February 22, 2019 -- Attachment 1

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Testimony of Kathy Griesmyer
SB 1114: Campaign Finance Reform – "Electioneering Communication"
Before Senate State Affairs Committee
February 20, 2019

The ACLU of Idaho stands before you today to express our concerns with SB 1114 given the overly broad definition for "electioneering communication" and electioneering communication statements requiring donor disclosure. Both proposals outlined in this legislation directly impacts the First Amendment rights of non-profit organizations who operate in Idaho, as well as Idaho donors who financially support the charitable work of many of these non-profit entities throughout the state.

Campaign finance reform has been a long debated issue at the Idaho Legislature, and the ACLU of Idaho also agrees that our campaign finance system needs to be reformed. For that reason, we support public financing programs that provide candidates with resources to mount a meaningful challenge against wealthy opponents, such as the matching dollar system in the Fair Elections Now Act. We support tailored disclosure requirements. We support stronger rules to ensure that outside political advocates are not illegally coordinating their activities with candidates. And we support reasonable limits on direct contributions to candidates.

However, the proposals included in SB 1114, which are being promoted as a method for shining light on "dark money" in Idaho would institute a host of new restrictions and regulations on political speech and advocacy that would violate the First Amendment rights of all Idahoans. Under the amended definition of "electioneering communication" in 67-6602(6)(a), any publicly circulated communication that "unambiguously refers to a specific candidate or measure to be on the ballot," if shared between the early candidate filing deadline in March through midnight of the general election would be considered electioneering communication. Because of this significantly expanded timeframe, SB 1114 isn't just about regulating election-related speech. It could also apply to speech intended to "influence" state government actions, especially those that take place during the final weeks of the legislative session.

For example: If a non-profit organization were to put out a call-to-action to members of the public, along with their members (both groups considered voters or potential voters) to call their legislators (specifically lawmakers that are to be on the ballot) to advocate for changes in a particular law, they might rethink their organizing strategy, thus censoring themselves from in engaging in a pure issue/policy discussion unconnected to an election. The same could apply for an organization that puts together a legislative report that recaps the policy issues they worked on in accordance of furthering their organizational mission. If they were to discuss a partnership they had with a lawmaker (specifically one that is to be on the ballot) in advancing legislation together, said report could now be considered electioneering communication despite the communication's intent to provide an objective report of legislative activity – not to advocate for the election of a particular candidate.

That problem is compounded, moreover, by the inherent difficulty in deciding what speech is campaign-related and thus subject to regulation. A virtual ban on issue advocacy achieved through redefining "electioneering communication" in an unconstitutionally vague and over-broad manner is highly problematic. The Supreme Court has held that only express advocacy, narrowly defined, can be subject

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to campaign finance controls. The key is the inclusion of an explicit directive to vote for or vote against a candidate. Minus the explicit directive or so-called "bright-line" test, the Secretary of State will decide what constitutes express advocacy. Few non-profit issue groups will want to risk their tax status or incur legal expenses to engage in speech that could be interpreted by the Secretary of State's office to have an influence on the outcome of an election.

Such a broad definition for "electioneering communication" is constitutionally suspect, and as such, we believe subject to further amendments. To address the First Amendment concerns outlined above, we recommend adding several additional exemptions to 67-6602(6)(b), including:

- *(vi) A communication paid for by an organization operating under section 501(c)(3) of the Internal Revenue Code;*
- *(vii) A communication made while the legislature is in session which, incidental to promoting or opposing a specific piece of legislation pending before the legislature, that urges the audience to communicate with a member or members of the legislature concerning that piece of legislation;*
- *(viii) A communication, such as a voter's guide, which refers to all of the candidates for one or more offices, which contains no appearance of endorsement for or opposition to the nomination or election of any candidate and which is intended as nonpartisan public education focused on issues and voting history.*

We also believe that the "electioneering communication" definition could be improved by adding a definition for what "paid" means under 67-6602. The currently undefined term is unclear as to what is to be considered "paid" – relevant staff time preparing a public communication piece, website hosting costs, the fees associated with using a constituent email program? Given the $1,000 threshold under 67-6628(1) Electioneering Communication -- Statements, a clearer definition is needed for organizations to determine if they are potentially subject to donor disclosure. We propose that *"paid" means any direct cost charged by a vendor related to the producing or airing of electioneering communications, such as studio rental time, staff salaries, costs of video or audio recording media and talent, or the cost of airtime on broadcast, cable and satellite radio and television stations, studio time, material costs, the charges for a broker to purchase the airtime and internet communications placed for a fee on the website of another person, business entity, or political action committee.*

Our other critical concern relates to the donor disclosure requirement under 67-6628(1) Electioneering Communication – Statements. The ACLU of Idaho agrees that Idahoans have a right to know who is spending money to influence the outcome of elections and who is supporting or opposing candidates and ballot initiatives. But any legislation requiring disclosure of donor names must be drawn carefully not to sweep more broadly than that. Otherwise, groups engaged in genuine issue advocacy regarding the issues of the day could see their speech chilled. Privacy in one's associations is integral to the freedom of speech guaranteed by the Constitution – particularly when unpopular opinions are expressed.

To protect the First Amendment speech and association rights of Idahoans, the state should include precise definitions limiting the application of this law to 'express advocacy' of the election or defeat of a candidate for office or the adoption or rejection of a statewide referendum or ballot initiative done through the funding of an electioneering communication. Therefore, we also recommend that 67-

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6628(1), line 12 be amended to add "*which was made for the purpose of furthering electioneering communications*" after "together with the date and amount of each donation."

We respect the Legislature's desires regarding more transparency around campaign funding and we want to be sure advocacy on important issues of the day remains unrestrained. These two goals are both worthy and not mutually exclusive. When it comes to the political process, we all have a right to be heard and we hope that the amendments provided through our testimony today provide the Legislature with the opportunity to advance campaign finance reform in a meaningful way while respecting the First Amendment rights of Idahoans and Idaho non-profit organizations. Thank you.