Senate State & Local Government Committee
Chairman Kristen Roers
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Testimony By Shane Goettle
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SB 2312

Chairman Roers and members of the Senate State and Local Government Committee, my name is Shane Goettle, and I am here today as a lobbyist on behalf the Brighter Future Alliance, a 501(c)(4) advocacy organization operating in compliance with federal law.

I am just going to speak to Section 2 beginning on lines 17-22. That section is unworkable, and because it would serve as prior restraint on speech, also unconstitutional.

The History of 501(c)(4) Advocacy

For decades, the voice of business and industry was prohibited from participating in our democracy while unions, environmental groups and certain anti-business groups were given free reign. Then came Citizens United. The U.S. Supreme Court, in the Citizens United decision, fostered the modern advocacy organization and restored the rights of business and industry, safeguarding their important voice in matters of public policy and elections.

Since that decision, many forces have been at work attempting to overturn the ruling and effect of Citizens United by legislating a regulatory regime at the state level that impedes and restricts the effectiveness of 501(c)(4) advocacy organizations. The legislation in front of you today, specifically the tracing requirements in Section 2, would have the effect of muzzling the voice of business and giving certain groups in the various states exactly what they want: a one-sided debate on taxes, regulations, and commerce.

A 501(c)(4) can engage in any mission or cause. Some may never engage in "electioneering", while others may put together voter guides to reveal the voting records of legislators who support or oppose their main issues. Some may zero in on those voting records in other ways, such as through radio or flyers. If that kind of activity occurs in the context of an upcoming election, specifically by naming someone who is up for election that cycle, the 501(c)(4) is now "electioneering" or transmitting information that might be relevant to voters concerning a particular candidate. But keep in mind, this is NEVER the primary activity or purpose of a 501(c)(4). It cannot be under federal law.

Thus, you should not treat non-profits like you would candidates, political committees, or measure committees. These all have a well-defined political purpose. On the other hand, most 501(c)(4)s operate in multiple states, focusing on a variety of issues, with only a small fraction of spending used for "electioneering."

Brighter Future Alliance

The Brighter Future Alliance is a social education 501(c)(4) non-profit. Its mission is to advance the cause of freedom and free enterprise to further the common good and general welfare of the citizens of North Dakota and the United States. Much of its work and spending is in the public policy arena. Brighter Future Alliance has promoted voting, free and fair elections, infrastructure development, workforce safety and a number of other issues confronted by our state's leading businesses and industry. Actual political campaign activity is limited, by IRS regulation, to less than 25%.

The impact of Brighter Future Alliance's political involvement, while not a major part of its overall effort, has been significant. For example, it got involved against Measure 3 in the 2020 election cycle, a ballot measure that would have overturned our election laws with jungle primaries and rank choice voting. Measure 3 was ultimately kept off the ballot through a court challenge.

Brighter Future Alliance also helped defeat the legalization of recreational marijuana and its threat to workplace safety.

In the case of the Brighter Future Alliance, in accord with its missions, it will always pursue a pro-business, responsible government agenda.

What is wrong with Section 2 of SB 2312?

We may not always like the protections afforded by the constitution, especially when we disagree with the activity protected, but the constitution is the foundation of our democracy and requires adherence to its principles above all else.

In Citizens United v. the FEC, the U.S. Supreme Court held that a prohibition on corporate independent expenditures and electioneering communications is a ban on speech and "political speech must prevail against laws that would suppress it, whether by design or inadvertence." Accordingly, laws that burden political speech are subject to "strict scrutiny," which requires the government to prove that a restriction furthers a compelling interest and is narrowly tailored to achieve that interest.

As defined in Citizens United, business and industry have the right to come together and pursue an agenda in support of their interests. Further, the constitution protects the identity of the members of non-profit associations. By requiring disclosure of donations made to this nonprofit by its contributors AND subcontributors, the bill demands a disclosure and tracing requirement that is so onerous, it will operate as an unconstitutional prior restraint on speech.

Let me illustrate by way example:

- First, keep in mind that, by federal law, a 501(c)(4)'s primary mission can NOT be to "electioneer" in advance of an election. It's primary mission, to maintain its nonprofit status, must be what is termed in federal law as "social welfare."

- To maintain its status as a nonprofit "social welfare" entity, a safe harbor rule that most 501(c)(4)s follow is that that over 75% of expenditures MUST be on mission related work. Thus, "electioneering" expenditures must then be less than 25% of total expenditures. (Brighter Future Alliance follows this rule.)
- Let's suppose a 501(c)(4) operates in multiple states, engages in multiple issues (election laws in one state, recreational marijuana in another, religions freedom in a third, etc.)
- Let's also suppose it raises $1m dollars to support its communication efforts on all these issues in the various states. It receives money from churches, individuals, businesses, trade associations, and other nonprofits.
- It picks one state where it puts out a voter guide in the weeks leading up to the election rating certain legislators. Suppose the voter guide costs $10 thousand to produce and distribute. Let's assume this voter guide meets the requirements of an independent expenditure and is done within the context of an upcoming election.
- While the independent expenditure amounts to only 1% of its total expenditures, Section 2 of SB 2312 would have it reveal all its contributors and subcontributors who gave over $200.

And herein lies the problem. First, donations are not earmarked and so cannot be attributed to one use. Rather than engage in the exhaustive disclosure requirement to list ALL donors over $200 (going back how far?), and attempting to secure information pertaining to their subdonors, the organization will choose to simply refrain from the speech it intended.

Government regulation has been effectively used to mute a voice that would have otherwise spoken up. Under the 1st Amendment to the U.S. Constitution, this "muzzling" serves as a prior restraint on speech. It may also impact the ability to bring people together for such purposes, which also infringes on freedom of association. Perhaps some large multi-state 501(c)(4)s might get creative and structure themselves in a way that arranges their disclosures to fit the political winds, but that just makes another point: small entities are chased out of using their voice in the political process while large nonprofit entities, with larger staff and more sophisticated software and legal acumen, find yet another way to continue to engage in elections.

Four final points to summarize:

1. The concept of tracing true source of funds from contributors through to subcontributors is unworkable. How are non-profits to know if someone bundled donations? How is it to know which members of a church are responsible? If a business contributes, is it really the owner, employee or stockholders that must be identified? Where does it stop? Who determines where it stops? Imagine the bureaucratic nightmare and cost if every donation must be traced to its supposed "true source."

2. The tracing requirement proposed in SB 2312 is extreme and unlike anything else in North Dakota election law. No other candidate or measure related group is required to trace their donations like what is proposed in this bill. Clearly, this requirement is intended to target and punish 501(c)(4) organizations that engage in political speech.

3. The new reporting required creates a mountain of bureaucratic excess for the Secretary of State and the affected non-profits. And the truth is that the state's current system cannot handle it.

4. Under Citizens United, business and industry have the right to come together and pursue a mission in support of their interests. The constitution protects their speech. The constitution also protects their identity as members of an association. (See the U.S. Supreme Court case: *Americans for Prosperity v Bonta, Attorney General of California*, 2021.)

Conclusion

When taken in its entirety, Section 2 of SB 2312 is obviously designed to do through legislation what anti- business forces could not do in the court -- limit the voice of business in our political process and upend the Citizen's United decision.

On behalf of Brighter Future Alliance, I encourage you to reject SB 2312 with a "do not pass."