Approved: February 17, 2010
Date

# MINUTES OF THE SENATE ETHICS AND ELECTIONS COMMITTEE

The meeting was called to order by Chairman Vicki Schmidt at 9:38 a.m. on February 3, 2010, in Room 144-S of the Capitol.

All members were present.

Committee staff present:
Mike Heim, Office of the Revisor of Statutes
Sean Ostrow, Office of the Revisor of Statutes
Reed Holwegner, Kansas Legislative Research Department
Carolyn Long, Committee Assistant

Conferees appearing before the Committee:
Terrie Huntington, Kansas Senator
Tom Moxley, Kansas House of Representatives
Carol Williams, Director, Governmental Ethics Commission
Kay Hale, Co-President, League of Women Voters, Lawrence/Douglas County
David Peterson
Clayton Callen, Graves Bartle Marcus & Garrett

Others attending:
See attached list.

The Chair opened the hearing on **SB 418 - Campaign finance; electioneering communications; reporting.** Staff explanation of this legislation stated that it would amend the Campaign Finance Act to require any person who spends $500 or more per calendar year for electioneering communications to submit a campaign finance report to the Secretary of State or county election officer of the county in which the candidate resides and specifies what information must be included as well as when the report must be filed. It was noted that there was no mention of phone communication and the revisor indicated perhaps this should be added.

Senator Terrie Huntington was introduced by the Chair. Senator Huntington stated that under this bill issue ads may be mailed but would provide knowledge of who is financing the ads (Attachment 1).

Representative Tom Moxley spoke in favor of the bill reiterating that the statute would not change the message of the ad, the spending, or limit the advocacy group but would allow the public to see who is financing the campaign (Attachment 2).

Kay Hale, League of Women Voters of Kansas, presented testimony urging the committee to pass this legislation which they felt would facilitate greater transparency in campaign electioneering (Attachment 3).

David W. Peterson, in supporting the bill, expressed his concern that until campaign finance disclosure requirements are improved, Kansans will not feel as though they have a voice (Attachment 4).

Speaking in support of the bill, Carol Williams, Director, Governmental Ethics Commission, indicated that this was a Commission recommendation. She said requiring issue ad disclosures will help voters follow the money in an ever-evolving campaign finance arena and urged passage (Attachment 5).

Clayton Callen representing Graves Bartle Marcus & Garrett, spoke in opposition to **SB 418** indicating that disclosure limits freedom of speech violating the 1st Amendment and that the current draft is vague (Attachment 6).

Written testimony in opposition to this legislation was submitted by Derrick Sontag representing Americans for Prosperity (Attachment 7).

The Chair thanked all those appearing before the Committee.

The meeting was adjourned at 10:30 a.m. The next meeting is scheduled for February 4, 2010.

# SENATE ETHICS AND ELECTIONS COMMITTEE GUEST LIST

DATE: Wednesday, February 3, 2010

| NAME | REPRESENTING |
|---|---|
| DAVID PETERSON | VOTING CITIZENS OF KANSAS |
| Kay Hale | League of Women Voters of KS. |
| Carol Jacobson | League of Women Voters of KS |
| Jeff Glendenning | KS Chamber |
| Judy Moler | KGEC |
| Carol Williams | KGEC |
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STATE OF KANSAS

TERRIE W. HUNTINGTON
SENATOR, 7TH DISTRICT
6264 GLENFIELD
FAIRWAY, KANSAS 66205
(913) 677-3582

STATE CAPITOL, ROOM 135-E
TOPEKA, KANSAS 66612
(785) 296-7369
TERRIE.HUNTINGTON@SENATE.KS.GOV

TOPEKA

SENATE CHAMBER

COMMITTEE ASSIGNMENTS
MEMBER: ASSESSMENT AND TAXATION
ETHICS AND ELECTIONS
PUBLIC HEALTH AND WELFARE
LOCAL GOVERNMENT
TRANSPORTATION

February 3, 2010

Testimony by Senator Terrie Huntington
Senate Committee on Ethics and Elections
Senate Bill 418

Madam Chairwoman Schmidt, Vice Chairman Brungardt and Ranking Minority Leader Faust-Goudeau:

The State of Kansas has made significant progress in initiating legislation on Campaign Finance Reform over the past several years. A bipartisan group of House and Senate members began meeting in 2004 with the purpose of elevating our "D" ranking given to us by The Reform Institute, whose mission "is to help reestablish the essential connection between citizens and their government, and to renew the American tradition of meaningful, active citizen participation in the nation's civic life."

In other words, they want as many people as possible to be engaged in the election process, whether that be candidates running for office, those assisting in the election of a candidate, or those contributing monies to a candidate.

After U.S. Senator John McCain's presidential race in 2000, The Reform Institute was founded in 2001 to facilitate campaign finance reform and the distribution of soft money—those unregulated dollars from corporations, unions, and very wealthy individuals. Money talks, and it certainly influences election outcomes. The McCain-Feingold legislation tried to address this issue at the federal level.

However, as you've heard, last month the US Supreme Court struck down a major portion of the 2002 campaign-finance reform law, saying it violates the free-speech right of corporations to engage in public debate of political issues.

From a recent internet article—"In a landmark 5-to-4 decision announced Thursday, the high court overturned a 1990 legal precedent and reversed a position it took in 2003, when a different lineup of justices upheld government restrictions on independent political expenditures by corporations during elections."

STATE HOUSE
TOPEKA, KANSAS 66612
(785) 296-7649
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Government may not suppress political speech on the basis of the speaker's corporate identity," Justice Anthony Kennedy wrote in the 57-page majority opinion. "No sufficient governmental interest justifies limits on the political speech of nonprofit or for-profit corporations." (Note attachments)

That overturns a portion of McCain-Feingold; but it does not have any bearing on the bill before you today, which deals with issue advocacy or "electioneering communications."

Under this bill, issue ads can still be mailed; but just like we, as candidates, have to report our contributions, those individuals or corporations who contribute more than $500 per year to an organization or PAC that sends electioneering communications, must be reported by that organization or PAC, in the same manner by which we, as legislators or candidates, must report our contributors. And that includes name, address, city, state, zip code, and occupation or employer, as required by the Kansas Governmental Ethics Commission.

To illustrate, Candidate Doe runs for an office, and organization HelpsALot mails out a postcard that says, "candidate Doe believes that every person in the district should eat doughnuts three times a day. Call Candidate Doe and tell them doughnuts are the leading cause of obesity. We should be eating apples three times daily." Who financed that mailer? Was it the local orchard, the neighborhood bread maker? Did Candidate Doe's next door neighbor, with whom Ms. Doe has not spoken in five years, send HelpsALot $10,000 to campaign against her?

The mailer can still be sent, but now we'll know exactly who is financing HelpsALot organization, and that allows the candidate the ability to respond appropriately and in a timely manner.

Kansas is now a grade B+ with its campaign reform measures. The Legislature has passed four of the five initiatives targeted by the Ethics Commission that were the most onerous; and we now have electronic reporting, which assists in last-minute campaign contribution reporting.

It's time for Kansas to receive an A+ rating in campaign finance laws. Let's pass the last of the initiatives and provide sunshine to our campaigning practices to allow our constituents to make informed votes when they go to the polls or fill out their absentee mail-in ballots.

# # #

# The Bill of Rights

protects citizens' privacy against
EXCESSIVE SNOOPING.



1-3

# Unfortunately, the Kansas Snoop Dog is at it again!

## When you go to the doctor, you expect a right to privacy.

Attorney General Phill Kline has subpoenaed women's private medical records on his personal crusade against abortion.[1]

## Phill Kline feels he has the right to snoop through your private medical records.

Kline spent hundreds of thousands of taxpayer dollars in court so he could access women's private medical records.[2]

## Phill Kline is more interested in your personal life than tracking down dangerous criminals.

While Attorney General Kline has been chasing after women's private medical records, the rate of violent crime has risen by nearly 69%.

| Total number of incidents: | 2002 | 2005[3] |
|---|---|---|
| Murder | 45 | 107 |
| Rape | 844 | 1,034 |
| Robbery | 982 | 2,198 |
| Agg. Assault/Battery | 4,713 | 7,103 |

# Snoop Dog Kline.

## He's sniffing out everything but crime.

**Check the Facts:** 1. Kansas Supreme Court Case #93-383. 2. *Topeka Capital-Journal*, Chris Moon, April 6, 2006. 3. Kansas Bureau of Investigation, Crime Statistics 2002-2005.

1-4

1-5

# WARNING:

## Your private medical records aren't safe from the Snoop Dog.

6505 E. Central #106
Wichita, KS 67206

PRSRT STD
U.S. Postage
PAID
SM&M

.PP0602 | GCIU | Paid for by Kansans for Consumer Privacy Protection

# Think law-abiding citizens have a right to privacy? Not while Snoop Dog Kline is in office.

## The **Attorney General** has made it a priority to invade our privacy.

Instead of going after real criminals, Phill Kline spent the last three years snooping through women's private medical records on a personal crusade against abortion.[1]

## He's not the **only one** who's been invading our privacy.

While Attorney General Kline was chasing women's private medical records, the rate of identity theft increased by nearly 77%[2], and robberies by more than 138%.[3]

# Snoop Dog Kline.

## He's sniffing out everything but crime.

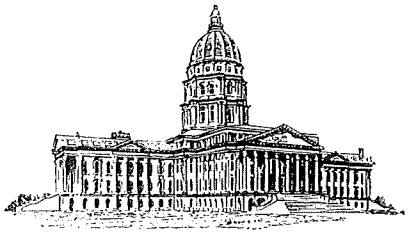
**Check the Facts:**

1. Kansas Supreme Court Case #93-383.
2. Federal Trade Commission, Identity Theft Complaint Data: Figures and Trends in Kansas, 2005.
3. 2005 Kansas Bureau of Investigation Reported Crime Index.

9-1

STATE OF KANSAS
HOUSE OF REPRESENTATIVES

DOCKING STATE OFFICE BLDG.
7TH FLOOR
TOPEKA, KANSAS 66612
785 296-7636
moxley@house.state.ks.us



1852 SOUTH 200 ROAD
COUNCIL GROVE, KS 66846
620-787-2277
tmoxley@tctelco.com

TOM MOXLEY
REPRESENTATIVE, 68TH DISTRICT

February 3, 2010
**Testimony in reference to the Third Party Advocacy:**

Chairman Schmidt, Committee Members and Colleagues,

Are we driving a modern car with Model T rules? My colleagues and I will provide evidence that this is the case. The thesis behind this third party advocacy amendment is that **if the public knows the motive of the donors to these groups, it can better weigh the merits of the issue or campaign.** I call your attention to a nationally recognized grade card for Kansas Election Laws. Please see attached Exhibits A.

Let me begin by stating the obvious: at the very core of democracy lies the need for free and fair elections with an informed electorate. Failure of any of these; Free, Fair; or Informed will necessarily lead to a poor conclusion.

The problem we wish to address today is Third Party Advocacy. This is ripe for abuse because of the lack of transparency of who the donors are and this leaves the electorate unable to judge from what position the arguments are made.

Let me give you an example that happened last year during the Sunflower Coal plant debate. Thousands of dollars were spent in Kansas by a single advocacy group for postcards, etc. This big spending third party advocacy group was asking voters to contact their candidate and tell them "Call Joe Smith and thank him for keeping our air clean." Or "Joe Smith stood up to big coal and helped keep Kansas clean". Interestingly, we believe that the main underwriter of this group was a major Natural Gas Producer who clearly would gain tremendous financial advantage if the coal plant were to be turned down. Do our citizens have the right to hear this Natural Gas producer's side of the issue? Absolutely! Do our citizens **need to know who that advocate** is and perhaps consider the source of funding as to its biases? Absolutely!

As a House member I am limited to a maximum $500 donation and from known donors if those donations are over $50. Political Action Committees have the same limitations and again from known donors. Third party advocacy groups have no limits as to the amount raised or dedicated to a campaign or issue promotion. But they can do just about anything to sway an election, or the legislature for that matter, so long as they don't use the specific words "vote for", "vote against", "support" and like terms found in KS 25-4143(h).

**Senate Ethics and Elections Cmte**
**Date** 2-3-2010
**Attachment** 2

The statute before you **would not change the message** of the cards or the spending **or limit the advocacy** groups in any way. What it would do is allow the public to see who is financing the campaign allowing for an informed electorate.

We have reached a point in Kansas where huge sums of money are spent by these advocacy groups because they have so few limitations and virtually no transparency is required.

Given good information, a democracy can work. Transparency is a must. Please pass this bill and send it to the Senate floor. You have it in your hands to make one of the most important decisions of your tenure in this institution. Now is the time and this is the place.

Respectfully,

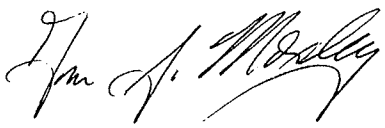


Exhibit A

# Grading State Disclosure 2008

*Evaluating states' efforts to bring sunlight to political money*

A Report by the California Voter Foundation,
with the Center for Governmental Studies
and the UCLA School of Law

A Publication of the Campaign Disclosure Project,
Supported by The Pew Charitable Trusts

www.campaigndisclosure.org

THE CAMPAIGN DISCLOSURE PROJECT
www.campaigndisclosure.org

## About the Campaign Disclosure Project



## Project Description

The Campaign Disclosure Project is designed to bring greater transparency and accountability to the role of money in state and federal campaigns. For thirty years the states have experimented with campaign disclosure, creating fifty sets of laws, regulations and procedures to monitor and control the transfer of political money. Disclosure under these systems is more timely than ever; but campaign data are rarely provided in formats that allow for an understanding of broad national trends, or for following the transfer of political money among states and between state and federal campaigns. If voters are to take advantage of Madison's "popular information," timeliness must be combined with uniformity.

The Campaign Disclosure Project brings together the UCLA School of Law, the Center for Governmental Studies and the California Voter Foundation in a collaborative effort to achieve three goals:

1. Classify and evaluate the campaign disclosure laws of the 50 states.
2. Design and promote a set of uniform standards and model laws for state reporting and disclosure practices, based upon the findings of the evaluation above.
3. Encourage the adoption of these standards by grading the states according to their disclosure laws and practices and by promoting the findings through publications, conferences and websites.

Pg 2

given election and navigation options have improved. The site includes menu options on the left side of each page and icons at the top of the homepage that link to the main areas of the site. The disclosure site provides users with a clear explanation of which records are available in the database, instructions for searching data, and a "Quick Statistics" function for comparing the totals raised and spent between candidates going back to 1993.

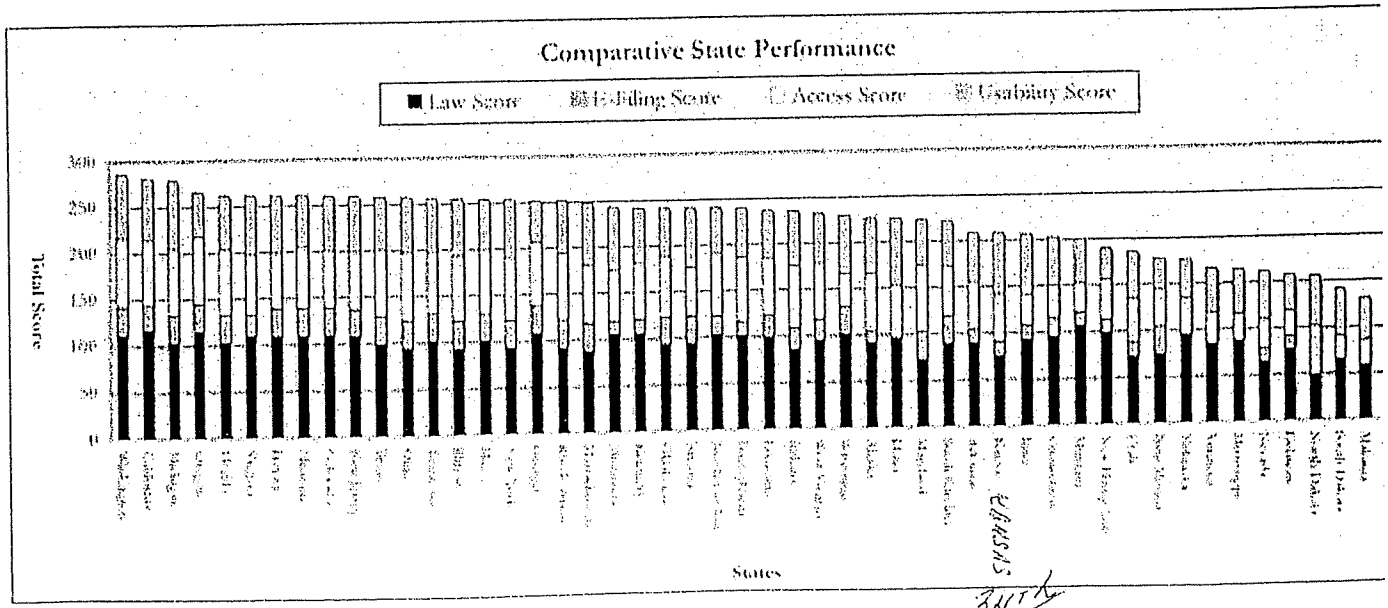
Grading State Disclosure
2008
*Evaluating states' efforts to bring sunlight to political money*

## Five-Year Grade Comparison Chart

| Year | State | Total | Law | E-File | Access | Usability |
|---|---|---|---|---|---|---|
| 2008 | Kansas | D+ | D- | F | D+ | B+ |
| 2007 | Kansas | D | D- | F | D+ | B |
| 2005 | Kansas | F | D | F | F | C |
| 2004 | Kansas | F | D | F | F | D |
| 2003 | Kansas | F | D- | F | D- | F |

Grading State Disclosure
2008
*Evaluating states' efforts to bring sunlight to political money*

## Comparative State Performance Bar Chart




34th

# Grading State Disclosure 2008

*Evaluating states' efforts to bring sunlight to political money*

## Kansas

| Grade | Rank |
|---|---|
| D+ | 34 |

| Subcategories | Grade | Rank |
|---|---|---|
| Campaign Disclosure Law | D- | 42 |
| Electronic Filing Program | F | 31 |
| Disclosure Content Accessibility | D+ | 34 |
| Online Contextual & Technical Usability | B+ | 5 |

Grading Process | Subcategory Weighting | Methodology | Glossary

### The State of Disclosure in Kansas

Kansas earned a B+ in the Online Contextual and Technical Usability category and shares with Iowa the distinction of being the most improved state in this area since 2003. Along with improvements in the usability category, Kansas raised its overall grade from a D to a D+ with the creation of a voluntary electronic filing program in 2008.

Kansas's campaign finance law earned a D- and ranked 42nd in 2008, but the passage of Senate Bill 196 in 2008 created a stronger law than the current grade reflects (2008 law grades are calculated based on laws passed as of December 31, 2007). The new law requires the disclosure of late contributions and independent expenditures of $300 or more and increases the level of detail disclosed about campaign contributors of $150 or more to include the industry in which they are employed (occupation disclosure is currently required, though employer data is not). Enforcement provisions of the law remain weak as reviews or audits of disclosure reports are not required. In 2007, legislation was passed that allowed the Secretary of State's office to develop a voluntary electronic filing program. The new system came online in 2008, and moved Kansas up ten places in the electronic filing rankings.

Kansas earned a D+ again in the Disclosure Content Accessibility category in 2008, though the state dropped six places in the rankings as other states improved. The public has online access to scanned copies of paper reports, as well as itemized contributions that have been data-entered by Governmental Ethics Commission staff. Electronic reports are filed with the Secretary of State's office and are now available on both that agency's site in an HTML format, and as PDF files on the Government Ethics Commission's site, though this development came after the close of the 2008 assessment period. The disclosure site features a contributions database that is searchable by donor name, transaction date, and amount but search results cannot be sorted online or downloaded from the site. The lack of an online, searchable database of campaign expenditures remains the primary weakness of the site.

The Governmental Ethics Commission's web site was redesigned since the 2007 assessment, which helped the state improve from a B to a B+ in the usability category in 2008. Usability testers reported the new site was easier to understand and rated their overall experiences on the site more favorably than testers did in 2007. The new site features a better organized page for accessing reports for a

**Testimony provided by**

**League of Women Voters of Kansas**

**To the Senate Ethics and Elections Committee**

**In support of Senate Bill No. 418**

**February 3, 2010**

Good morning. Thank you Senator Schmidt and members of the Senate Ethics and Elections Committee for this opportunity to come before you and testify on behalf of Senate Bill No. 418.

My name is Kay Hale. I am the co-President of the League of Women Voters of Lawrence/Douglas County. I am here to testify on behalf of the League of Women Voters of Kansas.

The League is a national, non-partisan non-profit political organization that has been in existence for almost 90 years. There are eight local chapters and over 700 individual members in Kansas.

Our mission is to encourage active participation of citizens in local government. We educate and we advocate. We study public policy issues and we adopt positions based on member consensus. Then we act.

One of our public policy positions is related to the Election Process and Campaign Finance. The position states:

> *Our interest is to improve methods of financing political campaigns in order to ensure the public's right to know, combat corruption and undue influence, enable candidates to compete more equitably for public office and promote citizen participation in the political process.*

In view of this public policy position statement, the League of Women Voters of Kansas, at its annual meeting in May, 2009, adopted the following Action Resolution:

**Campaign Finance Reform**
Be it resolved that we urge the leaders of the political parties in the

1. Kansas Senate Ethics and Elections Committee, and the
2. Kansas House Elections Committee

to establish laws that would require any organization that sponsors a political campaign "issue ad" to report the sources of their funding and their expenditures to an appropriate governmental agency; Furthermore, such reports would be made prior to election voting.

Senate Bill No. 418 would facilitate greater transparency in campaign electioneering. We encourage you to support this legislation, to pass it out of committee to the Senate Floor for a positive vote, and on to the House of Representatives.

Thank you for considering our comments.

**Senate Ethics and Elections Cmte**
**Date** 2-3-2010
**Attachment** 3

**David W. Peterson**
**14720 West 80th Street**
**Lenexa, Kansas 66215**
**913-894-5389**
**E: dpeterson71@everestkc.net**

February 2, 2010

**Testimony in Support of Senate Bill No. 418**

Dear Sen. Schmidt, Chairwoman, and Members of the Senate Committee on Ethics and Elections,

As a Kansas citizen who has actively participated in many state political campaigns, I always felt that I could make a difference. Over the years I have worked for candidates and issues by door-to-door campaigning, making telephone calls, helping with literature drops and yard sign deliveries, and contributing cash to politicians and causes that I support. However, in recent years I have often seen all of my efforts wiped out by a last minute advertising blitz by a 527 organization. I have begun to feel that all my hard work, and the hard work of others, does not matter. It will just get blown away by the power of anonymous, extremely wealthy 527 contributors.

Until we improve campaign finance disclosure requirements, nothing else matters. Kansas citizens like me feel disenfranchised and no longer have a voice. Against powerful 527 organizations, the average citizen feels powerless and will no longer actively participate in the political process or even vote.

As a lifetime Kansas citizen, I strong urge the committee to support Senate Bill No. 418 that will encourage all Kansas citizens to feel that they can make a difference when they participate in the democratic process.

Respectfully,

Dave Peterson

**Senate Ethics and Elections Cmte**
**Date** 2-3-2010
**Attachment** 4

STATE OF KANSAS

Administration of
Campaign Finance,
Conflict of Interest
& Lobbying Laws

109 West 9th Street, Suite 504
Topeka, Kansas 66612
(785) 296-4219 (phone)
(785) 296-2548 (fax)

## GOVERNMENTAL ETHICS COMMISSION

www.kansas.gov/ethics

**Written Testimony before Senate Elections Committee**
**in Support of Senate Bill 418**
**by Carol Williams, Executive Director**
**February 3, 2010**

The mission of the Kansas Governmental Ethics Commission is to provide the public with timely and accurate campaign finance information for knowledgeable participation in government and the electoral process. In fulfilling its mission, the Commission believes the State has a compelling interest in providing voters information about electioneering communications or issue ads so voters can be fully informed as to the source of support or opposition to candidates for state or local office and to identify those persons attempting to influence the outcome of elections in Kansas. The Commission believes the citizens of Kansas have a right to know the source of funding and the amount expended by any individual, committee, corporation, organization or association that expends money on any issue ad that clearly identifies a candidate.

An issue ad does not directly urge a voter to vote for or against a specific candidate. The ad usually discusses an issue and provides a candidate's support or opposition on that issue. The United States Supreme Court, in the case of *McConnel v. FEC,* 124 S.Ct.619 (2003), upheld the constitutionality of disclosure of electioneering communications made right before an election. In the recent Supreme Count ruling issued two weeks ago, the court once again upheld disclosure rules. There are currently15 states which require reporting of electioneering communications.

The Commission would like to see a loophole closed which currently allows sponsors of so-called "issue ads", appearing right before an election, to spend thousands of dollars attempting to influence voters while not disclosing who is paying for the ads or how much the sponsors are spending. Since 2004, the Commission has recommended that entities involved in electioneering communications be required to disclose the source of funding as well as the costs for such communication.

Senate Bill 418 would require any individual, committee, corporation, organization, association, or partnership that spends $500 or more per calendar year for any electioneering communication to file a report with the Secretary of State on the same date candidates, party

**Senate Ethics and Elections Cmte**
**Date** 2-3-2010
**Attachment** 5

committees, and political committees are required to file receipts and expenditures reports. Such report would include the name of the clearly identified candidate mentioned in the electioneering communication, the name and address of each individual or other entity that contributes more than $500 to such person for the communication, and the name and address of the vendor who is paid or contracted to be paid more than $500 for such communication. Any electioneering communication that occurs during the eleven days preceding the primary or general election will be required to be reported within 48 hours of making or contracting to make an expenditure for such communication.

Electioneering communication would be defined in the Campaign Finance Act to mean any communication broadcast by television or radio, printed in a newspaper or on a billboard, directly mailed or delivered by hand to personal residences or otherwise distributed that unambiguously refers to any clearly identified candidate within 30 days before a primary election or 60 days before a general election to an audience that includes members of the electorate for such public office.

An electioneering communication would not include any news article, editorial, or letter to the editor printed in a newspaper, magazine or other periodical or any editorial endorsement or opinion aired by a broadcast facility so long as the newspaper, broadcast facility, etc., is not owned or controlled by a candidate or political party. In addition, an electioneering communication would not include any communication by a person made in the regular course and scope of their business, by a membership organization solely to its members and their families, any communication made to promote a candidate debate or forum, any communication made as part of a nonpartisan activity to encourage individuals to vote or register to vote, or any communication that refers to any candidate only as part of the popular name of a bill or statute.

Any political action committee registered and in compliance with the Federal Election Commission that pays for an electioneering communication would be required to file a report only if the committee paid or contracted to pay for such ad within the 11 days before the primary or general election.

Requiring issue ad disclosures will help voters "Follow the money" in an ever-evolving campaign finance arena. The Commission urges passage of SB 418.

# Senate Bill 418 -- Electioneering Communications

**Testimony of Clayton J. Callen**
**Before the Kansas Senate Elections Committee**
**February 3, 2010**

## I. Introduction

My name is Clayton Callen and I practice law at the firm of Graves Bartle Marcus & Garrett in Kansas City, Missouri. I thank you for the opportunity to testify before this committee. My firm has a vibrant First Amendment and election law practice area, and in my practice I have represented various clients across the country in constitutional challenges to both state and federal campaign finance laws. I also served as counsel for Citizens United before the district court, and in the early stages of its Supreme Court appeal, in the recent *Citizens United v. FEC* case, which was handed down just a few weeks ago. I testify today as a practitioner of federal First Amendment law.

In this testimony I will first set out the foundational First Amendment principles implicated by Senate Bill 418. Second, I will discuss the significant burden that compelled disclosure places on political speech, illustrated by some recent real-world examples. Third, I will discuss the Supreme Court's *Citizens United v. FEC* opinion and its implications for Senate Bill 418.

Before looking to the specific First Amendment issues that are raised by this law, it's important to remember a fundamental truth about our constitutional republic: all three branches of government have an equal duty to protect and defend the United States Constitution and the rights granted to citizens thereunder. The modern tendency of the legislative and executive branches to refer all constitutional issues to the judicial branch would have been a foreign concept to the drafters of the Constitution. Each branch of government is obligated to the

citizenry to make its own determination as to the constitutional merits of legislation and other governmental actions. Neither the legislature nor the executive can properly "punt" constitutional issues to the judiciary. As a result, this Committee is under a duty to make its own determination as to the constitutional merits of Senate Bill 418. As I will testify today, the disclosure requirements imposed by this law cannot be reconciled with the First Amendment.

## II. First Principles

The First Amendment to the United States Constitution, which applies to the states through the Fourteenth Amendment, states that "Congress shall make no law ... abridging the freedom of speech." This "freedom of speech ... guaranteed by the Constitution embraces ... the liberty to discuss publicly and truthfully all matters of public concern without previous restraint or fear of subsequent punishment." [1] The Supreme Court has stated that the freedom of speech protected by the First Amendment has its "fullest and most urgent application precisely to the conduct of campaigns for political offices."[2] Indeed, "our form of government is built on the premise that every citizen shall have the right to engage in political expression and association."[3] "Speech is an essential mechanism of democracy, for it is the means to hold officials accountable to the people."[4] The best test for ideas is to subject them to the marketplace of ideas where the people are then free to make their own determination as to the merits and persuasiveness of the ideas.[5] The First Amendment stands as the bulwark to protect our "profound national

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[1] *First Nat'l Bank of Boston v. Bellotti*, 435 U.S. 765, 776 (1978) (internal quotation marks omitted).

[2] *Buckley v. Valeo*, 424 U.S. 1, 24 (1976).
[3] *Sweezy v. New Hampshire*, 354 U.S. 234, 250 (1957).
[4] *Citizens United v. FEC*, 558 U.S. __, *23 (2010).
[5] *Abrams v. U.S.*, 250 U.S. 616, 630 (1919).

commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open."[6]

Likewise, the First Amendment protects the right to engage in anonymous speech. As the Court has stated: "[A]n author's decision to remain anonymous, like other decisions of a publication, is an aspect of the freedom of speech protected by the First Amendment."[7] Our nation has a deep history of anonymous distribution of pamphlets, leaflets, and signs, which have even been called "weapons in defense of liberty.'"[8] One needs to look no further than the Federalist Papers to understand the history of anonymous political speech in this country. Anonymous speech may be preferred for a variety of reasons. For example, a speaker may wish to remain anonymous because they do not want their personal popularity—or lack thereof—to prejudice their message.[9] Likewise, a desire to remain anonymous may stem from a fear of threats, harassments, or other reprisals that might result from one's support for an issue becoming known.

While at first glance the First Amendment appears to prohibit any law that might restrict or burden free speech, the Supreme Court has held that some such laws will be upheld if they are justified by compelling state interests and are narrowly tailored to meet those interests. The Supreme Court has recognized that disclosure of certain political expenditures may further sufficiently compelling governmental interests to pass constitutional scrutiny. In the seminal case *Buckley v. Valeo*,[10] the Court struck down expenditure limitations for political spending independent of a candidate. However, the Court upheld disclosure requirements for independent political spending that expressly advocated the election or defeat of a clearly identified

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[6] *New York Times v. Sullivan*, 376 U.S. 254, 270 (1964).
[7] *McIntyre v. Ohio Elections Commission,* 514 U.S. 334, 342 (1995).
[8] *Talley v. Griffin*, 303 U.S. 444, 452 (1938).
[9] *See McIntyre*, 514 U.S. at 343.
[10] 424 U.S. 1 (1976)

candidate. *Buckley* held that these disclosure requirements were justified by the government's interest in providing "the electorate with information as to where the political campaign money comes from and how it is spent by the candidate," which can alert voters to the "interests to which a candidate is most likely to be responsive." [11] Moreover, the Court stated that disclosure allows voters to place each candidate in the political spectrum more precisely than is often possible solely on the basis of party labels and campaign speeches,"[12] by helping "voters to define more of the candidates' constituencies."[13] In the 2003 case of *McConnell v. FEC*, the Supreme Court extended the government interest in voter information, first recognized in *Buckley*, to justify compelled disclosure for advertisements that meet the federal definition of "electioneering communication."[14] Likewise, as I will discuss later, the Court has recently affirmed this holding in the recent *Citizens United v. FEC* opinion. Neither *McConnell* nor *Citizens United* adequately considered the severe burden that disclosure places on political speech protected by the First Amendment, particularly by laws with broad applications like Senate Bill 418.

**A. First Amendment burden is not justified by limited informational interest.**

The relevant question before this Committee is whether the government's interest in disclosure of political spending justifies the burden that Senate Bill 418 will place on the First Amendment rights of Kansans. I submit that it does not.

If enacted, Senate Bill 418 would require that persons and organizations spending $500 or more on "electioneering communications" file reports with the governmental ethics commission. These reports would not only include information about the filer, but must also

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[11] *Id.* at 66.
[12] *Id.*
[13] *Id.* at 81.
[14] 540 U.S. 93 (2003).

include information regarding any persons who have contributed over $500 to the filer, including the name, home address, and occupation of such contributors. As an initial semantic matter, the term "electioneering communication" is inherently misleading. Kansas law already requires disclosure of expenditures for communications expressly advocating the nomination or defeat of clearly identified candidates.[15] Those expenditures most certainly qualify as electioneering. On the contrary, as defined in Senate Bill 418, the term "electioneering communications" encompasses communications that merely mention a candidate by name, irrespective of the context. As a result, Senate Bill 418 encompasses what the Supreme Court has described as pure issue advocacy, which "conveys information and educates. An issue ad's impact on an election, if it exists at all, will come only after the voters hear the information and choose-uninvited by the ad-to factor it into their voting decisions."[16] In short, Senate Bill 418 is not really aimed at "electioneering" at all, but instead will require disclosure for everything from public service announcements to grassroots lobbying advertisements.

**B. Disclosure places significant burden on political speech.**

There is a misconception that disclosure requirements, like those that would be imposed by Senate Bill 418, place little or no burden on the First Amendment's right of free speech. This concept is antithetical to the First Amendment's historical protection of anonymous speech and is clearly dispelled by recent events. Indeed, the First Amendment's protection of anonymous political speech has never been needed more than it is today. With the advent of the internet, and on-line databases that store contributor information, anybody with a computer can readily access donor information. While making this information available to the public on-line was surely done with the best intentions, such as providing useful information to voters, experience has

[15] K.S.A. § 25-4150.
[16] *Federal Election Com'n v. Wisconsin Right To Life, Inc.*, 551 U.S. 449, 470 (2007) ("*WRTL II*").

borne out that this information is more often than not used by political opponents. Recent events provide a chilling illustration of the costs of compelled disclosure. As shown by the following examples, the costs of disclosure are more acute than ever before.

In 2008 the voters of California voted on a ballot proposal titled Proposition 8, which restricted the definition of marriage to include only one man and one woman.[17] Similar to Senate Bill 418, California campaign finance law requires that committees supporting or opposing ballot measures must disclose the identity of their donors, including their name, address, and employer.[18] As a result, opponents of Proposition 8 took this publicly available contributor information and created their own websites listing the names and addresses of persons who contributed to the committee supporting Proposition 8, one of which even included a map highlighting the homes of these contributors. Likewise, another website solicited donations in order to "take action" against these contributors.[19]

As a result of this information being made public, contributors have been subjected to significant retribution and reprisals on account of their political speech. These reprisals have included death threats, harassment, boycotts,[20] and loss of employment. For example, one supporter of Proposition 8 received message stating: "Consider yourself lucky. If I had a gun I would have gunned you down along with each and every other supporter...." Another supporter had a flyer circulated in his neighborhood referring to him as a "Bigot" and listing his occupation, employer, and the amount of his contribution. Two churches received envelopes

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[17] Cal. Const. art. 1, § 7.5.
[18] Cal. Gov't Code 84211.
[19] *See* http://www.californiansagainsthate.com; http://www.eightmaps.com.
[20] Steve Lopez, *A Life Thrown in Turmoil by $100 Donation for Prop 8*, L.A. Times, December 14, 2008 (restaurant proprietor's business was boycotted on account of her personal donation to committee supporting Prop. 8.).

with a white powdery substance because of their support of Proposition 8.[21] Business owners who made contributions to the Proposition 8 campaign had their businesses boycotted and had protesters picket outside their place of business.[22] Others have suffered adverse employment consequences as a result of their support of Proposition 8. Still others have had their houses and cars vandalized, been bombarded with harassing emails, been publicly excoriated on the street, and have even been asked to leave their church.[23] The examples go on and on, and are far too numerous to set out here. These examples are chilling, and plainly dispel any notion that disclosing the identity of contributors places little or no burden on the First Amendment.

Moreover, not only does the threat of reprisals from fellow citizens chill would-be donors from engaging in political speech, but so too does the threat of reprisals from elected officials. For example, the Wall Street Journal chronicled how business owners in West Virginia, desperate to remove the incumbent attorney general from office, were fearful of donating to his opponent for fear of retaliation from the attorney general if their names were reported as contributors.[24] A candidate challenging the incumbent attorney general described the phenomenon in the following manner: "I go to so many people and hear the same thing: 'I sure hope you beat him, but I can't afford to have my name on your records. He might come after me next.'"[25]

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[21] These and countless other examples are set out in affidavits submitted in a lawsuit challenging the donor disclosure requirements imposed under California law. The case is captioned *ProtectMarriage.com v. Bowen*, 2:09-cv-00058-MCE-DAD. Bradley Smith, former Chairman of the Federal Election Commission, has also written about these and similar examples that appeared in the Wall Street Journal. John R. Lott & Bradley Smith, *Donor Disclosure Has Its Downsides,* Wall St. J., December 26, 2008.
[22] Amy Bounds, *Gay rights advocates picket Boulder Ciniplex*, Rocky Mountain News, November 30, 2008.
[23] *Supra* at n. 21.
[24] Kimberley A. Strassel, *Challenging Spitzerism at the Polls*, Wall St. J., August 1, 2008.
[25] *Id.*

A recent study confirms the deleterious effect that disclosure has on free speech. In 2007, the Institute for Justice commissioned a study to examine the burden compelled disclosure places on the First Amendment.[26] While the study focused on ballot issue elections, its findings are just as relevant in the context of candidate elections. The study was performed by University of Colorado associate professor Dr. Dick Carpenter, and notably occurred in 2007, prior to the public examples of reprisals and harassment that occurred related to Proposition 8 in California. Carpenter's findings revealed that while the public favors disclosure of political spending in the abstract, when it is personalized, would-be contributors are less likely to engage in political speech if their personal information must be disclosed.

For example, Carpenter's study found that around 80% of respondents agreed that the government should make publically available the names of those who contribute to ballot measure campaigns.[27] However, only 40% of the respondents were comfortable with their own name and address being posted on a government website as a result of their contribution.[28] Likewise, 60% of respondents were less likely to contribute to issue campaigns if their names and addresses would be made publicly available. Carpenter aptly described the attitudes of those surveyed as favoring "disclosure for thee, but not for me."[29]

Moreover, the study's findings also undermine the government's asserted interest in requiring disclosure. Carpenter found that voters do not utilize publicly available contributor information when determining how to vote on an issue. Rather, the "vast majority of respondents had no idea where to access lists of contributors and never actively seek out such information before they vote. At best, some learn of contributors through passive information sources, such

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[26] Dick Carpenter, Ph. D., *Disclosure Costs: Unintended Consequences of Campaign Finance Reform*, Institute for Justice, March 2007 (available at http://www.ij.org/publications/other/disclosurecosts.html.
[27] *Id.* at 7.
[28] *Id.*
[29] *Id.* at 13.

as traditional media, but even then only a minority of survey participants could identify specific funders of campaigns related to the [] issue foremost in their mind."[30] Such results "hardly point to a more informed electorate as a result of mandatory disclosure."[31] Thus, not only does Carpenter's study demonstrate that political speech is chilled by compelled disclosure, but it also illustrates that the "informational interest" said to justify this infringement is illusory. As Dr. Carpenter concluded: people often "assume that mandatory disclosure is a benign regulation that shines light on valuable information without any real cost. But ... there are consequences, and they may in fact be quite costly to privacy and First Amendment rights while yielding little, if any, benefit in return."[32]

To summarize, the burdens of disclosure are significant and real. Compelled disclosure of contributor information can subject contributors to a host of reprisals and retaliation. As a result of these threats, may people are chilled from engaging in political speech at all. Those who do engage in political speech risk physical violence, adverse employment consequences, boycotts, and social disfavor as a result of their political speech. Moreover, it is becoming readily apparent that the only persons who use publicly available donor information are political opponents seeking to discourage political speech by subjecting donors to reprisals.

### *C. Citizens United v. FEC*

In *Citizens United v. FEC,*[33] handed down just a few weeks ago, the United States Supreme Court struck down federal laws prohibiting corporations from engaging in political speech, but upheld disclosure requirements for "electioneering communications," as defined by federal law. Justice Kennedy, writing for the majority, found that the law's disclosure

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[30] *Id.*
[31] *Id.*
[32] *Id.* at 1.
[33] 558 U.S. __ (2010).

requirements were supported by the informational interest first recognized in *Buckley*, i.e. "'provid[ing] the electorate with information' about the sources of election-related spending."[34] However, Justice Kennedy noted that recent examples of donors being subjected to reprisals as a result of their political contributions were "cause for concern."[35] The Court stated that compelled disclosure of contributor information would violate the First Amendment if "there were a reasonable probability that the group's members would face threats, harassment, or reprisals if their names were disclosed."[36] This exception had no application to Citizens United because it had not submitted any evidence that its donors would face reprisals or harassment if their identities were disclosed.

Two things are noteworthy about this decision. First, the law at issue in *Citizens United* regulates a much narrower category of political speech than Senate Bill 418 would. Under the federal "electioneering communication" law, disclosure is not triggered until a person spends over $10,000 on an electioneering communication and only contributors of over $1,000 are required to be disclosed.[37] Moreover, the federal definition of "electioneering communication" is limited to broadcast advertisements that can be received by at least 50,000 members of the relevant electorate.[38] On the contrary, Senate Bill 418 would require disclosure anytime a person spends a mere $500 on an "electioneering communication," and would require disclosure of contributor information for all contributions over $500. Additionally, the definition of "electioneering communication" used in Senate Bill 418 encompasses any communication, irrespective of whether broadcast or not, which is received by at least two members of the

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[34] *Id.* at slip op. *51.
[35] *Id.* at *54
[36] *Id.*
[37] 2 U.S.C. § 434(f)
[38] *Id.*

relevant electorate. In short, Senate Bill 418 will require disclosure for a far greater range of communications than the federal law at issue in *Citizens United.*

Secondly, the exception recognized by the Supreme Court to exempt groups from disclosure if they can show a reasonable probability of reprisals or harassments is simply inadequate to remedy the constitutional infringement. To obtain such an exception an organization would be required to file a lawsuit and provide evidence establishing a "reasonable probability" that its donors will face reprisals. There are two significant problems with this option. First, in order to provide a court with the necessary evidence, its donors must have already endured reprisals and harassment. Thus, in order to obtain an exemption from disclosure to prevent harassment and reprisals, an organization and its donors must first endure harassment and reprisals. But this bell can't be un-rung. Second, speakers should not be required to file lawsuits before exercising their constitutional right to engage in political speech. Moreover, not only is litigation expensive, but it is also time-consuming. As a result, it's unlikely that an organization could receive judicial relief in time to avoid making the very disclosures it seeks protection from. The First Amendment does not tolerate such a regime.

## Conclusion

In conclusion, Senate Bill 418 will impose a significant burden on the First Amendment rights of Kansans—a burden that is not justified by the limited governmental interest in providing the electorate with information. The "right to anonymous speech may not be abridged based on the simple interest in providing voters with additional relevant information."[39] Disclosure requirements do little more than "enable private citizens and elected officials to implement political strategies *specifically calculated* to curtain campaign-related activity and

[39] *Citizens United,* 558 U.S. __ at *1 (Thomas, J. concurring in part and dissenting in part) (citations and quotations omitted).

prevent the lawful, peaceful exercise of First Amendment rights."[40] To the extent Kansas has an interest in knowing the source of campaign-related political speech, this interest is served by existing Kansas law that requires disclosure of campaign contributions and expenditures for communications expressly advocating for or against a clearly identified candidate. Senate Bill 418 would subject a wide variety of issue ads to regulation and as a result chill political speech. The Kansas legislature should encourage, not discourage, political participation and political speech. Senate Bill 418 should be rejected.

[40] *Id.*

AFP AMERICANS FOR PROSPERITY
KANSAS

**Testimony in Opposition of Senate Bill 418**
**Senate Ethics and Elections Committee**
**February 3, 2010**

Madam Chair and Members of the Committee,

Americans For Prosperity opposes Senate Bill 418, concerning campaign finance; relating to electioneering communication; establishing certain reporting requirements. AFP believes this legislation to be an attack on anonymous, political free speech.

**Anonymous Free Speech**

Clearly there are free speech/free association implications of denying anonymity to citizens who are critical of politicians.

In 1958 the U.S. Supreme Court ruled in *NAACP v. Alabama* that forcing an organization to disclose its members chills their rights of free speech and free association. Justice Harlan: Immunity from state scrutiny of petitioner's membership lists is here so related to the right of petitioner's members to pursue their lawful private interests privately and to associate freely with others in doing so as to come within the protection of the Fourteenth Amendment.

Thomas Paine's influential "Common Sense" was initially published as being written by an "Englishman." Other Founding Fathers of this country used pseudonyms or anonymous free speech in writing the Federalist Papers. More recently, many who were blacklisted during the McCarthy era used pseudonyms to continue working.

The use of anonymous free speech is not a loophole or some nefarious political tactic. A much-cited 1995 Supreme Court ruling in *McIntyre v. Ohio Elections Commission* reads: Protections for anonymous speech are vital to democratic discourse. Allowing dissenters to shield their identities frees them to express critical, minority views . . . Anonymity is a shield from the tyranny of the majority. . . . It thus exemplifies the purpose behind the Bill of Rights, and of the First Amendment in particular: to protect unpopular individuals from retaliation . . . at the hand of an intolerant society.

**Disclosure for Newspapers?**

In *Citizens United v. FEC*, the court spent a great deal of time discussing and determining that corporations are not different than individuals when it comes to political speech and the First Amendment to the United States Constitution.

2348 SW Topeka, Suite 201 Topeka, Kansas 6661
785-354-4237 785-354-4239 FAX
www.afpks.org

Senate Ethics and Elections Cmte
Date 2-3-2010
Attachment 7

The Court did not, however, discuss if different types of corporations should receive different treatment regarding political speech.

The bill before you gives certain types of corporations, newspapers for example, different requirements than others. It is unclear, at this point, if such exceptions will pass Constitutional muster.

But should newspapers be exempted from the same requirements put forth by this legislation or similar proposals? Should a newspaper be required to disclose its' donors for an editorial they craft that would clearly identify a candidate within a certain time period of an election? Thousands of readers are potentially swayed by editorial writings, thus proponents of SB 418 should call for more disclosure than just the name of the newspaper.

This is but one example of the types of questions that should be asked before seriously considering passage of this legislation.

Thank you for your consideration on this important matter.

Derrick Sontag
State Director