear that **Congress may not regulate contributions** simply to reduce the amount of money in politics, or **to restrict the political participation of some in order to enhance the relative influence of others.**"[36]

Clearly, many states have done exactly that with their seven varieties of aggregate and proportional limits.

The opinion also states: "An aggregate limit on *how many* candidates and committees an individual may support through contributions is not a 'modest restraint' at all. The Government may no more restrict how many candidates or causes a donor may support than it may tell a newspaper how many candidates it may endorse."[37]

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[32] *See, e.g., National Conservative Political Action Comm.*, 470 U. S. at 496-501; *Randall v. Sorrell*, 548 U.S. 230, 253-262 (2006) (opinion of Breyer, J.).
[33] *McCutcheon* at 20. (citing *Buckley v. Valeo*, 424 U.S. at 25).
[34] *Ibid.* at 33.
[35] *Ibid.* at 33-35.
[36] *Ibid.* at 1 (emphasis added).
[37] *Ibid.* at 15.

Presumably, the same logic would apply to many of the proportional limits or to candidates that might wish to receive financial support from more committees.

Additionally, the Court said: "**To require one person to contribute at lower levels than others** because he wants to support more candidates or causes **is to impose a special burden on broader participation in the democratic process**.... And as we have recently admonished, the Government may not penalize an individual for 'robustly exercis[ing]' his First Amendment rights."[38]

The same logic that applies to individuals would likely also apply to political committees, which are just associations of individuals, and perhaps political party committees.

Later in the opinion, the Court said, "the degree to which speech is protected cannot turn on a legislative or judicial determination that particular speech is useful to the democratic process. The First Amendment does not contemplate such 'ad hoc balancing of relative social costs and benefits.'"[39]

If the state had some theory that providing special advantages to earlier donors over later donors or certain types of donors over others, it appears that will no longer save the regulation, if indeed it ever did.

[38] *Ibid.* at 16 (citing *Davis v. Federal Election Comm'n*, 554 U. S. 724, 739 (2008)) (emphasis added).
[39] *Ibid.* at 17 (citing *United States v. Stevens*, 559 U.S. 460, 470 (2010); see also *United States v. Playboy Entertainment Group, Inc.*, 529 U.S. 803, 818 (2000) ("'What the Constitution says is that' value judgments 'are for the individual to make, not for the Government to decree, even with the mandate or approval of a majority'")).

Conclusion

Even before the *McCutcheon* ruling, states were acting to eliminate aggregate limit statutes, in part due to a growing recognition of their burden on First Amendment rights. In Arizona, for example, Governor Jan Brewer (R) signed a bill into law in April 2013, which raised existing state contribution limits on the amount individuals and PACs may give to candidate campaigns and eliminated Arizona's aggregate limits on contributions from individuals and PACs to statewide and legislative candidates (though the legislation left intact an aggregate provision limiting candidate receipts from all political party committees), freeing individuals and groups to contribute up to the limit for as many candidates as they wish.

Following Arizona's example as well as the actions of the seven states that have already announced non-enforcement of their aggregate limit provisions, policymakers in the District of Columbia and the remaining 12 states with aggregate limits and proportional bans should strongly consider repealing these speech-stifling regulations in order to comply with the precedent set in the *McCutcheon* decision and avoid a likely successful legal challenge. Additionally, repealing these regulations will also enhance the First Amendment freedoms of the citizens residing in each of these states.

Appendix I: Likely Unconstitutional State Aggregate Limit Statutes

For further analysis of each state's aggregate limit on overall individual giving, this appendix provides the text of and cites to the corresponding statutes of the nine states and the District of Columbia. The following ten aggregate limit statutes are now likely unconstitutional, as they function nearly identically to the federal aggregate limit statute struck down as unconstitutional by the Supreme Court in McCutcheon v. FEC.

Connecticut – CONN. GEN. STAT. § 9-611(c); CONN. GEN. STAT. § 9-613(d); CONN. GEN. STAT. §§ 9-615(c) and (e)

Sec. 9-611. (c) No individual shall make contributions to such candidates or committees which in the aggregate exceed thirty thousand dollars for any single election and primary preliminary thereto.

Sec. 9-613. (d) Contribution limits for particular offices. A political committee organized by a business entity shall not make a contribution or contributions to or for the benefit of any candidate's campaign for nomination at a primary or any candidate's campaign for election to the office of: (1) Governor, in excess of five thousand dollars; (2) Lieutenant Governor, Secretary of the State, Treasurer, Comptroller or Attorney General, in excess of three thousand dollars; (3) state senator, probate judge or chief executive officer of a town, city or borough, in excess of one thousand five hundred dollars; (4) state representative, in excess of seven hundred fifty dollars; or (5) any other office of a municipality not included in subdivision (3) of this subsection, in excess of three hundred seventy-five dollars. The limits imposed by this subsection shall apply separately to primaries and elections and contributions by any such committee to candidates designated in this subsection shall not exceed one hundred thousand dollars in the aggregate for any single election and primary preliminary thereto. Contributions to such committees shall also be subject to the provisions of section 9-618 in the case of committees formed for ongoing political activity or section 9-619 in the case of committees formed for a single election or primary.

Sec. 9-615. (c) The limits imposed by subsection (a) of this section shall apply separately to primaries and elections and no such committee shall make contributions to the candidates designated in this section which in the aggregate exceed fifty thousand dollars for any single election and primary preliminary thereto.

(e) Contributions to a political committee established by an organization shall also be subject to the provisions of section 9-618 in the case of a committee formed for ongoing political activity or section 9-619 in the case of a committee formed for a single election or primary.

District of Columbia – DC OFF. CODE § 1-1131.01

No person may make contributions in any one election, for the Mayor, Shadow Senator or Shadow Representative, the Chairman of the Council, any member of the Council and each

member of the Board of Education (including primary and general elections, but excluding special elections) which, when totaled with all other contributions made by that person in that election to candidates and political committees, exceeds the total sum of $8500.00.

Kentucky – KY. REV. STAT. § 121.150(10)

(10) No person shall contribute more than one thousand five hundred dollars ($1,500) to all permanent committees and contributing organizations in any one (1) year.

Maine – ME. REV. STAT. ANN., Tit. 21–A, § 1015(3)

3. No individual may make contributions to candidates aggregating more than $25,000 in any calendar year. This limitation does not apply to contributions in support of a candidate by that candidate or that candidate's spouse or domestic partner.

Maryland – MD. ELEC. LAW CODE ANN. § 13–226(b)(2)

(b) Subject to subsection (c) of this section, a person may not, either directly or indirectly, in an election cycle make aggregate contributions in excess of:

(2) $10,000 to all campaign finance entities.

Massachusetts – MASS. GEN. LAWS, ch. 55, §§ 7A(a)(2) and (5)

Section 7A. (a)(2) An individual may in addition make campaign contributions for the benefit of elected political committees or non-elected political committees organized on behalf of a political party; provided, however, that the aggregate of such campaign contributions for the benefit of the political committees of any one political party shall not exceed in any one calendar year the sum of five thousand dollars.
[...]
(5) Notwithstanding any other provision of this subsection, the aggregate of all contributions from any one individual to all candidates and candidate's committees shall not exceed the sum of twelve thousand five hundred dollars in any one calendar year.

New York – N.Y. ELEC. LAW § 14–114(8)

Sec. 14–114. 8. Except as may otherwise be provided for a candidate and his family, no person may contribute, loan or guarantee in excess of one hundred fifty thousand dollars within the state in connection with the nomination or election of persons to state and local public offices and party positions within the state of New York in any one calendar year. For the purposes of this

subdivision ''loan'' or ''guarantee'' shall mean a loan or guarantee which is not repaid or discharged in the calendar year in which it is made.

Rhode Island – R. I. GEN. LAWS § 17–25–10.1(a)(1)

(a)(1) No person, other than the candidate to his or her own campaign, nor any political action committee shall make a contribution or contributions to any candidate, as defined by § 17-25-3, or political action committee or political party committee which in the aggregate exceed one thousand dollars ($1,000) within a calendar year, nor shall any person make contributions to more than one state or local candidate, to more than one political action committee, or to more than one political party committee, or to a combination of state and local candidates and political action committees and political party committees which in the aggregate exceed ten thousand dollars ($10,000) within a calendar year, nor shall any political action committee make such contributions which in the aggregate exceed twenty-five thousand dollars ($25,000) within a calendar year, nor shall any candidate or any political action committee or any political party committee accept a contribution or contributions which in the aggregate exceed one thousand dollars ($1,000) within a calendar year from any one person or political action committee.

Wisconsin – WIS. STAT. § 11.26(4)

(4) No individual may make any contribution or contributions to all candidates for state and local offices and to any individuals who or committees which are subject to a registration requirement under s. 11.05, including legislative campaign committees and committees of a political party, to the extent of more than a total of $10,000 in any calendar year.

Wyoming – WYO. STAT. ANN. § 22–25–102(c)(ii)

(c) Except as otherwise provided in this section, no individual other than the candidate, or the candidate's immediate family shall contribute directly or indirectly:

(ii) Total political contributions for any two (2) year period consisting of a general election year and the preceding calendar year, of more than twenty-five thousand dollars ($25,000.00).

Appendix II: Highly Vulnerable State Aggregate Limit, Proportional Limit, or Proportional Ban Statutes

For further analysis of each state's proportional limit or proportional ban statutes, this appendix provides the text of and cites to the corresponding statutes of the fourteen states with these regulations that are highly vulnerable to a legal challenge, pursuant to the Supreme Court's decision in McCutcheon v. FEC. *While the following fourteen statutes function somewhat differently than the federal aggregate limits ruled unconstitutional by the Supreme Court, they are ripe for legal challenge, and may also be considered unconstitutional.*

Alaska – ALASKA STAT. §§ 15.13.072(e), (f), and (h)

(e) A candidate or an individual who has filed with the commission the document necessary to permit that individual to incur election-related expenses under AS 15.13.100 may solicit or accept contributions from an individual who is not a resident of the state at the time the contribution is made if the amounts contributed by individuals who are not residents do not exceed

(1) $20,000 a calendar year, if the candidate or individual is seeking the office of governor or lieutenant governor;
(2) $5,000 a calendar year, if the candidate or individual is seeking the office of state senator;
(3) $3,000 a calendar year, if the candidate or individual is seeking the office of state representative or municipal or other office.

(f) A group or political party may solicit or accept contributions from an individual who is not a resident of the state at the time the contribution is made, but the amounts accepted from individuals who are not residents may not exceed 10 percent of total contributions made to the group or political party during the calendar or group year in which the contributions are received.
[...]
(h) A nongroup entity may solicit or accept contributions for the purpose of influencing the nomination or election of a candidate from an individual who is not a resident of the state at the time the contribution is made or from an entity organized under the laws of another state, resident in another state, or whose participants are not residents of this state at the time the contribution is made. The amounts accepted by the nongroup entity from these individuals and entities for the purpose of influencing the nomination or election of a candidate may not exceed 10 percent of total contributions made to the nongroup entity for the purpose of influencing the nomination or election of a candidate during the calendar year in which the contributions are received.

Arizona – ARIZ. REV. STAT. § 16-905(D)

D. A nominee of a political party shall not accept contributions from all political parties or political organizations combined totaling more than ten thousand twenty dollars for an election

for an office other than a statewide office, and one hundred thousand one hundred ten dollars for an election for a statewide office.

Florida – FLA. STAT. § 106.08(2)

(2)(a) A candidate may not accept contributions from national, state, or county executive committees of a political party, including any subordinate committee of such political party or affiliated party committees, which contributions in the aggregate exceed $50,000.
(b) A candidate for statewide office may not accept contributions from national, state, or county executive committees of a political party, including any subordinate committee of the political party, or affiliated party committees, which contributions in the aggregate exceed $250,000…

Hawaii – HAW. REV. STAT. § 11-362(a)

(a) Contributions from all persons who are not residents of the State at the time the contributions are made shall not exceed thirty per cent of the total contributions received by a candidate or candidate committee for each election period.

Indiana – IND. CODE § 3-9-2-4

IC 3-9-2-4. Corporations or labor organizations; limitation on contributions

Sec. 4. During a year a corporation or labor organization may not make total contributions in excess of:

(1) an aggregate of five thousand dollars ($5,000) apportioned in any manner among all candidates for state offices (including a judge of the court of appeals whose retention in office is voted on by a district that does not include all of Indiana);
(2) an aggregate of five thousand dollars ($5,000) apportioned in any manner among all state committees of political parties;
(3) an aggregate of two thousand dollars ($2,000) apportioned in any manner among all candidates for the senate of the general assembly;
(4) an aggregate of two thousand dollars ($2,000) apportioned in any manner among all candidates for the house of representatives of the general assembly;
(5) an aggregate of two thousand dollars ($2,000) apportioned in any manner among regular party committees organized by a legislative caucus of the senate of the general assembly;
(6) an aggregate of two thousand dollars ($2,000) apportioned in any manner among regular party committees organized by a legislative caucus of the house of representatives of the general assembly;
(7) an aggregate of two thousand dollars ($2,000) apportioned in any manner among all candidates for school board offices and local offices; and

(8) an aggregate of two thousand dollars ($2,000) apportioned in any manner among all central committees other than state committees.

Kentucky – KY. REV. STAT. § 121.150(23)

(23) (a) A candidate or a slate of candidates for elective public office shall not accept contributions from permanent committees which, in the aggregate, exceed fifty percent (50%) of the total contributions accepted by the candidate or a slate of candidates in any one (1) election or ten thousand dollars ($10,000) in any one (1) election, whichever is the greater amount. The percentage of the total contributions or dollar amounts of contributions accepted by a candidate or a slate of candidates in an election that is accepted from permanent committees shall be calculated as of the day of each election. Funds in a candidate's or a slate of candidates' campaign account which are carried forward from one (1) election to another shall not be considered in calculating the acceptable percentage or dollar amount of contributions which may be accepted from permanent committees for the election for which the funds are carried forward. A candidate or a slate of candidates may, without penalty, contribute funds to his campaign account not later than sixty (60) days following the election so as not to exceed the permitted percentage or dollar amount of contributions which may be accepted from permanent committees or the candidate or a slate of candidates may, not later than sixty (60) days after the end of the election, refund any excess permanent committee contributions on a pro rata basis to the permanent committees whose contributions are accepted after the aggregate limit has been reached.
(b) The provisions of paragraph (a) of this subsection regarding the receipt of aggregate contributions from permanent committees in any one (1) election shall also apply separately to the receipt of aggregate contributions from executive committees of any county, district, state, or federal political party in any one (1) election.
(c) The provisions of paragraph (a) of this subsection regarding the receipt of aggregate contributions from permanent committees in any one (1) election shall also apply separately to the receipt of aggregate contributions from caucus campaign committees.

Louisiana – LA. REV. STAT. § 18:1505.2 H.(7)

(7)(a) The total amount of combined contributions for both the primary and general elections, from political committees, which may be accepted by a candidate and his principal and subsidiary campaign committees, shall not exceed the following aggregate amounts:

(i) Major office candidates - eighty thousand dollars.
(ii) District office candidates - sixty thousand dollars.
(iii) Other office candidates - twenty thousand dollars.

(b) The provisions of this Paragraph shall not apply to contributions made by a recognized political party or any committee thereof.

Massachusetts – MASS. GEN. LAWS, ch. 55, § 6A

Section 6A. A candidate and such candidate's committee shall not accept any contribution from a political action committee if such contribution would result in such candidate and such committee together receiving from all political action committees aggregate contributions in any calendar year in excess of the following amounts:

(a) a candidate for governor, including contributions jointly to such candidate for governor and a candidate for lieutenant governor in a state election—one hundred and fifty thousand dollars;
(b) a candidate for lieutenant governor—thirty-one thousand, two hundred and fifty dollars;
(c) a candidate for attorney general—sixty-two thousand, five hundred dollars;
(d) a candidate for state secretary, state treasurer, and state auditor—thirty-seven thousand, five hundred dollars;
(e) a candidate for state senator, county commissioner, governor's councillor, district attorney, clerk of courts, register of probate, registrar of deeds or any other county officer—eighteen thousand, seven hundred and fifty dollars;
(f) a candidate for state representative—seven thousand, five hundred dollars.

Minnesota – MINN. STAT. §§ 10A.27, Subds. 2 and 11

Subd. 2. A candidate must not permit the candidate's principal campaign committee to accept contributions from any political party units or dissolving principal campaign committees in aggregate in excess of ten times the amount that may be contributed to that candidate as set forth in subdivision 1. The limitation in this subdivision does not apply to a contribution from a dissolving principal campaign committee of a candidate for the legislature to another principal campaign committee of the same candidate.

Subd. 11. A candidate must not permit the candidate's principal campaign committee to accept a contribution from a political committee, political fund, lobbyist, large contributor, or association not registered with the board if the contribution will cause the aggregate contributions from those types of contributors during an election cycle segment to exceed an amount equal to 20 percent of the election cycle segment expenditure limits for the office sought by the candidate, provided that the 20 percent limit must be rounded to the nearest $100. For purposes of this subdivision, "large contributor" means an individual, other than the candidate, who contributes an amount that is more than one-half the amount an individual may contribute during the election cycle segment.

Montana – MONT. CODE ANN. §§ 13-37-216(3) and (4); MONT. CODE ANN. § 13-37-218

Sec. 13-37-216. (3) All political committees except those of political party organizations are subject to the provisions of subsections (1) and (2). For purposes of this subsection, "political party organization" means any political organization that was represented on the official ballot at the most recent gubernatorial election. Political party organizations may form political

committees that are subject to the following aggregate limitations, adjusted as provided for in subsection (4) and subject to 13-37-219, from all political party committees:

(a) for candidates filed jointly for the offices of governor and lieutenant governor, not to exceed $18,000;
(b) for a candidate to be elected for state office in a statewide election, other than the candidates for governor and lieutenant governor, not to exceed $6,500;
(c) for a candidate for public service commissioner, not to exceed $2,600;
(d) for a candidate for the state senate, not to exceed $1,050;
(e) for a candidate for any other public office, not to exceed $650.

(4) (a) The commissioner shall adjust the limitations in subsections (1) and (3) by multiplying each limit by an inflation factor, which is determined by dividing the consumer price index for June of the year prior to the year in which a general election is held by the consumer price index for June 2002.
(b) The resulting figure must be rounded up or down to the nearest:
(i) $10 increment for the limits established in subsection (1); and
(ii) $50 increment for the limits established in subsection (3).
(c) The commissioner shall publish the revised limitations as a rule.

Sec. 13-37-218. A candidate for the state senate may receive no more than $ 2,150 in total combined monetary contributions from all political committees [PACs] contributing to the candidate's campaign, and a candidate for the state house of representatives may receive no more than $ 1,300 in total combined monetary contributions from all political committees [PACs] contributing to the candidate's campaign. The limitations in this section must be multiplied by an inflation factor, which is determined by dividing the consumer price index for June of the year prior to the year in which a general election is held by the consumer price index for June 2003. The resulting figure must be rounded up or down to the nearest $50 increment. The commissioner shall publish the revised limitations as a rule....

New York – N.Y. ELEC. LAW § 14–116(2)

Sec. 14–116. 2. Notwithstanding the provisions of subdivision one of this section, any corporation or an organization financially supported in whole or in part, by such corporation may make expenditures, including contributions, not otherwise prohibited by law, for political purposes, in an amount not to exceed five thousand dollars in the aggregate in any calendar year; provided that no public utility shall use revenues received from the rendition of public service within the state for contributions for political purposes unless such cost is charged to the shareholders of such a public service corporation.

South Carolina – S.C. CODE § 8-13-1316(A)

(A) Notwithstanding Section 8-13-1314(A)(1), within an election cycle, a candidate may not accept or receive contributions from a political party through its party committees or legislative

caucus committees, and a political party through its party committees or legislative caucus committees may not give to a candidate contributions which total in the aggregate more than:

(1) fifty thousand dollars in the case of a candidate for statewide office; or
(2) five thousand dollars in the case of a candidate for any other office.

Tennessee – TENN. CODE §§ 2-10-302(c) and (d); TENN. CODE §§ 2-10-306(a) and (c)

Sec. 2-10-302. (c) With respect to contributions from multicandidate political campaign committees for each election:

(1) No candidate for an office elected by statewide election shall accept in the aggregate more than fifty percent (50%) of the candidate's total contributions from multicandidate political campaign committees; and
(2) No candidate for any other state or local public office shall accept in the aggregate more than seventy-five thousand dollars ($75,000) from multicandidate political campaign committees.

In determining the aggregate limits established by this subsection (c), contributions made to a candidate by a committee controlled by a political party on the national, state, or local level or by a caucus of such political party established by members of either house of the general assembly are not included.

(d) (1) Each contribution limit established in subsection (a), (b) or (c) shall be adjusted to reflect the percentage of change in the average consumer price index (all items-city average), as published by the United States department of labor, bureau of labor statistics, for the period of January 1, 1996, through December 31, 2010. Each such adjustment shall be rounded to the nearest multiple of one hundred dollars ($100). The registry of election finance shall publish each such adjusted amount on its web site.

(2) On January 1, 2013, and every two (2) years thereafter, each contribution limit established in subsection (a), (b) or (c), as adjusted pursuant to subdivision (d)(1), shall be further adjusted to reflect the percentage of change in the average consumer price index (all items-city average), as published by the United States department of labor, bureau of labor statistics, for the two-year period immediately preceding. Each such adjustment under this subdivision (d)(2) shall be rounded to the nearest multiple of one hundred dollars ($100). The registry of election finance shall publish each such adjusted amount on its web site.

Sec. 2-10-306. (a) All contributions made by political campaign committees controlled by a political party on the national, state, or local level or by a caucus of such political party established by members of either house of the general assembly shall be considered to have been made by a single committee. Such contributions shall not, in the aggregate, exceed:

(1) Two hundred fifty thousand dollars ($250,000) per election to any candidate in a statewide election;
(2) Forty thousand dollars ($40,000) per election to any candidate for the senate; and

(3) Twenty thousand dollars ($20,000) per election to any candidate for any other state or local public office.

[...]

(c) (1) Each contribution limit established in subsection (a) shall be adjusted to reflect the percentage of change in the average consumer price index (all items-city average), as published by the United States department of labor, bureau of labor statistics, for the period of January 1, 1996, through December 31, 2010. Each such adjustment shall be rounded to the nearest multiple of one hundred dollars ($100). The registry of election finance shall publish each such adjusted amount on its web site.

(2) On January 1, 2013, and every two (2) years thereafter, each contribution limit established in subsection (a), as adjusted pursuant to subdivision (c)(1), shall be further adjusted to reflect the percentage of change in the average consumer price index (all items-city average), as published by the United States department of labor, bureau of labor statistics, for the two-year period immediately preceding. Each such adjustment under this subdivision (c)(2) shall be rounded to the nearest multiple of one hundred dollars ($100). The registry of election finance shall publish each such adjusted amount on its web site.

Wisconsin – WIS. STAT. § 11.26(9)

(9) (a) No individual who is a candidate for state or local office may receive and accept more than 65 percent of the value of the total disbursement level determined under s. 11.31 for the office for which he or she is a candidate during any primary and election campaign combined from all committees subject to a filing requirement, including political party and legislative campaign committees.

(b) No individual who is a candidate for state or local office may receive and accept more than 45 percent of the value of the total disbursement level determined under s. 11.31 for the office for which he or she is a candidate during any primary and election campaign combined from all committees other than political party and legislative campaign committees subject to a filing requirement.

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SB 2336 2-3-17 #3 pg 1

N.D. Senate Government and Veterans Affairs Committee
Pat Finken Testimony on SB 2336
February 3, 2017

Good morning Madam Chairman and distinguished members of the committee. My name is Pat Finken. I am here on my own behalf as owner of Odney, Incorporated, an advertising, public relations and public affairs group located here in Bismarck.

As many of you know, my firm has been involved in many high profile initiated measure campaigns over the last 25 years. In these campaigns, I have been both the beneficiary of out-of-state money and the victim of out-of-state money. I have seen measures win without money and lose with lots of money.

I stand before you today in opposition to SB 2336.

My testimony today will center on five points. First, 2336 is unconstitutional and a violation of free speech. Secondly, 2336 is vague and very likely a violation of the 14th Amendment. Third, what is good for the goose is good for the gander. Forth, regardless of point of view out-of-state measure money has been a force for good in North Dakota. It just depends on your point of view. And finally, laws like these only seek to drive campaign contributions underground.

My most important point today, of course, is that 2336 would be a violation of the 1st Amendment and, therefore, unconstitutional. I have consulted with one of the legal firms at the forefront of campaign law in America to help provide this analysis. A complete copy of the analysis from Bell, McAndrews & Hiltachk, LLP is attached to my testimony.

The First Amendment provides, in relevant part, that "Congress shall make no law... abridging the freedom of speech." Protected above all other forms of speech is political speech. Contribution limits such as the one proposed by SB 2336 burdens political speech, and therefore invokes the 1st Amendment, by restricting the amount a donor may contribute to aid his or her cause of choice in disseminating a political message. In Buckley vs. Valeo, the Supreme Court characterized contributions as invoking both the right to freedom of speech and its implied right of association, and determined that limits on such contributions are subject "to the closest scrutiny."

In order for a limit on political contributions to meet Constitutional scrutiny, the government must bear the burden of proving that the limit is "closely drawn to match a sufficiently important government interest." The only permissible interests that have been recognized are in combatting quid-pro-quo corruption and its appearance, and preventing the circumvention of base contribution limits. The government must present evidence, rather than rely on conjecture.

Contributions to a ballot measure campaign do not raise the specter of quid-pro-quo corruption as a matter of law, since no candidate is present to be corrupted. The risk of corruption perceived in cases involving candidate elections simply is not present in a popular vote on a public issue. Therefore, such contributions may not be limited. The proposed law appears to be similarly unsupported by any anti-circumvention interest, since nothing in the proposed law appears to be a measure intended to guard against the threat of illegal contributions reaching their source.

In McCutcheon versus the Federal Election Commission, the U.S. Supreme Court has made clear that a campaign finance law cannot be motivated by the desire to restrict the speech of some elements of society in order to enhance the relative speech of others. Clearly, a law that controls the giving and

receiving of contributions based on a legislatively-determined measure of the proper balance between contributions from in-state residents and out-of-state residents would violate this principle.

My simple point is that 1st Amendment freedoms are not limited to or defined by a state border. They are universally applied to all of us privileged to be called citizens and no law made by this body should infringe on that right.

In addition to the 1st Amendment problems presented by the contribution limit, the proposed law may also run afoul of the 14th Amendment doctrine that vague laws are unconstitutional. Notwithstanding that North Dakota Century Code section 16.1-08.1-01 defines "person" as "an individual, partnership, political committee, association, corporation, cooperative corporation, limited liability company, or other organization or group of persons," the term "out-of-state" is not defined.

And if you were to define out-of-state, how would you effectively accomplish that task? Does out-of-state apply to companies that have multiple locations and thousands of employees in North Dakota? Is out-of-state an association headquartered in DC, but represents hundreds of North Dakotans? Or is an energy company from Houston with billions invested in North Dakota an out-of-state entity? Or should an individual with land or mineral rights in North Dakota but lives in another state truly be considered and an out-of-state interest? You can see the difficulty in defining who can have free speech and who you seek to limit.

And then, are we going to apply this to political campaigns too. After all, if this bill is good enough for measure committees, isn't it good enough for elected officials? Are you going to tell Heidi Heitkamp that she can't take more than 50% of her campaign funding from out-of-state? If you do, she will have very little money to run on. And are you going to tell Governor Burgum that he can only self-fund 30% of his campaign because this bill limits individual donations to 30%?

Senate Bill 2336 implies that measure campaigns supported by out-of-state money are tainted, but that is really just a point of view. A point of view with which a majority of voters have disagreed. It was out-of-state money that helped pass a real estate transfer tax ban. It helped put in place a comprehensive smoke-free workplace law. It helped stop a tobacco tax increase. And where would we be if out-of-state money hadn't weighed in to help defeat Measure 5, a measure that would have diverted hundreds of millions of dollars annually of oil tax revenue into an outdoor heritage fund? Through all the campaigns I have been involved in, I have come to realize one truth, trust the voters. You may not always like what they do, but they are not as gullible or ignorant as you might presume. And, it is their government after all.

Finally, money is like water. It always finds a way. If you limit out-of-state money, you are only going to force it underground. I have already identified two ways to legally circumvent this law. Is that really what we want? I have always believed the best campaign finance regulation is transparency. Give the voters the information they need to make good decisions and then let them make up their own mind.

In closing, I ask for a vote of do not pass from the committee. Thank you. I am happy to stand for any questions.

BELL, McANDREWS & HILTACHK, LLP
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MEMORANDUM

February 2, 2017

FROM: Charles H. Bell, Jr. & Terry J. Martin
Bell, McAndrews & Hiltachk, LLP

RE: Constitutional Issues in Proposed North Dakota Limit on Out-Of-State Contributions to Ballot Measure Committees

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CONCLUSION

A limit on the contributions of out-of-state donors to a North Dakota ballot measure campaign, as proposed in SB 2336, would violate the U.S. Constitution. Such a provision would likely be found to violate the First Amendment, since the right to contribute is protected by the free speech clause and its implied right to free association, and out-of-state campaign contributions to ballot measure campaigns both do not raise the specter of corruption that would be necessary in order to limit them, and additionally do not represent measures intended to prevent circumvention of base contribution limits. It may additionally be subject to invalidation for unconstitutional vagueness as against the Fourteenth Amendment, since "out-of-state" is undefined within the statutory scheme.

BACKGROUND

The North Dakota State Legislature is currently debating SB 2336, which provides:

> A person, political action committee, or measure committee that is soliciting or accepting a contribution for the purpose of aiding or opposing the circulation or passage of a statewide initiative or referendum petition or measure placed upon a statewide ballot by action of the legislative assembly at any election may not accept contributions exceeding fifty percent of its aggregate contributions during any reporting period from out - of - state persons and may not accept more than thirty percent of its aggregate contributions during any reporting period from any individual contributor.

Proposed North Dakota Century Code section 16.1-08.1-03.1

SB 2336 also provides:

> A sponsoring committee may not accept contributions exceeding fifty percent of its

aggregate contributions from out - of - state persons and may not accept more than thirty percent of its aggregate contributions from any individual contributor.

Proposed North Dakota Century Code section 16.1-08.1-03.13

ANALYSIS

The First Amendment provides, in relevant part, that "Congress shall make no law… abridging the freedom of speech." Protected above all other forms of speech is political speech. *McCutcheon v. Fed. Election Comm'n*, 134 S.Ct. 1434, 1441 (2014) (The First Amendment "has its fullest and most urgent application precisely to the conduct of campaigns for political office.") (quoting *Monitor Patriot Co. v. Roy*, 401 U.S. 265, 272 (1971)). Contribution limits such as the one proposed by the North Dakota State Legislature burden political speech, and therefore invoke the First Amendment, by restricting the amount a donor may contribute to aid his or her cause of choice in disseminating a political message. *Buckley v. Valeo*, 424 U.S. 1, 24-25 (1976). Therefore, in *Buckley*, the Supreme Court characterized contributions as invoking both the right to freedom of speech and its implied right of association, and determined that limits on such contributions are subject "to the closest scrutiny." 424 U.S. at 25 (quoting *NAACP v. Ala. ex rel Patterson*, 357 U.S. 449, 460-61 (1958)). This close scrutiny applies not only when the contribution limit is directed at an individual donor, but also when it is directed at an association such as a political action committee ("PAC"). *Fed. Election Comm'n v. Nat'l Conservative Political Action Comm.*, 470 U.S. 480, 495 (1985) ("To say that their collective action in pooling their resources to amplify their voices is not entitled to full First Amendment protection would subordinate the voices of those of modest means as opposed to those sufficiently wealthy to be able to buy expensive media ads with their own resources.")

In order for a limit on political contributions to meet Constitutional scrutiny, the government must bear the burden of proving that the limit is "closely drawn to match a sufficiently important government interest." *Buckley*, 424 U.S. at 25. The only permissible interests that have been recognized are in (1) combatting quid-pro-quo corruption and its appearance, and (2) preventing the circumvention of base contribution limits. *Fed. Election Comm'n v. Beaumont*, 539 U.S. 146, 153-155 (2003). The government must present evidence, rather than rely on conjecture. *Citizens United v. Fed. Election Comm'n*, 558 U.S. 310, 359-60 (2010); *McCutcheon*, 134 S.Ct. at 1450-51.

Contributions to a ballot measure campaign do not raise the specter of quid-pro-quo corruption as a matter of law, since no candidate is present to be corrupted. *Citizens Against Rent Control v. City of Berkeley*, 454 U.S. 290, 298 (1981) ("Referenda are held on issues, not candidates for public office. The risk of corruption perceived in cases involving candidate elections [citations omitted] simply is not present in a popular vote on a public issue."). Therefore, such contributions may not be limited. The proposed law appears to be similarly unsupported by any anti-circumvention interest, since nothing in the proposed law appears to be a measure intended to guard against the threat of illegal contributions reaching their source.

Although the proposed statutory provisions do not set a dollar threshold as the maximum amount a donor may contribute to a ballot measure campaign, a court would likely view the

scheme as a contribution limit. This is both because it would create an effective upper limit on the amount that a donor could so contribute and because it would force the recipient committee to make trade-offs among potential donors. *McCutcheon v. Fed. Election Comm'n*, 134 S.Ct. 1434, 1449 (2014) ("the Government may not penalize an individual for 'robustly exercis[ing]' his First Amendment rights.") (quoting *Davis v. Federal Election Comm'n*, 554 U.S. 724, 739 (2008)). Indeed, the U.S. Court of Appeal for the 2nd Circuit examined a law that capped contributions to candidates, PACs, and political parties at 25 percent of their total receipts under the same legal structure applicable to an outright limit on the amount a donor could contribute. *Landell v. Sorrell*, 382 F.3d 91, 137 (2d Cir. 2004), rev'd and remanded on other grounds sub nom. *Randall v. Sorrell*, 548 U.S. 230, 126 (2006).

Citizens Against Rent Control involved an unincorporated association formed to oppose a ballot measure during the April 1977 municipal election. The substance of the ballot measure was in effect to impose rent control on many residential units within the City of Berkeley. In generating its war chest to oppose the measure, the unincorporated association accepted nine contributions that exceeded the $250 limit on contributions to ballot measure committees created by local ordinance. The U.S. Supreme Court reviewed the case and cited *Buckley* for the proposition that contributions are protected speech. However, the Court held that the reasons the Court in *Buckley* approved limits on contributions in a candidate election campaign as constitutional were not present in a ballot measure campaign. 454 U.S. at 439 ("Whatever may be the state interest or degree of that interest in regulating and limiting contributions to or expenditures of a candidate or a candidate's committees there is no significant state or public interest in curtailing debate and discussion of a ballot measure.") In particular, the *Citizens Against Rent Control* Court found that there was no danger of *quid pro quo* corruption (dollars exchanged for political favors) in a ballot measure, since no candidate is being elected to office to repay any favor. *Id.* at 438. This serves to create the presumption that any contribution limit to a ballot measure committee is unconstitutional.

More broadly, State restrictions on out-of-state resident participation in their ballot measure processes have been met with general judicial disapproval. In *Buckley v. American Constitutional Law Foundation*, for example, the Supreme Court struck down a law permitting only registered voters of Colorado to circulate initiative petitions. 525 U.S. 182 (1999). In doing so, it rejected the state's proffered interest of ensuring that petition circulators would be subject to the state subpoena power. *Id.*

Even in the candidate election context, the corruptive nature of out-of-state contributions has been met with disagreement, with courts in Alaska appearing to hold a different view from courts elsewhere. The most well-known case dealing with out-of-state contributions is *VanNatta v. Kiesling*, in which the U.S. Court of Appeal for the 9th Circuit held unconstitutional a contribution limit on out-of-district residents to candidates, observing that "Measure 6 bans all out-of-district donations, regardless of size or any other factor that would tend to indicate corruption." 151 F.3d 1215 (9th Cir.1998). The implication of this is that out-of-district donations do not, on their own, implicate corruption. The 9th Circuit's conclusion in *VanNetta* was rejected by the Alaska Supreme Court in *State v. Alaska Civil Liberties Union*, which upheld the out-of-state contribution limit to its candidates

on the grounds that such a limit prevents out-of-state residents from having too much power on Alaska's electoral process. 978 P.2d 597, 615 (Alaska 1999).

The Alaska Supreme Court's opinion is subject to criticism because the U.S. Supreme Court has since made clear that a campaign finance law cannot be motivated by the desire to restrict the speech of some elements of society in order to enhance the relative speech of others. *McCutcheon*, 134 S. Ct. at 1441. Clearly, a law that controls the giving and receiving of contributions based on a legislatively-determined measure of the proper balance between contributions from in-state residents and out-of-state residents would violate this principle. The U.S. Court of Appeal for the 2nd Circuit found as much in *Landell v. Sorrell* when it discussed *State v. Alaska Civil Liberties Union* and rejected that there is anything different about out-of-state residents with regard to corruption flowing from speech-related activities. 382 F.3d 91 (2nd Cir. 2002) ("we are unpersuaded that the First Amendment permits state governments to preserve their systems from the influence, exercised only through speech-related activities, of non-residents"). The only recognized exception is for foreign national contributors, who may be barred altogether from contributing to candidate campaigns. *Bluman v. Fed. Election Comm'n*, 800 F. Supp. 2d 281 (D.D.C. 2011), aff'd, 132 S. Ct. 1087 (2012) ("It is fundamental to the definition of our national political community that foreign citizens do not have a constitutional right to participate in, and thus may be excluded from, activities of democratic self-government."). The logic for foreign nationals is very specific to them and would not likely be read to apply to citizens of other states as opposed to other nations.

Notwithstanding, a federal district court in Alaska recently upheld functionally the same restriction on out-of-state donors to candidates at issue in *State v. Alaska Civil Liberties Union*, but on grounds that Alaska candidates are especially susceptible to out-of-state influence. The court's reasoning was based on expert testimony that the "unique combination of Alaska's small population, geographic isolation, and great natural resources make it extremely dependent on outside industry and interests." *Thompson v. Dauphinais*, No. 3:15-CV-00218-TMB, 2016 WL 6602419, at *10 (D. Alaska Nov. 7, 2016). The reasoning in the *Thompson* decision is dubious in light of Supreme Court precedent and may not survive the pending appeal, which has been filed in the U.S. Court of Appeal for the 9th Circuit. Even if it were to pass muster on appeal, the fact that the decision relied on the special character of the State of Alaska would likely limit its applicability. More importantly for our purposes, the decision concerns candidates and not ballot measures, for which contribution limits are not allowed at all. *Citizens Against Rent Control*, 454 U.S. at 298; *Bellotti*, 435 U.S. at 790. Even in the initial *State v. Alaska Civil Liberties Union* decision, the Alaska Supreme Court acknowledged that the U.S. Supreme Court addressed the issue and found no corruption "in individual contributions relating to initiative campaigns, where there is no danger of an improper quid pro quo." 978 P.2d at 606. Thus, the conflict regarding out-of-state contributions to candidate campaigns does not reach out-of-state contributions to initiative campaigns, which remain governed by the *Citizens Against Rent Control* Court's bar on laws that restrict such contributions

In addition to the First Amendment problems presented by the contribution limit, the proposed law may also run afoul of the Fourteenth Amendment doctrine that vague laws are unconstitutional. *Grayned v. City of Rockford*, 408 U.S. 104, 108 (1972) ("It is a basic principle of due process that an enactment is void for vagueness if its prohibitions are not clearly defined.") Notwithstanding that North Dakota Century Code section 16.1-08.1-01 defines "person" as "an individual, partnership, political committee, association, corporation, cooperative corporation, limited liability company, or other organization or group of persons," the term "out-of-state" is not defined. One could speculate

that since the authors require campaign statements to list contributor addresses, an out-of-state contributor would be defined as one whose listed residence is outside of the state of North Dakota, but this in no way assures that either a court or members of the regulated community would reach such a conclusion. The absence of a definition is especially troubling given that individuals may have more than one address, but may choose to list an out-of-state address on their report. The lack of ability for a contributor to discern whether he or she qualifies as "out-of-state" fails to "give the person of ordinary intelligence a reasonable opportunity to know what is prohibited, so that he may act accordingly." *Grayned*, 408 U.S. at 108. Thus, the law may violate the Fourteenth Amendment.

North Dakota's proposed law is unlikely to meet the "closely drawn" test. No sufficiently important government interest is present, since the law does not aim to prevent political actors from evading valid contribution limits, and the U.S. Supreme Court has held that there is no anti-corruption interest present in a ballot measure campaign. Even in the candidate election context, every federal court of appeal to consider the issue has rejected that contributions to candidates from out-of-state sources may be limited to an extent greater than in-state contributions. The law would therefore likely be held to be invalid as a violation of the First Amendment. The lack of a definition for "out-of-state" contributor may fuel an additional challenge based on the Fourteenth Amendment's prohibition on vague laws.

Please do not hesitate to contact us if we can be of any further assistance.

SB 2336 2-3-17 #4 pg 1

GNDC
Greater North Dakota Chamber

Testimony of Andy Peterson
Greater North Dakota Chamber of Commerce
SB 2336
GVA Committee
Honorable Nicole Poolman - Chair
February 3, 2017

Madame Chairperson and members of the committee, my name is Andy Peterson and am here today representing the Greater ND Chamber, local chambers of commerce, and other business associations throughout North Dakota. Some members of the media describe the GNDC as the most prominent business organization in North Dakota. As a group we stand in opposition of SB 2336 and strongly urge a "Do not Pass" from the committee regarding this bill.

This bill, as nearly as I can tell, removes the constitutional right of free speech from those not living within state boundaries. It also puts restrictions on free speech and squelches the right of an individual and/or an organization to influence a ballot measure while, at the same time, providing undue influence to others. The founding fathers, in my opinion, felt this to be such an egregious wrong they were willing to sacrifice their own lives in order to protect free speech including the right to influence who might govern the self-governed. This is part and parcel of that process.

This bill, by virtue of unintended consequence, removes transparency from the initiated and referred measure process. It does this through intimidation via the stringent requirements required of those who donate in order to promote or defeat a measure. Clearly it is aimed at free speech and encourages yet to be developed processes that will eventually cloud the trail of money whether that money be in state or out of state money. These processes in and of themselves will gain undue influence and be subject to corruption.

If this measure were to pass, organizations might simply raise large amounts of money and invest in war chests with no specific measure in mind other than to ready themselves in case an unlikeable measure might arise. The bill does not specifically address how general war chest dollars might be spent, used, or reported in the case of ballot measures. Again, this is one small example wherein power might be amassed and corruption might occur.

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GNDC
Greater North Dakota Chamber

The thirty percent threshold also presents problems. Say a measure were initiated to rid the state of coal mining or oil extraction. How would a committee formed to fight the measure know when the thirty percent threshold was met? Without a timeframe no committee can reasonably establish the thirty percent threshold. Moreover, establishing that threshold before Election Day, then, stymie's free speech. The thirty percent threshold is impossible to establish without a final number regarding the total amount of contributions, and the total cannot be established without coming to the final number which generally happens on or just before Election Day.

The bill also does not define an "out-of-state contributor." Are in state contributors only those who spend the vast majority of their time in North Dakota? What about those who spend the winter in Arizona or Florida? Are they "out-of-state" contributors? In the case of a business are they in-state if they domicile their business in North Dakota? What about those businesses which are domiciled elsewhere but have significant operations in North Dakota? The bill is poorly written and is susceptible to constitutional question in this regard.

Lastly, this committee has already conducted a hearing on a much better bill (SB 2135) which establishes a study commission regarding initiated and referred measures. Once the study is complete legislative management will receive a report which legislators can act upon. One can rightfully conclude those recommendations would be thoughtfully processed and then vetted in the court of public opinion before changes are made.

SB 2336, however, creates more problems than it solves and should be given a "do not pass" from this committee.

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BALLOT MEASURE GROUP

TO: Andy Peterson, President and CEO, North Dakota Chamber of Commerce

FROM: Bradley J. Ketcher, Ballot Measure Group
brad@ballotmeasuregroup.com

DATE: February 2, 2017

RE: Constitutionality of Senate Bill No. 2336

I. Background

Introduced on January 23, 2017, Senate Bill No. 2336 (SB 2336) seeks to amend the North Dakota Century Code, to, inter alia, provide that supporters or opponents of statewide ballot measures may only accept up to 50% of their aggregate contributions from out-of-state persons during any reporting period:[1]

> A person, political action committee, or measure committee that is soliciting or accepting a contribution for the purpose of aiding or opposing the circulation or passage of a statewide initiative or referendum petition or measure placed upon a statewide ballot by action of the legislative assembly at any election may not accept contributions exceeding fifty percent of its aggregate contributions during any reporting period from out-of-state persons and may not accept more than thirty percent of its aggregate contributions during any reporting period from any individual contributor.

Proposed N.D.C.C. § 16.1-08.1-03.1(5) (emphasis in original) and:

> A sponsoring committee may not accept contributions exceeding fifty percent of its aggregate contributions from out-of-state persons and may not accept more than thirty percent of its aggregate contributions from any individual contributor.

Proposed N.D.C.C. § 16.1-08.1-03.13(8) (emphasis in original)

We believe the limitation on out-of-state contributions set forth in SB 2336 is unconstitutional and would not withstand challenge in court if enacted.

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1 In the chapter of the North Dakota Century Code sought to be amended, a "person" is defined as "an individual, partnership, political committee, association, corporation, cooperative corporation, limited liability company, or other organization or group of persons." N.D.C.C. § 16.1-08.1

II. Restrictions on Campaign Contributions Receive Close Scrutiny

Political contributions in general are a form of free speech and enjoy great protection under the Constitution. See Buckley v. Valeo, 424 U.S. 1, 14 (1976) ("The First Amendment affords the broadest protection to such political expression in order 'to assure [the] unfettered interchange of ideas for the bringing out of political and social changes desired by the people."). The Supreme Court has ruled that campaign contributions are "subject to the closest scrutiny" and can only be limited by a state that demonstrates "a sufficiently important interest and employs means closely drawn to avoid unnecessary abridgment of associational freedoms." Id. To survive constitutional challenge under the First Amendment, North Dakota would have to demonstrate that the harm caused by out-of-state contributions is real and that SB 2336 would alleviate the harm in a direct and material way. See Turner Broadcasting Sys., Inc. v. FCC, 512 U.S. 622, 664 (1994).

III. Restrictions on Out-of-State Contributions Are Not Favored by the Law

Four states have enacted statutory provisions limiting out-of-state political contributions: Hawaii, Oregon, Vermont, and Alaska. Hawaii's provision has not yet been challenged; Vermont and Oregon's provisions were struck down by federal courts as violating the First Amendment; and Alaska's provision withstood constitutional challenge in state court. None of these states is located in the same federal appellate circuit as North Dakota. However, the opinions provided by the courts on these statutes will influence any opinion issued on the North Dakota bill at issue.

A. Oregon

Oregon's statute prevented residents that lived outside of a candidate's electoral district from contributing more than 10% of the candidate's campaign funds. Oregon argued that this law served the sufficiently important state interest of (1) curbing corruption and (2) encouraging a republican form of government.

1. Curbing Corruption

A three-judge panel of the Ninth Circuit Court of Appeals found that the law was not closely tailored to prevent corruption, because it did not limit the amounts of contributions made by any out-of-state contributor. Vannatta v. Keisling, 151 F.3d 1215, 1221 (9th Cir. 1998). However, the Ninth Circuit's opinion on this point, although favorable, is not applicable to restrictions on ballot measures such as SB 2336. The Supreme Court has ruled that there is no danger of quid-pro-quo corruption with respect to ballot measures because there is no danger of a candidate repaying his contributors with future political acts. First Nat'l Bank of Boston v. Bellotti, 435 U.S. 765, 790 (1978) ("The risk of corruption perceived in cases involving candidate elections . . . simply is not present in a popular vote on a public issue."). Therefore, curbing corruption can never be a sufficiently important state interest in limiting contributions to ballot measure campaigns by out-of-state residents.

2. Republican Government

A majority of the court concluded Oregon did not have a sufficient interest in restricting out-of-state contributions in order to promote a republican form of government. Vannatta, 151 F.3d at 1217. ("The right to a republican form of government has never before been recognized as a sufficiently important state interest."). The Ninth Circuit's majority opinion is binding on the lower federal courts in Alaska, California, Oregon, Montana, Idaho, Nevada, and Arizona.

B. Vermont

Vermont's statutory provision limited out-of-state contributions to 25% of all candidate contributions.

1. Corruption

Vermont argued that its limitation furthered the sufficiently important state interest of limiting corruption. The Second Circuit Court of Appeals found that the law was not narrowly tailored towards this interest because it prohibited small contributions from out-of-state residents once the 25% cap was reached and such small contributions posed no danger of corruption. Landed v. Sorrell, 382 F.3d 91, 147 (2004). As discussed previously, corruption can never be a sufficient state interest to justify limiting contribution with respect to a ballot measure. Bellotti, 435 U.S. at 790.

2. Distortions to Political System

The Second Circuit also ruled that the state did not have a legitimate interest in preventing "distortions to its political system" by non-state residents. Id. at 148 ("[T]he government does not have a permissible interest in disproportionately curtailing the voices of some, while giving others free reign, because it questions the value of what they have to say.") The Second Circuit's opinion is binding on the lower federal courts of Connecticut, New York, and Vermont.

C. Alaska

Alaska's statutory provision limits contributions to groups or political parties by nonresident individuals to 10% of total contributions during the calendar year.

1. Curbing Corruption

The U.S. District Court for the District of Alaska has ruled that the provision further the State's interest in avoiding actual or apparent quid-pro-quo relationships. Thompson v. Dauphinais, No. 3:15-cv-00218, (D. Ala. Nov. 7, 2016). However, as previously noted, corruption can never be a sufficient state interest in restricting contributions to a ballot measure campaign. Bellotti, 435 U.S. at 790.

2. Dominating the Political Process

The State of Alaska has also argued that the statutory provision prevents nonresidents from dominating the political process and promotes the goal of encouraging voter participation in campaigns. State v. Alaska Civil Liberties Union, 978 P.2d 597, 615 (Ala. 1999). The Alaska Supreme Court has upheld the provision, ruling that the restrictions are "closely drawn to achieve the goal of preventing non-resident contributors from drowning out the voices of Alaska residents." Id. at 617. The court relied on Alaska's unique history in reaching this conclusion.

IV. Attorney's Fees Available to Winning Plaintiffs in First Amendment Litigation

Lawsuits brought against states for violating the First Amendment are typically brought in federal court under 42 U.S.C. § 1983, which provides that "[e]very person who, under color of any statute . . . subjects, or causes to subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights . . . secured by the Constitution . . . shall be liable to the party injured in an action at law . . . ." Pursuant to 42 U.S.C. § 1988, the prevailing party in a "section 1983" lawsuit may be allowed reasonable attorney's fees as part of its costs. See 42 U.S.C. § 1988(b); Yamada v. Snipes, 786 F.3d 1182 (9th Cir. 2015) (affirming award of attorney's fees to plaintiff's attorneys challenging Hawaii statute limiting contributions to noncandidate committees); Sampson v. Buescher, 625 F.3d 1247 (10th Cir. 2010) (affirming attorney's fee award to plaintiff's attorneys challenging Colorado registration requirements for ballot measure contributors).

V. Conclusion

In conclusion, it is our view that the provisions of the North Dakota bill limiting contributions by out-of-state residents to a ballot measure campaign is unconstitutional. Contribution limits are usually justified as anti-corruption measures, but North Dakota, like all states, does not have a sufficiently strong state interest in limiting corruption to justify restricting contributions to ballot measure campaigns. See, e.g., Citizens Against Rent Control v. City of Berkeley, 454 U.S. 290, 298 (1981).

Moreover, only one court, the Supreme Court of Alaska, has ruled that a state can discriminate against non-resident contributors in order to prevent the "drowning out" of the voices of its own state residents. See Alaska Civil Liberties Union, 978 P.2d at 615. It should be noted that this ruling was based on particularities of Alaska's history and may have less application to North Dakota.

Importantly, the Eighth Circuit Court of Appeals, which includes North Dakota in its jurisdiction, has interpreted Supreme Court precedent to mean that "the state may abridge political speech in the form of campaign contributions only to address the reality or perception of undue influence or corruption attributable to large contributions." Russell v. Burris, 146 F.3d 563, 568 (8th Cir. 1998) (emphasis added). As noted previously, there can never be a sufficient state interest in restricting contributions to a ballot measure campaign. Bellotti, 435 U.S. at 790. Therefore, it is highly unlikely that a federal court within the Eighth Circuit will find that North Dakota has a sufficiently strong interest to justify discriminating against out-of-state contributors to statewide ballot measure campaigns.

And finally, if SB 2336 were enacted and then challenged in court and struck down like Vermont's and Oregon's on First Amendment grounds, the State of North Dakota would likely be liable for the prevailing party's attorney's fees.

NORTH DAKOTA
Farmers Union

SB 2336 2-3-17 # 5

February 3, 2017
SB 2336
Senate Government and Veteran Affairs Committee

Chairman Poolman and members of the Committee,

My name is Kayla Pulvermacher and I'm here to represent the members of North Dakota Farmers Union. We oppose SB 2336.

Our members have had longstanding policy in support of North Dakota's initiated measure and referral process. In the history of our organization, we have used these process a number of times to address our member's concerns with issues in the state or laws that have been passed. Our members believe that SB 2336 creates restrictions that would only seek to limit their voices at the ballot box, as it ultimately their decision what issues the organization works on their behalf.

Finally, it creates a number of questions at to how such reporting and requirements could work. North Dakota Farmers Union, along with a number of the groups in the room, have worked together to pass or defeat measures that have been brought to the ballot. How could we continue to do this important work while still keeping our dollar ratios in balance? Would campaigns have to keep track of the dollars and refund organizations their donations in order to keep within the intentions of the law? These are just some of the questions that come to mind.

I can take any questions that you may have.

SB 2336 2-3-17 #6

Friday, February 03, 2017

SENATE GOVERNMENT & VETERANS AFFAIRS COMMITTEE
SB 2336

CHAIRMAN POOLMAN AND COMMITTEE MEMBERS:

My name is Jack McDonald. I'm appearing on behalf of the North Dakota Newspaper Association and the North Dakota Broadcasters Association. We respectfully **oppose SB 2336** and respectfully request that you give it a DO NOT PASS.

North Dakota's Constitution provides all citizens free speech.

NORTH DAKOTA CONSTITUTION - ARTICLE I
DECLARATION OF RIGHTS

Section 4. Every man may freely write, speak and publish his opinions on all subjects, being responsible for the abuse of that privilege. In all civil and criminal trials for libel the truth may be given in evidence, and shall be a sufficient defense when the matter is published with good motives and for justifiable ends; and the jury shall have the same power of giving a general verdict as in other cases; and in all indictments or informations for libels the jury shall have the right to determine the law and the facts under the direction of the court as in other cases.

It doesn't say every person except those living out of state. It doesn't say every person as long their contribution doesn't exceed certain percentages. It just says every person has a right of freedom of speech.

As you've heard from prior testimony, the U.S. Constitution, and the U.S. Supreme Court both provide that political contributions reflect a person's exercise of his or her rights of public expression or free speech.

This bill flies in the face of both the North Dakota Constitution and the U.S. Constitution.

Additionally, the bill is vague to the extreme regarding definitions of out of state contributions. I have six grown children – four of whom live out of state. If I start a statewide initiative would their contributions to their father's efforts be considered out of state contributions? They were born, raised and went to college in North Dakota.

How about someone who works for a North Dakota business, such as KLJ Architects, but is assigned to its Sioux Falls office? Are their contributions now the feared "out-of-state" variety?

North Dakota's initiative and referendum laws have provided us with unique powers to control and shape our state government. Why would we want to clamp down on that great process by imposing the unconstitutional restrictions called for in SB 2336? While well intentioned, it should be defeated.

If you have any questions, I will be happy to try to answer them. THANK YOU FOR YOUR TIME AND CONSIDERATION.

Testimony for 2017 Senate Bill 2336
House Human Services Committee
Presented by Waylon Hedegaard
President of the North Dakota AFL-CIO
February 3rd.

Madame Chair, Members of the Committee:

I certainly understand the intended aim of SB 2336; the ballot initiative process should be kept in the hands of the citizens of North Dakota and not a billionaire from California. Getting money out of politics is something I agree with wholeheartedly. However, I have serious reservations about this bill. Though intended to limit the influence of big money in our initiative system, I fear it may do the opposite.

The increased reporting requirements alone will create enough paperwork to inhibit a truly grassroots ballot initiative. In addition to the reports now required, this bill makes it mandatory that an expenditure report be filed "on the first business day of each week." Weekly reports filed on an exact day.

Moreover, if the measure committee "receives any contribution of two hundred dollars in the aggregate, the person or committee shall file with the secretary of state a statement listing the name and street address of that contributor within seventy-two hours of the receipt of the contribution." So if someone has already given $100 and then later gives another $100, the sponsoring committee has 72 hours to report this total donation. This would require constant tracking of finances to assure that the next donation doesn't put the aggregate total for that contributor over the $200 limit.

Much of this info already has to be reported, but for a truly grassroots ballot initiative or referendum, these are onerous requirements.

In addition, the sponsors of these initiatives "may not accept contributions exceeding fifty percent of its aggregate contributions during any reporting period from out-of-state persons"

When this is referring to out of state persons, I am assuming that refers to not just actual human beings, but also organizations and corporations. There are thousands of corporations and organizations operating in North Dakota that cross state boundaries. Companies like MDU, Walmart and Costco, to name just a few, cover regions far greater than North Dakota alone along with organizations like Planned Parenthood, the AFL-CIO and various religious groups. My own union, Boilermakers local 647, covers a three state region.

With this in mind, what actually defines in-state money and out-of-state money? How can this be tracked? If it could be tracked, aren't there a vast number of

loopholes that could be exploited by a billionaire who is willing to spend a million dollars to change North Dakota Law? At the same time these are the onerous requirements that will hinder the average citizens group from pursuing an initiative.

And I have equal difficulty with the no "more than thirty percent of its aggregate contributions during any reporting period from any individual contributor." Does this mean that if a citizen has a great ballot initiative that they think would make all of North Dakota better, and they manage to solicit a donation of $10,000 from the Chamber or a local labor union or a private individual, do they now have to wait until sufficient matching funds are available so that the single donation is under 30% limitation?

Keeping North Dakota democracy in the hands of its rank and file citizens is an admirable goal. Unfortunately, this bill appears to erect enough obstacles in North Dakota's initiative process that only an organization with substantial resources will be able to navigate the system.

I love our state history with the ballot initiative. It's built right into the North Dakota constitution. Article III, Section 1 states " While the legislative power of this state shall be vested in a legislative assembly consisting of a senate and a house of representatives, the people reserve the power to propose and enact laws by the initiative, including the call for a constitutional convention; to approve or reject legislative Acts, or parts thereof, by the referendum; to propose and adopt constitutional amendments by the initiative; and to recall certain elected officials. This article is self-executing and all of its provisions are mandatory. Laws may be enacted to facilitate and safeguard, but not to hamper, restrict, or impair these powers. "

I think this bill goes a long way toward Hampering, restricting and impairing the process. We have to be very careful in changes to the initiative and referendum system.

This committee already heard testimony on commissioning a study to see what could be done to improve this process. I do not know where this committee is in amending that bill, but that a thoughtful diverse study would be a far better alternative.

I urge this committee to vote a "do not pass" on SB 2336.

SB 2336 2-3-17 #8

NDNA
NORTH DAKOTA NEWSPAPER ASSOCIATION

Testimony of Steve Andrist
Executive Director, North Dakota Newspaper Association
Before the Senate and Veterans Affairs Committee
In Opposition to SB 2336

Chairman Poolman and members of the committee, my name is Steve Andrist and I'm the executive director of the North Dakota Newspaper Association, which represents the state's 90 daily and weekly newspapers.

Somehow it just feels like there's something wrong when a businessman from California or a tobacco company from North Carolina pumps millions of dollars into a campaign to influence the laws of North Dakota.

There isn't. We may dislike it or find it distasteful or even wish that it wasn't so, but the fact is that commercial speech is free speech, and free speech is a right that is guaranteed in the Bill of Rights of our Constitution.

While understanding the temptation to try protect North Dakotans from the influences of deep pockets from elsewhere, we just can't pick and choose when to apply the rights guaranteed by our constitution. Those rights must be upheld even in cases when we're not entirely comfortable upholding them. This view is universally held by the diverse group of citizens who make up our board of directors, people who come from communities like Minnewaukan, Crosby, Dickinson, Garrison, Steele, Fargo and Linton.

We see great value in requiring the reporting of expenditures that are made to influence public policy in our state, but not to limiting how much they can spend. When voters are informed about who is providing the funds for or against a measure, we can trust them to decide whether that information will make a difference in how they vote.

For these reasons I ask you to recommend a "no" vote on 2336.

Thank you.

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www.ndna.com

NDLA, S GVA - Winings, Cari SB 2336 2-3-17 #9 pg 1

[redacted]m: Poolman, Nicole
[redacted]t: Thursday, February 02, 2017 12:23 PM
To: NDLA, S GVA - Winings, Cari
Subject: FW: Senate Bill 2336
Attachments: Senate Bill 2336.pdf

Here is some testimony for tomorrow's bill.

Thanks,
Nicole

From: Robert Romine [mailto:RRomine@kxnet.com]
Sent: Wednesday, February 1, 2017 5:27 PM
To: Poolman, Nicole <npoolman@nd.gov>; Bekkedahl, Brad <bbekkedahl@nd.gov>; Meyer, Scott <scottmeyer@nd.gov>; Vedaa, Shawn A. <svedaa@nd.gov>; Marcellais, Richard <rmarcellais@nd.gov>
Cc: Beth Helfrich <bethh@ndba.org>; Jack McDonald <jackmcdonald@wheelerwolf.com>
Subject: Senate Bill 2336

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[redacted]rable Senator's:

I am writing on behalf of the KX News Network in Western ND and our parent company Nexstar Media Group as well as my fellow broadcasters across the state.

My correspondence is in regards to SB 2336 to give you context as to how this bill will negatively affect broadcasters across the state. By limiting the out of state contributions this bill will limit the investment in broadcast advertising. Money that goes into creating local content that the people in the communities we serve have come to rely on.

We refer to it as "Localism". Relevant content that informs, entertains and connects our viewers to the very information that shapes their daily lives. Breaking news events like the Dakota Access Pipeline Protests, the funeral coverage of Deputy Allery in Rolette county, local and statewide debates, four hours a day of local news from across Western ND and the live coverage of HS tournaments and local sporting events. Severe weather coverage including school closings, business closings and above all early warning technology and staffing that keeps our viewers safe and ahead of the storms. These are just a few of our commitments to the viewers we serve and the people you represent.

The effort to limit contributions at any level has a direct impact on our ability to employ valuable local people that are responsible for ensuring that the aforementioned commitments are fulfilled on a daily basis; on air, online and in social media platforms. It's a significant investment each year to fund these commitments and anything that limits that funding impacts these resources and in turn, affects the ability to not only hold the status quo; but virtually eliminates the ability to innovate beyond it.

[redacted]k for your help. We ask that you say no to SB 2336 in committee this Friday. I am available to shed any additional [redacted]on this important issue and would encourage you to call my cell at 701-595-3769 should you need more input from the Broadcasters side of the issue.

Bob Romine
Vice President and General Manager
KX Network
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KX News does not discriminate in advertising contracts on the basis of race, ethnicity or gender and further requires that in the performance of all KX News advertising agreements, KX News requires that each party not discriminate on the basis of race or ethnicity.

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