

**Schindler, Pam**

**From:** Matt Nese <mnese@campaignfreedom.org>  
**Sent:** Tuesday, February 12, 2013 1:07 PM  
**To:** Schindler, Pam  
**Subject:** Center for Competitive Politics' Comments on H.B. 129 Before the Senate Judiciary Committee  
**Attachments:** 2013-02-12\_Senate Comments\_MT\_HB 129\_False Statement Law Changes.PDF

Hi Pam,

We just spoke on the phone. My name is Matt Nese, and I'm the Director of External Relations at the Center for Competitive Politics. In this capacity, I'm responsible for our state legislative outreach efforts as well as our research and coalition activities. The Center is a nonpartisan, nonprofit 501(c)(3) organization focused on promoting and protecting the First Amendment's political rights of speech, assembly, and petition. We oppose efforts to limit campaign contributions, institute taxpayer funded political campaign programs, and implement other restrictions on citizens' ability to support the candidates and causes of their choice.

On behalf of the Center, I have written comments regarding H.B. 129, which amends various aspects of Montana's campaign finance law and political-civil libel law. We desire to submit our comments to all members of the Senate Judiciary Committee, who are scheduled to hear H.B. 129 in a public hearing at a 9 AM session on Thursday, February 14. If possible, we'd like to make our comments part of the public record.

I've attached to this e-mail a PDF of the Center's comments on this bill. The comments run seven pages, including a two-page newspaper article relevant to our testimony.

If you have any questions or concerns, I can be reached on my direct line at (703) 894-6835 or via e-mail.

Thanks for all your help! I very much appreciate it.

Best,

Matt Nese

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CENTER *for*  
COMPETITIVE  
POLITICS

*Congress shall make no law...*

February 12, 2013

The Honorable Terry Murphy  
Montana Senate  
P.O. Box 200500  
Helena, MT 59620-0500

The Honorable Scott Sales  
Montana Senate  
P.O. Box 200500  
Helena, MT 59620-0500

Re: Constitutional Issues with House Bill 129

Dear Chairman Murphy, Vice-Chair Sales, and Members of the Committee:

On behalf of the Center for Competitive Politics, I am writing you today to respectfully submit the following comments regarding the legal and practical impact of the provisions contained in House Bill 129, which amends various aspects of Montana's campaign finance law and political-civil libel law.

The Center for Competitive Politics is a nonpartisan, nonprofit 501(c)(3) organization focused on promoting and protecting the First Amendment political rights of speech, assembly, and petition. It was founded in 2005 by Bradley A. Smith, a former member and Chairman of the Federal Election Commission (FEC).

I write to express concern about the proposed version of H.B. 129, scheduled for a hearing before the Senate Judiciary Committee on February 14, 2013 at 9:00 AM. Our concerns arise out of recent court precedent and the First Amendment's protections for campaign speech.

While we commend the Legislature for considering a measure to correct the state's political-civil libel law, which was deemed unconstitutionally vague in *Lair v. Murry*,<sup>1</sup> unfortunately, the proposed revisions would almost certainly be deemed unconstitutional in many of its applications.

Accordingly, if H.B. 129 is signed into law as written, there is a high likelihood that the provision will again be successfully challenged. Any potential legal action will cost the state a great deal of money defending the case, and will distract the Attorney General's office from meritorious legal work. Additionally, it is probable that the state will be forced by the courts to award legal fees to any potential plaintiffs. Legal fee awards are often costly, and can cost governments well over one hundred thousand dollars.

Indeed, the Sixth Circuit of the United States recently struck down a similar provision in Ohio law in *Susan B. Anthony List v. Driehaus* based on existing and recent Supreme Court

<sup>1</sup> *Lair v. Murry*, 846 F.Supp. 2d 1116 (D. Mt. 2012).

suits for false statements can be successfully brought by persons who are harmed. For example, in 2004 challenger Danny Tarkanian sued incumbent Nevada State Senator Mike Schneider for publishing ads stating that Tarkanian helped set up scam telemarketing businesses. When the jury found for Tarkanian, Schneider ultimately settled the libel suit for \$150,000 (fearing the jury might award even more).<sup>6</sup>

Similarly, an incumbent state senator filed a lawsuit against the Nevada State Democratic Party for circulating a flyer containing false information about him during a campaign. The Party admitted the falsity of their statement and made a donation to the Senator's favorite charity to settle the lawsuit.

Another former state senator in Nevada, Sandra Tiffany, sued the Nevada State Education Association for circulating a flyer depicting her behind bars. Tiffany had previously admitted to ethics violations, but there was never a threat of imprisonment as punishment. She settled the defamation suit, reportedly for \$250,000.<sup>7</sup>

For more background information on Nevada's experience with its standard libel law and the cases described above, please review the April 2012 Las Vegas Review-Journal article, "System works when it comes to negative campaigns," which appears at the end of these comments.

Taken together, these lawsuits demonstrate that existing standard libel laws are effective in punishing campaign speech that is actually damaging. Particularly in light of the high "actual malice" standard, these victories show that allegations, which cross the line, are addressed by existing libel laws that do not suffer from the constitutional difficulties posed by this legislation.

Nevada's experience also proves that laws like the one amended by H.B. 129 are vulnerable in court. Indeed, when Nevada had a system of assessing fines for false campaign statements, they assessed a fine against a candidate who had not, in fact, made any untruthful allegations. The wrongly accused candidate, represented by the American Civil Liberties Union, sued, and the state's statute was invalidated.

In short, the government should not be in charge of deciding what is true or false about officials in government. Nor should the government have the ability to impose fines or other punishments for speech. Instead, regular libel laws are available for settling disputes between the candidates regarding false statements, allowing for the results to be determined by a jury.

### **III. A plurality of the United States Supreme Court noted that even false speech is protected by the First Amendment.**

Libel laws already prohibit damaging false speech, and the Supreme Court has indicated that false speech is not exempt from First Amendment protection merely because of its falsity.

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<sup>6</sup> Steve Sebelius, "System works when it comes to negative campaigns," *Las Vegas Review-Journal*. Available at: <http://www.lvrj.com/opinion/system-works-when-it-comes-to-negative-campaigns-148227365.html> (April 20, 2012).

<sup>7</sup> *Id.*

itself becomes meaningless. Ultimately, H.B. 129 would set a dangerous precedent allowing the government itself to define the truth or falsity of campaign speech, and would erode the very dialogue that allows our democratic society to function.

Instead, given recent court precedent, the political-civil libel statute that H.B. 129 seeks to amend should be repealed outright to preserve the political speech rights of Montanans and to avoid a costly and likely successful lawsuit against the state.

Thank you for allowing me to submit comments on House Bill 129. I hope you will find this information helpful. Should you have any further questions regarding these issues or any other campaign finance proposals, please do not hesitate to contact me at (703) 894-6835 or by e-mail at [mnese@campaignfreedom.org](mailto:mnese@campaignfreedom.org).

Respectfully yours,

A handwritten signature in black ink that reads "Matt Nese". The signature is written in a cursive, slightly slanted style.

Matt Nese  
Director of External Relations  
Center for Competitive Politics

This week, Tiffany settled her case. Although there's a gag order in place, sources told the Review-Journal's Ed Vogel that the teacher union wrote Tiffany a hefty \$250,000 check.

Talk about your favorite charity - I'd wager more than a few state senators would consider a quarter-mil (less attorney fees, even) to be a fair trade for their seat.

As a political journalist, I've seen enough campaign mudslinging to last a lifetime, but you won't catch me denouncing it. People deploy negative attacks because they've been shown to work, since they stick with voters longer than do positive ads.

Since it's not easy to win a libel lawsuit - especially if you're considered a "public figure" - this list of successful actions shows the system works. Hurl a defensible charge, and you're fine; cross the line a little, and you could end up writing a big check.

And that's a lot better than the alternative, in which the state tries to ban untruthful statements in political campaigns. Nevada tried that once, and it was (ironically enough) Bob Beers who stood accused of a violation during his 1998 run for the Assembly. He was assessed a \$5,000 fine.

The problem was, everything Beers had said in his campaign had been true, and, with the help of the American Civil Liberties Union of Nevada, he successfully fought and eventually killed the truth-in-campaigning law in federal court.

Ultimately, the voters decide if a campaign has gone too far. And, for the still-aggrieved, there's always court.

*The above article, "System works when it comes to negative campaigns," can be accessed at: <http://www.lvrj.com/opinion/system-works-when-it-comes-to-negative-campaigns-148227365.html>.*