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RE: Support Bennett Amendment No. 20 to avoid radical effects of Section 220 of S. 1 (substitute amendment)

Dear Senator:

The National Right to Life Committee (NRLC) urges you to support the Bennett Amendment (No. 20), which would strike Section 220 from the pending substitute amendment to S. 1. **Because of the chilling effect that Section 220 could have on grassroots activism, NRLC may include any roll call on the Bennett Amendment in our scorecard of key votes for the 110th Congress.**

While supporters of Section 220 say that it would only require "disclosure" of certain big-dollar lobbying campaigns, the actual language of Section 220 would place unprecedented burdens on issue-oriented citizen groups from coast to coast that seek to motivate the public on matters of federal policy. **Any local activist who runs afoul of the new requirements could be subjected to crushing civil penalties, raised from $50,000 to $200,000 per infraction by adoption of the Vitter Amendment No. 10 on January 12, and even to intimidation by threat of the new criminal penalty of up to 10 years in prison created by Section 223 of the substitute bill.** The net effect would be to chill activities that are essential to the healthy functioning of a representative system of government.

The reach of Section 220 would be far more expansive and drastic than has been acknowledged by any of the sponsors or advocacy-group backers of the provision. Some of the sweeping effects are clearly intended (if not acknowledged) by the provision's backers, but others may be the result of poor draftsmanship or poor understanding of the way Section 220 would alter the structure of the existing Lobbying Disclosure Act (2 U.S.C. Chapter 26).

CONSTITUTIONAL PRINCIPLE

Before discussing the specific regulatory burdens that would be imposed by Section 220, it is necessary to describe the pernicious premise that is at the heart of the proposal: ***Section 220 defines the act of a constituent contacting a member of Congress as an act of "lobbying," specifically "grassroots lobbying."*** In our view, petitioning elected representatives is at the very heart of representative democracy, is granted the highest degree of protection by the First Amendment, and ought to be encouraged rather than restricted and regulated. Yet Section 220 would enact into law a mind-set that encouraging citizens to contact their federal representatives is a type of influence-peddling, inherently suspect, and the proper subject for scrutiny regarding exactly how citizens were motivated to exercise their constitutional right to petition.

(We refer here to definition 17 in Section 220: "GRASSROOTS LOBBYING. The term

'grassroots lobbying' means the voluntary efforts of members of the general public to communicate their own views on an issue to Federal officials or to encourage other members of the general public to do the same." Note that this definition is so expansive that it covers not only verbal and written communications sent by a constituent to an officeholder, but also such activities as holding placards at public demonstrations. submitting letters for publication in local newspapers, or offering comments on an officeholder's position on a call-in radio program.)

Bradley Smith, former chairman of the FEC, and Stephen Hoersting, former Republican Senatorial Committee general counsel, last year explained in detail why "grassroots lobbying" should be protected from Congressional scrutiny and regulation (*see* "Let the Grassroots 'Lobbying' Grow," www.nationalreview.com/comment/smith_hoersting_200602210809.asp). They wrote:

> *"Grassroots lobbying" is merely encouragement of average citizens to contact their representatives about issues of public concern. It is not "lobbying" at all, as that phrase is normally used outside the beltway, meaning paid, full-time advocates of special interests meeting in person with members of Congress away from the public eye. . . . Contact between ordinary citizens and members of Congress, which is what "grassroots lobbying" seeks to bring about, is the antithesis of the "lobbying" at the heart of the Abramoff scandals. It is ordinary citizens expressing themselves. That they are "stimulated" to do so by "grassroots lobbying activities" is irrelevant. These are still individual citizens motivated to express themselves to members of Congress.*

We agree. We urge you to support the Bennett Amendment in order to reject the root concept that communications from constituents are a form of "lobbying," or that what motivated a constituent is a proper subject for governmental inquiry – be it a mailing from an advocacy group, or a newspaper editorial, or a franked newsletter, or a conversation at a local gym.

SECTION 220 – TWO DISTINCT WEBS OF NEW REGULATION

Beyond the fundamental constitutional objection, it is vital that you understand the actual legal effects of Section 220, which have been grossly understated (and are probably poorly understood) by many of the provision's supporters.

Section 220 would create many legal hazards for grassroots-based, activist-staffed organizations throughout the country. Poorly paid, activist employees of such organizations could receive penalties of up to $200,000 per infraction, and even face the threat of criminal prosecution, even if they never set foot in Washington, D.C., or speak to a member of Congress or congressional staff.

Section 220 creates two separate and distinct new webs of regulation. (These have been confused or conflated in some materials circulated by both supporters and opponents of the provision.) *First*, Section 220 greatly expands the universe of persons who must register and file detailed reports (henceforth, quarterly) as federal "lobbyists," because Section 220 redefines

"lobbying activities" to include "paid efforts to stimulate grassroots lobbying." This would include many employees of state and local right-to-life organizations who are paid only small amounts and who seldom engage in true lobbying of members of Congress or their staffs. *Second*, Section 220 creates a new category, the "grassroots lobbying firm," defined so broadly that even a *single individual*, employed by a state or local advocacy group and paid a nominal amount, could be forced to register as a "grassroots lobbying firm" if the organization purchased a single full-page ad in a newspaper on a federal legislative issue.

The primary impact of these regulations would not fall primarily on well-heeled "K Street" lobbyists or on professional public relations firms, which supporters of Section 220 claim are their targets. Most professional Washington lobbying firms and their vendors are well-equipped to deal with complex regulations – they can hire extra lawyers, bookkeepers, and support staff, and bill their clients for the additional expenses required to keep track of their centralized "grassroots lobbying activities."

The real burdens of Section 220 would fall on the thousands of low-paid employees of thousands of issue-oriented citizen groups across the land, of every ideological stripe, who try to motivate members of the general public to communicate with members of the U.S. Senate and House regarding pending legislation. If Section 220 is enacted, the activist will learn that she must register with the federal government as a "lobbyist" and file quarterly reports detailing her efforts to stimulate "grassroots lobbying," of any dollar amount, *if* (1) she is paid any sort of salary, (2) spends more than 20 percent of her time on such grassroots activities, (3) presents the motivating communications to more than 500 persons who are not paying members of the organization, and (4) has communicated with a congressional office or Executive Branch official more than once during a calendar quarter (for example, by sending an e-mail or making a phone call advising a Senate office of the organization's position on a pending vote).

REGISTRATION/REPORTING BY "GRASSROOTS LOBBYISTS" WHO SPEND $1

Some defenders of Section 220 say that these requirements would apply only if the activist is an employee of an organization that spends more than $10,000 in a calendar quarter on such "grassroots lobbying activity." Regrettably, they are mistaken – that may have been the intent, but it is not the language of Section 220. ***There is indeed a $10,000 minimum (per three-month period) threshold in the bill (which amends the $24,500 semi-annual threshold that applies under the current Lobbying Disclosure Act), but Section 220(b)(1) explicitly removes "paid efforts to stimulate grassroots lobbying" from the scope of this exemption. In other words, Section 220 creates an exception to the exemption. This means that under Section 220, even $1 per quarter spent to "stimulate" citizens to communicate with their representatives in Congress triggers the registration and reporting requirement, for an individual who meets the other four numbered criteria in our previous paragraph. (Note: The $10,000 minimum discussed here applies to registration as a "lobbyist," and should not be confused with the $25,000 threshold that applies to the "grassroots lobbying firm," the new entity created by Section 220, which is discussed on the final two pages of this letter.)***

Some defenders of Section 220 also claim that the registration requirement would apply *only* to individuals or firms that are already required to register because they engage in extensive direct lobbying with members of Congress or congressional staff. In this, too, they are mistaken: ***Section 220(a)(1) explicitly adds "paid efforts to stimulate grassroots lobbying" to the list of activities that trigger the federal registration and reporting requirement.*** Therefore, if a local issue-activist group has an employee who has spent any money to encourage more than 500 private citizens (not members of the organization) to write letters to their representatives, has spent 20% of his time on such activity, and has made as few as two contacts to congressional or Executive Branch offices urging action on a pending issue, that employee would be trapped by the registration and reporting requirements.

Defenders of Section 220 emphasize that communications to *members* of an organization (for example, members of a labor union) are exempt. But the First Amendment does not merely guarantee the right to communicate with those who pay dues for the privilege of receiving such communications. Even a small single-issue organization may have a large e-mail alert list (for example), made up of individuals who fall outside of the Section 220 definition of "membership" because they do not make contributions, but nevertheless have a strong desire to be kept informed of congressional legislative activities. In addition, the group may at times feel the need to reach out to the general public – for example, by purchasing an ad in a daily newspaper – to urge citizens to speak out on a timely issue.

"GRASSROOTS LOBBYING FIRM" REGULATION WEB

The second and distinct web of regulation created by Section 220 applies to a new category of regulated entity, the so-called "grassroots lobbying firm." Defenders of Section 220 talk about this provision in terms of so-called "Astroturf" operations, as if it applied to professional advertising or public relations firms, but the actual language is far more sweeping. Section 220 defines a "grassroots lobbying firm" as "*a person* or entity" [emphasis added] who is paid, by a "client," to stimulate "grassroots lobbying" (as defined in Section 220), and who receives, spends, or agrees to spend $25,000 or more in a quarter for such activities. "Client" is defined in the existing law to include an organization that employs an in-house staff person who engages in "lobbying activities," a definition that Section 220 would expand to include activities to motivate grassroots contacts to members of Congress.

(***It is important to note that this $25,000-per-quarter threshold applies <u>only</u> to the new "grassroots lobbying firm" provision of Section 220, and not to the separate requirement that one engaged in "paid efforts to stimulate grassroots lobbying" must register and report as a "lobbyist." As we have already explained, the lobbyist registration requirement is not confined by any dollar threshold with respect to "paid efforts to stimulate grassroots lobbying."***)

Thus, under Section 220, the executive director (for example) of a state or local affiliate of National Right to Life, even if she is part-time and paid only a nominal amount, and even if she seldom or never interacts directly with congressional offices, could be forced to register as a

federal "grassroots lobbying firm" and file detailed reports on a quarterly basis, if she on behalf of the organization (the "client") spends more than $25,000/quarter on encouraging the general public to contact their federal elected representatives. Since a single full-page ad in a major metro newspaper typically costs more than $25,000, many part-time citizen activists would find themselves legally defined as "grassroots lobbying firms." Note that in this scenario, it is not the organization that Section 220 defines as a "grassroots lobbying firm," but the individual staff person as described. Also, note that this new regulation of "grassroots lobbying firm(s)" is not constrained by the language that limits the existing Lobbying Disclosure Act requirement to register as a "lobbyist" to persons who make at least two direct "lobbying contacts" and who spend more than 20% of their paid time on lobbying activities during a reporting period. Those limitations apply only to the Act's definition of "lobbyist," and not to the new language of Section 220 defining "grassroots lobbying firm."

The "grassroots lobbying firm" provision of Section 220 has one additional side effect which has not been understood, or at least has not been acknowledged, by its supporters: The $25,000 threshold is an aggregate figure for a vendor, not a threshold that applies to each issue-oriented client organization. We illustrate the implications by the following scenario: In Anytown, 15 citizen-activist groups, none of which has any paid staff or engages in any direct contacts with members of Congress or congressional staff, all hire the same vendor to mail to various lists of citizens urging them to communicate with their elected representatives on different timely issues. No organization pays more than $2,000 for the use of any list, but the aggregate amount collected by the vendor for mailings to all lists exceeds $25,000 in a three-month period. Under Section 220, this local vendor would be required to register as a "grassroots lobbying firm" and to report the details of his mailing activities for *all* 15 of his "clients," even a group that merely paid $50 for the use of a list.

CONCLUSION

In summary, Section 220 is a poorly drafted provision. If enacted, it will disrupt the constitutionally protected activities of thousands of issue-oriented citizen groups from coast to coast, chill free speech by citizen activists on the issues of the day, and become a textbook example of the Law of Unintended Consequences.

We urge you to prevent these consequences by supporting the Bennett Amendment No. 20, which will strike Section 220 from the substitute to S. 1. Thank you for your consideration of our strong views on this issue.

Sincerely,

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