CENTER *for* COMPETITIVE POLITICS

Congress shall make no law...

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February 24, 2015

The Honorable Jeremy Gillam
State Capitol
500 Woodlane Street, Suite 350
Little Rock, AR 72201

The Honorable Eddie L. Armstrong
State Capitol
500 Woodlane Street, Suite 350
Little Rock, AR 72201

Re: Constitutional and Practical Issues with House Bill 1425

Dear Speaker Gillam, Minority Leader Armstrong, and members of the House:

On behalf of the Center for Competitive Politics, I am writing you today to respectfully submit the following comments regarding the constitutional and practical impact of the provisions contained in House Bill 1425, which proposes amendments to Arkansas' campaign finance laws.

The Center for Competitive Politics is a nonpartisan, nonprofit 501(c)(3) organization that promotes and protects the First Amendment political rights of speech, assembly, and petition. It was founded in 2005 by Bradley A. Smith, a former Chairman of the Federal Election Commission. In addition to scholarly and educational work, the Center is actively involved in targeted litigation against unconstitutional laws at both the state and federal levels. For instance, we presently represent nonprofit, incorporated educational associations in challenges to state campaign finance laws in Colorado, Delaware, and Nevada. We are also involved in litigation against the state of California.

If House Bill 1425 becomes law as written, there is a high likelihood that the law will be found unconstitutional if challenged in court. 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 successful plaintiffs. Legal fee awards are often expensive, and can cost governments hundreds of thousands of dollars.

House Bill 1425 proposes to regulate speech and creates massive new government reporting requirements for speakers. Many provisions in the bill are unconstitutionally vague while others are far too broad in their impact on speech. There is no question the measure would greatly harm First Amendment free speech rights.

I. The legislation's "electioneering communication" definition is stunningly broad and highly susceptible to legal challenge.

The bill's over-inclusive definitions cause H.B. 1425 to sweep far more broadly than allowed under the First Amendment.

Section 1 defines an "electioneering communication" as any broadcast, cable, or satellite communication that refers to a clearly identified candidate and is distributed within sixty days of a primary election or ninety days of a general election, if the communication "is targeted to the relevant electorate" in a state legislative (or other) district. As constructed, the definition presents several serious constitutional and practical issues.

Just because a communication refers to a candidate doesn't mean that it has anything to do with "electioneering." The term used in the bill is fundamentally misleading. An ad for a nonpartisan voter guide that urges citizens to "find out where John Smith and John Doe stand on key issues in Arkansas" would be a regulated communication under H.B. 1425, so long as it was aired in the sixty or ninety-day window. So would an ad that urges citizens to call State Representative John Jones and ask him to sponsor a particular bill aired in the same period. Many more communications that have nothing to do with an election would become regulated activities creating massive government reporting obligations.

Worse, the sixty-day window prior to primary elections and ninety-day window prior to general elections under which communications are subject to regulation as "electioneering communications" is 67% longer than the federal electioneering communication windows of thirty days before a primary and sixty days before a general election. Effectively, H.B. 1425 subjects an expansive number of communications to government reporting requirements for at least full five months of the ten months leading up to Election Day. There is no evidence such broad time restrictions are needed, and such a window is of dubious constitutionality. This provision would likely lead to many inadvertent violations of the law by unsuspecting speakers.

For areas where primary runoff elections might take place, the limits would drag on even longer. If such a law had been in effect in 2014, 175 of the days – well over half of the period leading up to the November 2014 election – may have been covered by the bill.

H.B. 1425, furthermore, purports to require that communications be "targeted to the relevant electorate." In fact, the bill contains no real definition of "targeting" at all – for any possibility that a communication may be heard by someone in the relevant jurisdiction (district, county, state, etc.) would then be considered regulated speech. Such burdens are contrary to the free speech protections of the First Amendment.

For example, an incidental mention of Arkansas Secretary of State Mark Martin on a Mississippi television station during a Mississippi State-Arkansas college football game in October of an election year – even if the mention was solely to note a prominent University of Arkansas alumni – could trigger the electioneering communications law if even one person in Arkansas was able to see the broadcast. This is in stark contrast to the carefully worded "electioneering communication" definition approved by Congress.

The federal law's version of "targeted to the relevant electorate" limited the scope of electioneering communication regulation to "communication[s that] can be received by 50,000 or more persons" in the relevant jurisdiction.[1] By requiring a significant number of audience members to trigger the law, this federal provision specifically protects incidental references to candidates from bearing the full burdens of campaign finance regulation. The federal electioneering communications

[1] 52 U.S.C. § 30104(f)(3)(C).

statute further required the Federal Communications Commission to establish and maintain an online electioneering communications database,[2] so that speakers can know whether a given communication can be heard by 50,000 or more persons in a state or district. As the definition in H.B. 1425 is written so broadly as to cover any communication incidentally mentioning a candidate, any Arkansas speaker would have to assume that *every* broadcast communication naming a candidate sixty days before a primary or ninety days before a general election would be regulated as an "electioneering communication."

In short, nearly any mention of a candidate in a covered communication may be regulated under this measure. This broad coverage would silence many speakers during the electioneering communication period and silence much important public discussion and debate about key issues in Arkansas.

II. The concept of a "coordinated electioneering communication" is dangerous and should be discarded.

Much of the speech labeled as an electioneering communication by the bill is protected issue speech. "Coordination" is a concept that affects "independent expenditures" supporting the election or defeat of a candidate. The concept should not be applied to issue speech. At times, such issue speech needs to be coordinated in order to be effective. For example, take any bill in the General Assembly. Groups supporting a cause need to, and should be, coordinating their efforts with allies in the General Assembly or among other elected officials. Such actions cannot reasonably be likened to campaign contributions, and should remain beyond the reach of government regulation.

Given the overbreadth of the "electioneering communication" definition, the "coordinated electioneering communication" standard will invite demands for investigations of alleged coordination by political opponents. By their very nature, investigations concerning illegal coordination will target the most sensitive information: internal communications, membership lists, and conversations with political allies, all with great potential to harm First Amendment rights.

An illegal coordination claim alleges that someone spoke to someone else concerning a prohibited topic. Naturally, any contact between two individuals can raise suspicions that such a conversation occurred. And, once initiated, a coordination investigation will focus on who spoke with whom. This will require an invasive investigation that, by its nature, is directed precisely at private communications. Moreover, since information may be passed through intermediaries, the investigation will often expand to encompass the target's entire professional and personal network.

For example, in 1997, a complaint by the Democratic National Committee triggered an investigation of over 60 conservative organizations, plus numerous individuals, that lasted over four years.[3] The various respondents were ultimately exonerated. Another investigation of the Christian Coalition led to over 80 depositions and years of legal fees before the Coalition was ultimately found not to have illegally coordinated its activities.[4] These examples are not outliers, but rather

[2] "The Electioneering Communications Database," Federal Communications Commission. Retrieved on February 24, 2015. Available at: http://apps.fcc.gov/ecd/ (February 28, 2014).
[3] *See* Federal Election Commission, MUR 4624.
[4] *FEC v. Christian Coalition*, 52 F. Supp. 2d 45 (D.D.C. 1999). *See also* Mark Hemingway, "IRS's Lerner Had History of Harassment, Inappropriate Religious Inquiries at FEC," *The Weekly Standard*. Retrieved on February 24, 2015. Available at: http://www.weeklystandard.com/blogs/irss-lerner-had-history-harassment-inappropriate-religious-inquiries-fec_725004.html (May 20, 2013).

paradigmatic examples of the intrusive and speech-inhibiting nature of coordination investigations based on flimsy allegations and generalized suspicion. Imposing this standard in Arkansas law will offer the opportunity for illegal coordination complaints to great harm of First Amendment rights.

III. The legislation's overbroad disclosure requirements run contrary to longstanding Supreme Court First Amendment precedent and are highly vulnerable to a legal challenge.

While the Supreme Court upheld certain disclosure in *Citizens United v. Federal Election Commission*,[5] it addressed only a narrow and far less burdensome form of disclosure than that contemplated by H.B. 1425. The Court merely upheld the disclosure of an electioneering communication report, which disclosed the *entity* making the expenditure and the purpose of the expenditure. Such a report only disclosed contributors giving over $1,000 *for the purpose of furthering the expenditure*.[6]

By contrast, this legislation proposes massive government reporting requirements that make little sense. If a group simply spends over the threshold amount on a covered communication, then it must report to the government the names and addresses of everyone who contributes over a $250 threshold going back to the beginning of the previous year. A group with a $1 million annual budget that spends just $5,000 on a radio ad might have to report contributions of well over $1 million for the ad. Clearly, such reporting would be ridiculous and would provide misleading information.

By contrast, the federal regulation requires only that money earmarked for the ads be disclosed. This bill contains no similar provision.

In contrasting the disclosure burdens dealt with by the Court in the 1986 case of *Massachusetts Citizens For Life, Inc. v. Federal Election Commission* ("*MCFL*"),[7] the *Citizens United* Court specifically held that the limited disclosure of an independent expenditure report is a "less restrictive alternative to more comprehensive regulations of speech," such as those proposed in H.B. 1425.[8]

In *MCFL*, both the plurality and the concurrence were troubled by the burdens placed upon nonprofit corporations by certain disclosure requirements. The plurality was concerned with the detailed record keeping, reporting schedules, and limitations on solicitation of funds to only "members" rather than the general public.[9] Likewise, Justice O'Connor was concerned with the "organizational restraints," including "a more formalized organizational form" and a significant loss of funding availability.[10]

If this bill becomes law, it will create conditions that raise the very concerns addressed by the Supreme Court in *MCFL*. H.B. 1425 would mandate detailed record keeping and effectively force groups to create multiple bank accounts and solicitations.

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[5] *Citizens United v. FEC*, 558 U.S. 310 (2010).
[6] 52 U.S.C. § 30104(f); *Citizens United*, 558 U.S. 366-67.
[7] *Massachusetts Citizens For Life, Inc. v. Federal Election Commission*, 479 U.S. 238 (1986).
[8] *Citizens United*, 130 S. Ct. at 915 (contrasting independent expenditure reports with the burdens discussed in *MCFL*).
[9] *MCFL*, 479 U.S. at 253 (Brennan, J., plurality opinion).
[10] *Id*. at 266 (O'Connor, J., concurring).

Essentially, the proposed bill would force nonprofit groups to either form what is functionally a separate PAC, face disclosure to the government of some of its donors if the groups spends more than $5,000 on communications that merely mention the name of a candidate, or avoid all speech that mentions the name of a candidate. *MCFL* noted that these sorts of "incentives" serve to "necessarily produce a result which the State [can]…not command directly. It only result[s] in a deterrence of speech which the Constitution ma[de] free."[11]

IV. The type of disclosure mandated by organizations making electioneering communications under H.B. 1425 could deter individuals from contributing to organizations by impinging on their right to freedom of association.

Section 2, 7-6-229(a)(1) triggers some form of disclosure from organizations that spend more than $5,000 in a calendar year to fund electioneering communications. However, as noted previously, the language of the provision mandates disclosure beyond that which has been sanctioned by previous Supreme Court rulings and is, therefore, susceptible to legal challenge.

H.B. 1425 requires any organization that pays for an electioneering communication from its general treasury funds aggregating more than $5,000 during a twelve-month period to report all its donors who gave an aggregate of more than $250 dating to the first day of the preceding calendar year.

Alternatively, the proposed legislation allows organizations to pay for electioneering communications out of a segregated account for the purpose of making electioneering communications. If an entity creates such a segregated account, all donors whose funds are deposited into the account who gave an aggregate of more than $100 dating to the first day of the preceding calendar year would still need to be reported, provided the organization pays out of said account for covered communications aggregating more than $5,000 during a twelve-month period. But all this means is these unsuspecting donors might have their donations made public, even if they had no knowledge of the communication or even would disagree with its message.

Taken together, under the proposed legislation, if an organization planned to sponsor an issue advocacy communication or communications in Arkansas identifying a candidate in the sixty or ninety-day window before a primary or general election in excess of $5,000, in order to avoid having to report all its donors who gave more than $250 dating to the first day of the preceding calendar year preceding the communication or communications, the organization would have to either:

1) Limit its total spending on all covered communications to $5,000 or less; or
2) Pay for issue ads in Arkansas using a segregated account, in which case those donors would still have to be reported if they gave more than $100 into the account dating back to the first day of the preceding calendar year; or
3) Cancel the planned communication or communications.

While the courts have generally upheld these types of reporting requirements for political committees – whose main purpose is to ensure the election or defeat of candidates – these reporting burdens are inappropriate given the government's lesser interest in imposing such requirements on organizations engaging in non-electoral speech about policy issues and matters of importance to the

[11] *MCFL*, 479 U.S. at 256 (plurality opinion).

public. Moreover, the deterrent effect of having donors' names and addresses publicly reported encroaches on the organizations' and the donors' First Amendment right to freedom of association.

Indeed, when faced with the knowledge that their full name and residential address will be reported to the government and made publicly available on the Internet for journalists, employers, fundraisers, salesmen, and nosy neighbors to access, it is quite plausible that many of these would-be donors will decide not to donate, preferring instead to maintain their privacy. This could lead to the demise of many nonprofit groups.

As written, the law compels disclosure "[i]f the disbursements were not paid exclusively from a segregated bank account established to pay for the electioneering communications, the name and address of and amount contributed by each person who made a contribution or contributions which, in the aggregate, exceed two hundred fifty dollars ($250) or more to the person making the disbursement, aggregating since the first day of the preceding calendar year."[12] This provision clearly compels the disclosure of all donors to the general fund of an organization regardless of whether or not such contributions were intended for electioneering communications. Such a requirement will likely invite a costly legal challenge.

As discussed previously, in *Citizens United*,[13] the U.S. Supreme Court upheld an electioneering communications disclosure regime that *only* compelled the disclosure of earmarked contributions.[14] The Supreme Court has never upheld any other donor disclosure requirement for speech that is not express advocacy. This "earmark-only" disclosure provision was specifically designed to prevent corporations from disclosing all of their funders as a condition of engaging in protected First Amendment political speech. Contrary to claims by those who advocate for greater regulation of political speech, generalized disclosure for electioneering communications has never been upheld by the United States Supreme Court. Indeed, the Supreme Court has never upheld generalized disclosure as it pertains to genuine, non-pejorative issue speech – which would be regulated by this proposal.[15]

Conversely, adopting only language requiring the disclosure of those contributions *specifically intended* for communications supporting the election or defeat of candidates would be constitutional, pursuant to a nearly forty-year-old unbroken chain of U.S. Supreme Court litigation.[16] The additional requirement for instances when such an earmarked account does not exist, however, is an onerous and likely unconstitutional requirement.

Limiting such disclosure to an earmarking provision for express advocacy for and against candidates would also cure another problem with the bill – the fact that it could compel the generalized disclosure of donors to Section 501(c)(3) organizations engaged in legitimate nonpartisan voter information activity. Section 501(c)(3) organizations are prohibited under federal tax laws from engaging in *any* electoral advocacy, and as such, the state has no interest in the donors to such groups. But such groups are permitted to speak to the public through education on issues.

This is a reason why many states have enacted electioneering communications statutes that exempt neutral communications, or prevent § 501(c)(3) organizations from being regulated under

[12] Sec. 2, 7-6-229(a)(2)(H).
[13] 558 U.S. 310 (2010).
[14] 78 Fed. Reg. 72899, 72911 (Dec. 26, 2007).
[15] *Citizens United*, 558 U.S. at 368.
[16] *Buckley v. Valeo*, 424 U.S. 1, 80 (1976).

such statutes.[17] Presently, the Center for Competitive Politics represents a § 501(c)(3) organization in a suit against Delaware's[18] electioneering communications regime – which compels generalized donor disclosure from organizations engaged in neutral, nonpartisan issue speech. The district court ruled in favor of our client.

V. Disclosure information can result in the harassment of individuals by their political opponents and should be carefully balanced with the public's "right to know."

In considering this bill, it's worth noting that disclosure laws implicate both citizen privacy rights and touch on Supreme Court precedent. Indeed, the desire to preserve privacy stems from a growing awareness by individuals and the Supreme Court that threats and intimidation of individuals because of their political views is a very serious issue. Much of the Supreme Court's concern over compulsory disclosure lies in its consideration of the potential for harassment. This is seen particularly in the Court's decision in *NAACP v. Alabama*, in which the Court recognized that the government may not compel disclosure of a private organization's general membership or donor list.[19] In recognizing the sanctity of anonymous free speech and association, the Court asserted that "it is hardly a novel perception that compelled disclosure of affiliation with groups engaged in advocacy may constitute as effective a restraint on freedom of association as [other] forms of governmental action."[20] This is why even anonymous political activity has been protected in certain contexts.[21]

Much as the Supreme Court sought to protect African Americans in the Jim Crow South and those citizens who financially supported the cause of civil rights from retribution, donors and members of groups supporting unpopular causes still need protection today. It is hardly impossible to imagine a scenario in 2016 in which donors to controversial causes that make independent expenditures – for or against same-sex marriage; for or against abortion rights; or even groups associated with others who have been publicly vilified, such as the Koch family or George Soros, might be subjected to similar threats.

This may seem unrealistic, but it illustrates the fundamental problem with the approach taken. The assumption seems to be that citizens are dangerous to government, and the government must be protected from them. Little thought is given to protecting the citizens from government, as is required by the First Amendment. Worse still is that little can be done once individual contributor information – a donor's full name and street address – is made public under government compulsion. It can then immediately be used by non-governmental entities and individuals to harass, threaten, or financially harm a speaker or contributor to an unpopular cause. We believe, therefore, that the problem of harassment is best addressed by limiting the opportunities for harassment, and that this is best done by crafting reporting thresholds that capture just those donors who are truly contributing large sums to *political candidates* – and not to organizations engaging in issue advocacy about a particular topic relevant to the voters of Arkansas.

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[17] *See, e.g.* Conn. Gen. Stat. § 9-601b(b)(13) (excluding "[a] lawful communication by any charitable organization which is a tax-exempt organization under Section 501(c)(3) of the Internal Revenue Code of 1986, or any subsequent corresponding internal revenue code of the United States"); 10 Ill. Comp. Stat. Ann. 5/9-1.14(b)(4) (excluding "[a] communication by an organization operating and remaining in good standing under Section 501(c)(3) of the Internal Revenue Code of 1986"); Iowa Code § 68A.401A (limiting reporting for communications merely mentioning a candidate to § 527 organizations).

[18] *See Delaware Strong Families v. Biden*, 13-01746 (D. Del. 2014).

[19] *NAACP v. Alabama ex rel. Patterson*, 357 U.S. 449 (1958).

[20] *NAACP*, 357 U.S. at 462.

[21] *See McIntyre v. Ohio Elections Commission*, 514 U.S. 334, 337-338 (1995).

Ultimately, the Court has made clear that 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 political activity requires a strong justification and must be carefully tailored to address issues of public corruption and the provision of only such information as is particularly important to voters. It is questionable that requiring government reporting of the private information of an individual giving as little as $251 to an organization speaking about a particular issue is sufficient to meet this justification.

VI. The proposed reporting thresholds for organizations making so-called "electioneering communications" would often uncouple the disclosed "donor" from the actual speech funded, resulting in "junk disclosure" that associates a donor with a communication they have no knowledge of and may not even support.

The proposed reporting regime in H.B. 1425 will mislead rather than enlighten voters.

When we speak of political committees and political parties, we can be reasonably assured that all donors to such organizations intend for their contributions to be used for political purposes. The same is not true of donors to 501(c) membership organizations and other forms of incorporated advocacy groups that may be captured by the electioneering communication definition in H.B. 1425. However, if the group decides to engage in the extremely broad types of communications covered in the bill starting at the low level of $5,001, all of its donors over a $250 threshold would potentially be made public.

This is problematic, as many of these donors will have given for very different reasons. Imagine, then, a Madison County cattle rancher, who is a proud Democrat, contributing to the Arkansas Cattlemen's Association (ACA) as his professional association. Then, suddenly a bill is introduced for additional regulation on the raising and slaughtering of cattle. This Arkansan finds himself listed as contributing to ads that mentioned Democratic elected officials that were run by the ACA, without ever having known about the ads. People give to trade associations and nonprofits not because they agree with everything the organization does, or particular political positions it takes, but because on balance they think it provides a valuable service. To publicly identify contributing individuals with so-called "electioneering communications," that are genuine issue advocacy is both unfair to members and donors and will often be misleading to the public. Our cattle rancher in the above hypothetical does not take issue with those Democratic candidates and may actually support the candidates; this is "junk disclosure."

By mandating disclosure at such low thresholds for those giving to an organization out of general support, it is actually more difficult for voters to discern who the major supporters of an organization are. Muddying up the report's contents with many relatively small donors runs counter to this aim. In effect, this amounts to "junk disclosure" – disclosure that is primarily used by other parties to look for potential donors and by prying neighbors to search their fellow citizens' political activity and affiliations.

A simple test is this: in all of the stories about disclosure in the past three elections, did any express alarm about persons donating $100 or even $250? We suggest the answer is no.

It is difficult to argue that public reporting on relatively small dollar contributions to organizations speaking on issues, which do not advocate for or against a candidate, advances the legitimate purposes of informing the public or preventing corruption.

VII. The 72-hour reporting requirement for electioneering communications will severely burden less sophisticated speakers, and will increase the likelihood of inaccurate disclosure reports.

The proposed statute requires less-formalized organizations, which engage in electioneering communications, to fill out reports within 72 hours of triggering the statute.[22] For less sophisticated speakers, who are not used to involving themselves in politics, aggregating records and filing for the first time will inevitably be a difficult endeavor. Lengthening the reporting time to involve less immediate disclosure will shield these less sophisticated actors from inadvertently filing incorrect reports – likely in an endeavor to comply with the burdensome deadline – or from incurring fines for late filing. Beyond these concerns, the reports are so burdensome that substantial First Amendment questions are raised by the provision. Certainly, such reports should not have to be filed more often than reports filed by political committees. A 72-hour requirement might be more reasonable if the election is imminent, such as less than 14 days away, but not if it is still 85 days away.

VIII. Any effective date attached to this legislation should not compel disclosure information from citizens who gave prior to the passage of H.B. 1425.

As currently written, this legislation has no effective date, but regardless of when the legislation takes effect, it may inadvertently force the disclosure of the names and addresses of contributors who gave to organizations before the passage of this bill. Those individuals contributed to organizations without any expectation of being placed at risk of public exposure. At the very least, the law should not be made to apply to contributions made prior to the passage of this bill.

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Thank you for allowing me to submit comments on House Bill 1425. 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.

Respectfully yours,

Matt Nese
Director of External Relations
Center for Competitive Politics

[22] Sec. 2, 7-6-229(a)(1).