INSTITUTE FOR FREE SPEECH

Testimony of Tyler Martinez
Before the Idaho Legislature's
Campaign Finance Reform Interim Committee

October 16, 2018

I am Tyler Martinez, an attorney for the Institute for Free Speech,[1] formerly known as the Center for Competitive Politics. We have followed this Committee's efforts to change Idaho's campaign finance laws since August 2017. We have written extensive comments on the prior iterations of this Committee's work.

I would like to speak briefly to note several significant legal concerns raised by the draft bills, which propose sweeping amendments to Idaho's campaign finance laws. The nine draft proposals range from ministerial refinement of existing law to serious restrictions on political rights in Idaho. While I'm happy to discuss the particulars of any of the draft bills, I'll focus for now on the most serious restrictions on First Amendment rights.

These drafts, especially the proposed changes to the regulation of "electioneering communications," touch on fundamental First Amendment rights of speech, petition, and private association. Any draft legislation, therefore, is subject to "exacting scrutiny"—a heightened form of judicial review under which a state must demonstrate a substantial interest and proper tailoring of the law to that interest.

For decades, the Supreme Court has consistently shielded the privacy of organizational donors and supporters. The important right to private association allows people to come together to speak collectively—particularly on unpopular topics that could invite harassment of the organization's donors and members. Hard won in the civil rights area, this doctrine has been specifically applied to campaign finance disclosure that seeks to go beyond unambiguous campaign activity.

Two drafts are particularly problematic. Though they differ slightly, both Draft DRKMF015 and Draft DRKMF018[2] would substantially lengthen the window were the government would demand intrusive reporting of an organization or group of people for merely mentioning a candidate (including incumbent officeholders) by name.

[1] The Institute is a nonpartisan, nonprofit § 501(c)(3) organization that promotes and protects the First Amendment political rights of speech, press, assembly, and petition. Originally known as the Center for Competitive Politics, it was founded in 2005 by Bradley A. Smith, a former Chairman of the Federal Election Commission. In addition to scholarly and educational work, the Institute is actively involved in targeted litigation against unconstitutional laws at both the state and federal levels. Its attorneys have secured judgments in federal court striking down laws in Colorado, Utah, and South Dakota on First Amendment grounds. We are also currently involved in litigation against California, Connecticut, Missouri, Massachusetts, South Dakota, Tennessee, and the federal government.

[2] Draft DRKMF017 is substantively similar to the other drafts, except it keeps the more reasonable electioneering communications window to be 30 days before the primary and 60 days before the general—just like federal law.

Draft DRKMF015, and other drafts, modify the temporal window from the "electioneering communications" definition. The longest window floated was from March 9 to election day—about 242 days this year. Draft DRKMF015 § 1(6). This is untenable and violates the First Amendment as a burdensome regulation of speech.

For comparison, most other states, and the federal government, only regulate electioneering communications for 90 days total: 30 days before the primary and 60 days before the general election. Idaho is proposing to regulate more than 2½ times longer than the Supreme Court has approved. And, that period runs right though the Legislative season, including when many important—and controversial—bills are being debated as the session closes. The proposed window is not only excessively long, it actually interferes with people talking about incumbents' votes and actions.

Draft DRKMF 018 is not much better, running from 30 days before the primary through the general election. This year's primary was May 15. So, under Draft DRKMF 018, Idaho would be regulating issue speech for 175 days. That's still twice as long as what has been approved in the Supreme Court.

This is not "transparency," but forced registration in order to discuss the government of Idaho. The First Amendment will not tolerate a system where citizens must give the government mountains of information in order to speak about the important issues of the day. The Supreme Court has recognized "Candidates, especially incumbents, are intimately tied to public issues involving legislative proposals and governmental actions,"[3] and it is the very discussion of public issues that the First Amendment is designed to protect.

Idaho should keep in mind that "electioneering communication" is a term of art for a very carefully-defined type of speech intended to impact speakers during only a small slice of the calendar during election years. The government's interest is only in who is speaking shortly before an election, not who mentions a candidate—often an incumbent officeholder—the rest of the year. Expanding the electioneering communications window beyond the thirty/sixty-day timeframe will require the state to amass an extensive record to articulate and justify its interest in regulating that speech, which by definition is more likely to be directed at legislative and policy debates, rather than elections. The state cannot simply rely on federal law, such *McConnell v. Federal Election Commission*'s record, which focused only on the relatively limited window in federal law.

Worse, the draft legislation is proposing to expand the type of speech covered. The Supreme Court has only directly approved the federal electioneering communication definition, which covers only broadcast, cable, and satellite ads—the kind of ads run by sophisticated PACs with lawyers to advise them—and lists only those who give large amounts of money for those ads. Idaho, in contrast, regulates flyers and pamphlets—classic work done by small groups and unsophisticated people. It's a trap for the unwary.

This Committee is looking at regulating "social media"—a vague and overbroad definition of what "social media" is. Draft DRKMF015 § 1(19). Under the proposed language, any website that has a community feel qualifies as social media—not just Facebook or Twitter, but news

[3] *Buckley v. Valeo*, 424 U.S. 1, 42 (1976) (per curiam).

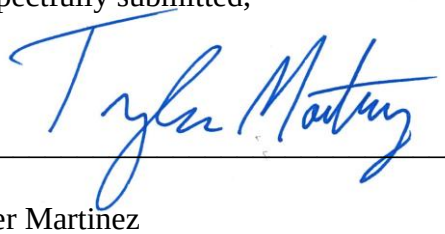
articles, blogs, or any other site with the ability to comment. And the Supreme Court has recently said social media is "like a street or park and less like a broadcast facility with one-way communication."[4] Or, as one senior federal judge stated: "the internet is the new soapbox; it is the new town square."[5]

Additionally, Drafts DRKMF015, DRKMF 017, and DRKMF 018 would require a lengthy disclaimer to be run on every electioneering communication. Draft DRKMF015 § 2(4); Draft DRKMF017 § 2(4); Draft DRKMF 018 §2(4). Idaho has operated just fine for years without such a disclaimer requirement, and the state must articulate an interest on why such declaimers are needed now. This compelled speech is highly suspect under recent Supreme Court decisions, including California's attempt to compel pro-life centers to post disclaimers that said where to get an abortion. Currently, there are challenges to these campaign disclaimers in Massachusetts and South Dakota. Now is not the time to make the same error.

Idaho's electioneering communication regulation is already burdensome, let's not compound the restrictions on the freedoms of speech and assembly. Existing law requires donor disclosure of $50 level. Idaho Code § 67-6628(1). Existing law also requires *two reports* for electioneering communications that cost more than $100: one report is due seven days before the election, the other is due thirty days after. Idaho Code § 67-6628(2). This Committee should be considering reforming these very low thresholds and burdensome reporting requirements rather than regulating more speech.

Thank you for allowing me to testify on the draft bills. I hope you will find this information helpful. Should you have any further questions regarding this potential legislation or other campaign finance proposals, please contact me at (703) 894-6800 or by e-mail at tmartinez@ifs.org.

Respectfully submitted,



Tyler Martinez
Attorney
Institute for Free Speech

[4] *Packingham v. North Carolina*, 582 U.S. ___, 137 S. Ct. 1730, 1735 (2017).

[5] *Coal. for Secular Gov't v. Gessler*, 71 F. Supp. 3d 1176, 1182 (D. Colo. 2014) *aff'd* 815 F.3d 1267 (10th Cir. 2016) *cert. denied* 580 U.S. ___, 137 S. Ct. 173 (2016).