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May 26, 2011

Mr. Gary Goldsmith
Campaign Finance and Disclosure Board
Centennial Office Building
658 Cedar Street, Suite 190
St. Paul, MN 55155-1603

Re: Revocation of Advisory Opinions

Dear Mr. Goldsmith:

As you know, this firm represents the National Organization for Marriage (NOM) and the Minnesota Family Council (MFC). It has come to our attention that your agenda for the May 31, 2011 meeting includes an item "Revocation of Advisory Opinions related to ballot measure disclosure." It has been suggested that the Board is considering revoking AO 257 and AO 343 as they require less disclosure than that required of those making independent expenditures in Minnesota.

Although the Board may be considering increasing disclosure requirements for corporations donating to ballot question committees, what U.S. Supreme Court precedent actually requires is less disclosure. For the following reasons, AO 257 (1997) and AO 343 (2002) should stand.

First, the introduction to House File No. 1533 in its "Comparison of existing versus proposed disclosure provisions for ballot question political committees or funds" states in pertinent part:

> It is questionable whether Advisory Opinions 257 and 343 should be relied on as being authoritative. The recent recognition of independent expenditure political committees or

> funds creates a group of entities that are similar in many respects to associations making ballot question expenditures. Yet under the advisory opinions, the two groups would be treated very differently with respect to disclosure requirements.
>
> Rules of statutory construction require the Board to construe statutes so as to reach a constitutional result. Continuing to rely on the construction established in Advisory Opinion 257 would result in unequal treatment of corporations making independent expenditures and those making ballot question expenditures.
>
> Additionally, the advisory opinions themselves establish unequal treatment for corporations versus non-corporate associations making ballot question expenditures. This unequal treatment may result in a constitutional infirmity to the interpretation expressed in the advisory opinions.

(emphasis added).

There are no court decisions anywhere requiring equal treatment of corporations making ballot question expenditures and corporations making independent expenditures. Likewise, there are no cases requiring similar treatment ballot question committees and independent expenditure committees under equal protection analysis or any other constitutional rationale. That is because ballot question committees and independent expenditure committees are not similarly situated. Ballot question committees make expenditures only in regard to ballot questions, not candidates. Independent expenditure committees make expenditures only in regard to candidates, not ballot questions. Other than a rudimentary informational interest, the rationale for disclosure regulations for candidate expenditures is entirely distinct from ballot question expenditures. Under the U.S. Constitution and judicial precedent, ballot question advocacy has greater protection than candidate advocacy, and for the reasons stated below, ballot question advocacy should be less regulated than candidate advocacy.

Second, disclosure requirements, like those at issue here, are only constitutional if they can pass "exacting scrutiny," which requires a "substantial relation" between the disclosure requirement and a "sufficiently important" governmental interest. *Citizens United v. Federal Election Comm'n*, 130 S. Ct. 876, 913-14 (2010). The Supreme Court in *Buckley v. Valeo* identified three constitutionally cognizable interests in disclosure – the informational interest, the enforcement interest, and the anti-corruption interest. *Buckley*, 424 U.S. 1, 66-68 (1976). The anti-corruption interest is inapplicable because ballot measure speech is not corrupting. *Citizens Against Rent Control v. Berkeley*, 454 U.S. 290, 298 (1981) ("CARC"). Similarly, the enforcement interest is likewise inapplicable. *Buckley* explained that "recordkeeping, reporting, and disclosure requirements are an essential means of gathering the data necessary to detect violations of . . . contribution limitations" so that the government may better enforce those limits. *Buckley*, 424 U.S. at 67-68. But since ballot measure speech is non-corrupting, there is no constitutionally cognizable interest supporting restrictions of contributions to ballot measure

committees. *Citizens United*, 130 S. Ct. at 901, 909. Consequently, the enforcement interest in disclosure is very limited in the ballot measure context.

Third, the informational interest is inapplicable in the ballot measure context to all but large contributions to ballot measure committees. The Supreme Court in *Buckley* explained that the informational interest in disclosure was tied to the goal of informing voters about the sources of political campaign money and how candidates spend it. 424 U.S. at 66. Such knowledge would "alert the voter to the interests to which a candidate is most likely to be responsive and thus facilitate predictions of future performance in office." *Id.* Unlike elected candidates, adopted ballot measures cannot "be responsive" to anyone. Nor can they have secret potential "future performance" that is hidden from the voters. Rather, everything necessary to evaluate ballot measures is contained in the text of the measure itself. Any informational interest in ballot measure disclosure is limited to large financial sponsors – what is sometimes called the "interest in following the money." As the Ninth Circuit recognized, "the information to be disclosed is the identity of persons financially supporting or opposing a candidate or ballot proposition." *Canyon Ferry Road Baptist Church v. Unsworth*, 556 F.3d 1021, 1032 (9th Cir. 2009).

The Ninth Circuit explained:

> In the ballot issue context, the relevant informational goal is to inform voters as to who backs or opposes a given initiative financially, so that the voters will have a pretty good idea of who stands to benefit from the legislation. As a matter of common sense, the value of this financial information to the voters declines drastically as the value of the expenditure or contribution sinks to a negligible level. As the monetary value of an expenditure in support of a ballot issue approaches zero, financial sponsorship fades into support and then into mere sympathy.

Id. at 1033 (internal quotation and citation omitted). The concurrence was even more blunt: "How do the names of small contributors affect anyone else's vote? Does any voter exclaim, 'Hank Jones gave $76 to this cause. I must be against it!' Small contributors are not the Anaconda Company." *Id.* at 1036 (Noonan, J., concurring).

Thus, there is no constitutionally cognizable interest supporting restrictions on ballot measure speech. Nor is there any constitutionally cognizable interest supporting disclosure of most contributors. The informational interest can only support disclosure of contributors of large contributions – those whose disclosure allows voters to "follow the money" in order to determine who stands to benefit from a given ballot measure. We suggest a reporting threshold of no less than $10,000 would meet this requirement. On the one hand, maintenance of the current disclosure scheme satisfies this informational interest. On the other hand, increasing disclosure is unjustified.

Here, the ballot measure that will be affected by any change in the regulatory scheme involves the preservation of traditional marriage, the concept that a legally cognizable marriage may exist only between a man and a woman. Changing the rule now only exposes individual donors to NOM and MFC to the potential of harassment, intimidation, and threats of those who oppose traditional marriage.

Fourth, the primary duty of the Board is to enforce the provisions of Chapter 10A "Campaign Finance and Public Disclosure." Its duty is administrative, not legislative. Therefore, if there has been no change in Chapter 10A, there should be no change in the Board's advisory opinions unless they were erroneously promulgated ab initio, which is not the case here.

Fifth, the disclosure provisions have not changed. The legislature offered such a change, but the bill failed to pass. The Board has no obligation to change its enforcement position when legislation fails. In fact, just the opposite is true. The Board best serves the people by maintaining continuity of enforcement policy. The advisory opinions under consideration have provided helpful guidance for fourteen years. The marriage amendment and the parties supporting or opposing the amendment do not justify a change in enforcement policy.

The people have a right to vote on this question, and donors have a right to donate to NOM and MFC without being subjected to harassment, intimidation, and threats made possible by disclosure requirements that heretofore have never been required. We ask that AO 257 and AO 343 be retained.

Sincerely,

BOPP, COLESON & BOSTROM

/s/

James Bopp, Jr.
Barry A. Bostrom