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Anita Milanovich
General Counsel
Office of the Governor of Montana
State Capitol, Room 204
PO Box 200801
Helena, Montana 59620

RE: Constitutional and Practical Concerns with Senate Bill 278, Requiring Nonprofit Donor Disclosure

Dear Ms. Milanovich:

On behalf of Mountain States Legal Foundation, we respectfully write to express our concerns with portions of Senate Bill 278 (SB 278), which is pending before Governor Gianforte.[1] The law would, among other things, require nonprofit organizations to disclose their donor lists to the Montana Attorney General as a precondition of litigating in the state on a variety of claims. Although the law may be well-intentioned, such a precondition would potentially be in violation of the constitutional right of free association.

Mountain States Legal Foundation ("MSLF") is a nonpartisan, nonprofit § 501(c)(3) public interest law firm. We were founded to protect the U.S. Constitution, protect property rights, and advance individual liberty in the Mountain West and beyond. From its headquarters in Colorado, MSLF litigates cases on a variety of topics, from natural resources law to the Second Amendment to political speech and association.

For decades, the Supreme Court has shielded organizational donors and supporters from generalized donor disclosure as a precondition for engaging in the organization's ordinary business. The right to privacy of association allows people to come together to speak collectively, particularly on unpopular topics that could invite harassment of the organization's donors and members. SB 278's demand for donor lists would improperly burden this important constitutional right.

I. The First Amendment protects donor lists from state inspection.

If signed into law, SB 278 would require any 501(c)(3) organization challenging (or supporting) a government action in the state to disclose all donors who contributed more than $50 from the start of the last year.[2] Such disclosures must be provided to the Montana Attorney General within 30 days of filing a lawsuit.[3] Conditioning the right to engage in litigation on assent to

[1] *Enrolled version available at*: https://leg mt.gov/bills/2021/SB0299/SB0278_X.pdf.
[2] SB 278 § 4(1)(b).
[3] *Id.*

dragnet of donor disclosure is both problematic under the First Amendment and sets a dangerous precedent going forward. While there are other concerns with the bill, this issue is so paramount that we focus only on donor disclosure.

For obvious reasons, most organizations protect their donor lists, and the Supreme Court has upheld their right to do so. In *NAACP v. Alabama*, for example, the U.S. Supreme Court vindicated the right to privacy of association—in particular, from disclosure of an organization's contributors and members—by subjecting "state action which may have the effect of curtailing the freedom to associate . . . to the closest scrutiny."[4] Furthermore, the Court has emphasized that "[e]ffective advocacy of both public and private points of view, particularly controversial ones, is undeniably enhanced by group association,"[5] and that there is a "vital relationship between freedom to associate and privacy in one's associations."[6] To protect that right, the Constitution protects the right to associational privacy. After all, the freedom of association must be protected "not only against heavy-handed frontal attack, but also from being stifled by more subtle governmental interference," such as registration and disclosure requirements and the attendant sanctions for failing to disclose.[7]

Moreover, in *Buckley v. Valeo*, the Supreme Court expressed similar concerns with the harm that overbroad disclosure could work to civic discourse, because "the right of associational privacy . . . derives from the rights of [an] organization's members to advocate their personal points of view in the most effective way."[8] The *Buckley* Court confronted a campaign finance statute that "require[d] direct disclosure of what an individual or group contributes or spends."[9] The Court held that "[i]n considering this provision we must apply the same strict standard of scrutiny, for the right of associational privacy developed in *NAACP v. Alabama* derives from the rights of the organization's members to advocate their personal points of view in the most effective way."[10] Thus, the Court required that any restriction on this right "survive exacting scrutiny."[11] And, under exacting scrutiny, the Court "insisted that there be a 'relevant correlation' or 'substantial relation' between the governmental interest and the information to be disclosed."[12]

In the almost sixty years since *NAACP v. Alabama* and the forty-five years since *Buckley*, the right to associate—privately—has neither changed nor diminished. Rather, as the Supreme Court recently held in *Citizens United v. Federal Election Commission*, laws that burden these fundamental rights must continue to meet "'exacting scrutiny,' which requires a 'substantial

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[4] *NAACP v. Alabama ex rel. Patterson*, 357 U.S. 449, 460-61 (1958) ("*NAACP v. Alabama*"); *see also id*. at 462.

[5] *Id*. at 460.

[6] *Id*. at 462; *id*. (noting that "[i]t is hardly a novel perception that compelled disclosure of affiliation with groups engaged in advocacy may constitute a[n] effective . . . restraint on freedom of association").

[7] *Bates v. City of Little Rock*, 361 U.S. 516, 523 (1960); *see also NAACP v. Button*, 371 U.S. 415, 433 (1963) (noting that the freedoms of speech and association are "delicate and vulnerable" to "[t]he threat of sanctions [which] may deter their exercise almost as potently as the actual application of sanctions").

[8] 424 U.S. 1, 75 (1976) (per curiam).

[9] *Id*.

[10] *Id*.; *see also id*. at 66 (noting "[t]he strict test established by *NAACP v. Alabama* is necessary because compelled disclosure has the potential for substantially infringing the exercise of First Amendment rights").

[11] *Id*. at 64 (collecting cases).

[12] *Id*.

relation' between the disclosure requirement and a 'sufficiently important' governmental interest."[13]

While the Courts have upheld donor disclosure in some circumstances, it is always in a limited context where the demand meets an important governmental interest in the information itself. For example, campaign donations can be disclosed to fight *quid pro quo* corruption between campaign contributors and government officials,[14] or to identify who is specifically funding speech about a candidate for office shortly before an election.[15]

But no similar nexus exists in SB 278's demand. There is no indication of *why* the Attorney General needs the lists of those who gave $50 or more to an organization litigating against the state. And the U.S. Supreme Court has "never accepted mere conjecture as adequate to carry" the government's burden of First Amendment rights.[16]

II. SB 278's disclosure, if public, does more harm than good.

Even assuming that the Attorney General keeps donor lists secure from public view, the *NAACP* line of cases shows that mere disclosure to the government harms First Amendment rights to privately associate.

But the danger in public disclosure is real. Supporters of ballot measures protecting traditional marriage in California endured death threats.[17] Employees at the Goldwater Institute faced threats and harassment at their workplace—and at their homes—due to their organizations' positions.[18] Even delegates to both major political parties' national nominating conventions faced death threats.[19] The list can go on, but all of the examples point to the same conclusion: in our current volatile political atmosphere, accidental disclosures happen, and they pose real dangers to donors and employees of organizations working on hot button issues.

Ultimately, this concern over harassment exists, whether the threats or intimidation come from the government or from private citizens who receive their information because of the forced disclosure. In short, mandatory disclosure of activity requires a strong justification and must be carefully tailored to address issues of public corruption. SB 278 lacks both.

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SB 278 implicates First Amendment rights because it mandates donor disclosure for reasons not tied to a weighty state interest. Thank you for allowing us to share our concerns. We hope you will find this information helpful. We respectfully request that Governor Gianforte consider vetoing this bill in light of these concerns and the potential legal problems discussed in this letter.

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[13] 558 U.S. 310, 366-67 (2010) (quoting *Buckley*, 424 U.S. at 64, 66).

[14] *Buckley*, 424 U.S. at 67.

[15] *Citizens United*, 558 U.S. at 369.

[16] *Nixon v. Shrink Missouri Gov't PAC*, 528 U.S. 377, 392 (2000).

[17] Brad Stone, *Prop 8 Donor Web Site Shows Disclosure Law Is 2-Edged Sword*, THE NEW YORK TIMES, Feb. 7, 2009 *available at*: https://www nytimes.com/2009/02/08/business/08stream html.

[18] Tracie Sharp and Darcy Olsen, *Beware of Anti-Speech Ballot Measures*, THE WALL STREET JOURNAL, Sept. 22, 2016 *available at*: https://www.wsj.com/articles/beware-of-anti-speech-ballot-measures-1474586180.

[19] *See, e.g.*, Alan Rappeport, *From Bernie Sanders Supporters, Death Threats Over Delegates*, THE NEW YORK TIMES, May 16, 2016 *available at*: http://www nytimes.com/2016/05/17/us/politics/bernie-sanders-supporters-nevada.html?_r=0; Eli Stokols and Kyle Cheney, *Delegates face death threats from Trump supporters*, POLITICO, Apr. 22, 2016 *available at*: http://www.politico.com/story/2016/04/delegates-face-death-threats-from-trump-supporters-222302.

Should you have any further questions please contact us at (303) 292-2021 or by e-mail at tmartinez@mslegal.org.

Respectfully submitted,

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