January 18, 2017

The Honorable Bob Ballinger State Capitol 500 Woodlane Street, Suite 350 Little Rock, AR 72201	The Honorable Jack Ladyman State Capitol 500 Woodlane Street, Suite 350 Little Rock, AR 72201

Re: Constitutional and Practical Issues with House Bill 1005

Dear Chair Ballinger, Vice-Chair Ladyman, and members of the House State Agencies and Governmental Affairs Committee:

On behalf of the Center for Competitive Politics, we are writing you today to respectfully submit the following comments regarding the constitutional and practical impact of the provisions contained in the introduced version of House Bill 1005, which has been referred to the House State Agencies and Governmental Affairs Committee. This measure would dramatically amend Arkansas's campaign finance laws.

The Center for Competitive Politics is a nonpartisan, § 501(c)(3) nonprofit organization dedicated to protecting and defending the First Amendment political rights of speech, assembly, and petition. The Center 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. Just this past year, we secured judgments in federal court that struck down laws in the states of Colorado and Utah for violating the First Amendment. We are also involved in litigation in California, Missouri, and against the federal government.

If legislation that is in any way similar to House Bill 1005 becomes law, that statute faces a high likelihood of being found unconstitutional in court. Any potential legal action will cost the state a great deal of time and resources to defend, and will divert your Attorney General's office from meritorious legal work. Furthermore, under the federal Civil Rights Act, Article III courts are empowered to order states to pay costs and damages to successful plaintiffs. The Center received two such judgments – both in the six-figure range – from state governments in 2016.

House Bill 1005 proposes to regulate speech and association, and creates labyrinthine reporting requirements for speakers and even individual donors. The measure is full of vague and uncertain phrases – a constitutional harm in and of itself. What is discernible about the bill is also far too broad in its impact on speech. There is no question that this measure, if enacted, will greatly harm "the free discussion of governmental affairs," the "universal[ly]" recognized "major purpose of th[e First] Amendment."[1]

As a general principle, "[t]he First Amendment does not permit laws that force speakers to retain a campaign finance attorney…before discussing the most salient political issues of our day."[2] Complicated

[1] *Mills v. Ala.*, 384 U.S. 214, 218 (1966).
[2] *Citizens United v. Fed. Election Comm'n*, 558 U.S. 310, 324 (2010).

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and "[p]rolix laws" in this area inevitably "chill speech for the same reason that vague laws chill speech: People of common intelligence must necessarily guess at the law's meaning and differ as to its application."[3] Campaign finance laws are not often praised for their simplicity, but this law is – as discussed below – in a league of its own. House Bill 1005, which provides for a needlessly complicated reporting regime for communications – and requires that groups and individuals issuing such reports do so with an affidavit – will severely burden those who attempt to meet its criteria, and will dissuade many others from even entering the political dialogue.[4]

Moreover, the Supreme Court has insisted that laws such as House Bill 1005, at a minimum, be subject "to exacting scrutiny, which requires a substantial relation between" the regulation "and a sufficiently important governmental interest."[5] In practice, this means that the law must either work to prevent the exchange or appearance of an exchange of "[t]he hallmark of corruption…dollars for political favors,"[6] or provide the electorate with information regarding the direct "sources of a candidate's financial support."[7] If there is "a substantial mismatch between" these "objective[s] and the means" that the State undertakes to "achieve" them, the law will fail.[8]

In practice, House Bill 1005 seeks to (1) establish a new form of regulated speech in Arkansas, "electioneering communications"; (2) enact a far-reaching disclosure regime for such electioneering communications; (3) regulate speech where the message is "coordinated" between a number of parties; and (4) institute a donor reporting provision whereby donors, as opposed to recipient organizations, are forced to report a wide array of unnecessary and unhelpful information to the State. We will take each in turn.

I. The Proposed Electioneering Communication Definition

The Supreme Court has determined that persons associating for the purpose of or speaking about politics may only be forced to register and report with the State if and when an organization conducts express advocacy – speech that explicitly tells the electorate whom to vote for.[9] Arkansas already defines and regulates such speech as an "independent expenditure."[10]

The Court has permitted one additional form of regulated speech – the regulation of speech via broadcast media, targeted to the relevant electorate, which mentions a candidate shortly before an election.[11] Under federal law, such speech is regulated as an "electioneering communication." In *McConnell v. Federal Election Commission*, 540 U.S. 93 (2003), the Court upheld the federal electioneering communications regime after a 100,000-page record demonstrated that broadcast ads that named candidates shortly before an election functioned as express advocacy – that is, that they were virtually the equivalent of explicitly telling a voter how to cast his or her ballot.

House Bill 1005 regulates speech that it also calls "electioneering communications." But the proposed statute bears little resemblance to the federal statute upheld in *McConnell*, which the Court praised as being "easily understood and objectively determinable."[12] Claiming Arkansas's proposed regime is

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[3] *Citizens United*, 558 U.S. at 324 (punctuation altered).
[4] *Van Hollen v. Fed. Election Comm'n*, 811 F.3d 486 (D.C. Cir. 2016) ("The arc of campaign finance law has been ambivalent, bending toward speech and disclosure. Indeed what has made this area of election law so challenging is that these two values exist in unmistakable tension. Disclosure chills speech").
[5] *Citizens United*, 558 U.S. at 366 (citation and internal quotation marks omitted).
[6] *McCutcheon v. Fed. Election Comm'n*, 134 S. Ct. 1434, 1441 (2014) (citation and internal quotation marks omitted).
[7] *Buckley v. Valeo*, 424 U.S. 1, 67 (1976) (*per curiam*).
[8] *Wisc. Right to Life, Inc. v. Barland*, 751 F.3d 804, 841 (7th Cir. 2014) (citation and internal quotation marks omitted).
[9] *Buckley*, 424 U.S. at 79-81.
[10] Ark. Code. Ann. § 7-6-201(11)(A) ("Expressly advocates the election or defeat of a candidate for office…").
[11] Specifically, 60 days before a general election or 30 days before a primary. 52 U.S.C. § 30104(f)(3)(A)(i)(II).
[12] *McConnell*, 540 U.S. at 194.

similar to the federal one is a bit like suggesting that a United States Army captain should be permitted to take command of a United States Navy vessel on the theory that both services recognize a rank called "captain."

First, unlike the federal statute, which "applies only…to a broadcast,"[13] House Bill 1005 applies to advertisements "in any form."[14] But the federal courts have insisted that the legislature demonstrate that the media being regulated is "actually utilized in [state] elections."[15] The unlimited scope of House Bill 1005's reach indicates it may "fail to serve the State's interest" and therefore will flunk an exacting scrutiny analysis.[16]

Second, unlike the federal statute and every electioneering communication statute that has been upheld by the judiciary, House Bill 1005 does not create an "electioneering communications window" – typically 60 days before a general election when its provisions apply.[17] Instead, House Bill 1005 provides a free-floating timeline in which the window may be enforced, subjecting speakers only to the vagaries of the five-member, partisan Arkansas Ethics Commission which – in determining *post hoc*, for the purposes of regulating covered transfers, explained below at **IV**, whether a given advertisement constitutes an electioneering communication – "consider[s]…[t]he proximity between the date of the advertisement…and the date of the election."[18] Such an amorphous line offers speakers "no security for free discussion…it blankets with uncertainty [whether] whatever may be said" constitutes regulable speech.[19]

Third, what form of advertisement would constitute an electioneering communication is entirely unclear. The statute appears to suggest that electioneering communications only encompass speech "[f]or which the only reasonable interpretation….is an attempt to influence a vote for or against a specific candidate or specific set of candidates."[20] The Supreme Court struck similar language as unconstitutional in *Buckley v. Valeo*, noting the inherent vagueness of attempting to regulate the mere "influence" of a vote.[21]

The provision doubles down on this vagueness by instructing the Arkansas Ethics Commission to, when reviewing potential covered transfers, "consider" along with "[a]ny other factor the commission deems relevant…[w]hether the advertisement or communication offers preferential support for or criticism of a clearly identified candidate for office."[22] Such a broad directive – especially combined with the inherent vagueness of the proposed law's effort to regulate the mere "influence" of an election, welcomes the sort of intents-and-effects analysis that the Supreme Court has repeatedly rejected, finding that a standard "turning on the intent of the speaker does not remotely fit the bill."[23]

In this review, the roving authority that the Arkansas Ethics Commission is afforded – to determine whether any given speech is regulated as an "electioneering communication" based on "[a]ny…factor the

[13] *McConnell*, 540 U.S. at 194.
[14] Proposed Code § 7-6-201(20)(A)(i). Oddly, despite claiming universal application over "any political advertisement or campaign communication" that fits its criteria, the bill then lists a number of covered "medias" [*sic*]. These include "electronic" and "digital," without definition – implying a difference – as well as "graphic" and "design," presumably a typographical error in place of "graphic design."
[15] *Del. Strong Families v. Att'y Gen.*, 793 F.3d 304, 311 (3d Cir. 2014).
[16] *Del. Strong Families*, 793 F.3d at 311.
[17] *E.g. Indep. Inst. v. Williams*, 812 F.3d 787, 797 (10th Cir. 2016) ("Colorado *only* demands disclosure for communications…within sixty days of a general election").
[18] Proposed Code § 7-6-201(20(C)(ii).
[19] *Thomas v. Collins*, 323 U.S. 516, 535 (1945).
[20] Proposed Code § 7-6-201(20)(A)(vi).
[21] *Buckley*, 424 U.S. at 79-81.
[22] Proposed Code § 7-6-201(20)(C)(i)-(iii).
[23] *Wis. Right to Life, Inc.*, 551 U.S. at 468; *id.* ("Far from serving the values the First Amendment is meant to protect, an intent-based test would chill core political speech by opening the door to a trial on every ad within the terms of [the statute], no matter how compelling the indications that the ad concerned a pending legislative or policy issue").

commission deems relevant to its determination" is a recipe for selective enforcement, and "open[s] the door to a trial on every ad"[24] put before the Ethics Commission. "No reasonable speaker would choose to run an ad"[25] potentially covered by House Bill 1005, as "the only means…to discover where that line falls is post-hoc…case-by-case adjudication."[26] Such a state of affairs would be intolerable regarding *any* speech, but is all the more serious given that House Bill 1005 seeks to regulate "speech uttered during a campaign for political office," where "the First Amendment has its fullest and most urgent application."[27] This is particularly so here, where Arkansas threatens criminal penalties for violation of its campaign finance laws.[28]

House Bill 1005 does impose a few minor exceptions; it does not go so far as to regulate handbills distributed by volunteers – although presumably paid individuals conducting the same activity would trigger the statute.[29] But even these exceptions pose problems. The bill would exempt news stories distributed through "print media" – which is perfectly acceptable. But while "print media" gets a general pass from regulation, only news stories or commentaries distributed "through the facilities of any…Internet media *business*" are similarly shielded.[30] The term "Internet media business" is undefined. Does Twitter count? Facebook? Personal blogs? And is the Arkansas Ethics Commission – which must investigate claims brought before it by "[a]ny citizen"[31] – the right agency of state government to figure that out on a case-by-case determination?[32]

The vagueness and uncertainty of the proposed electioneering communication definition are further compounded by the aggressive and invasive disclosure regime that attends it.

II. Proposed Electioneering Communication Disclosure Regime

House Bill 1005 seeks to establish an overwhelming disclosure regime that is triggered by the making of "electioneering communications in an aggregate amount exceeding one thousand dollars ($1,000) in one (1) calendar year" that mention a candidate for office.[33] Reporting is required within 72 hours of disbursing the communication, leaving groups a mere three days to collect and publicize an astounding amount of personal and financial information, which the Secretary of State is required by law to maintain on the Internet, where it is functionally immortal.[34]

It is dangerous for the government to monitor its citizens, and requiring the reporting of financial contributions and transactions can be particularly pernicious, for "financial transactions can reveal much about a person's activities, associations, and beliefs."[35] For this reason, government is not permitted to broadly demand and publicize the donor information of "every little Audubon Society…or a Golden Age

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[24] *Id.*
[25] *Id.*
[26] *Gessler v. Colo. Common Cause*, 327 P.3d 232, 238 (Colo. 2012) (Eid, J., concurring in part and dissenting in part).
[27] *Eu v. San Francisco Cnty. Democratic Central Comm.*, 489 U.S. 214, 223 (1989) (citation and internal quotation marks omitted).
[28] Ark. Code Ann. § 7-6-202 ("A person who knowingly fails to comply with this subchapter shall upon conviction be guilty of a Class A misdemeanor").
[29] Proposed Code § 7-6-201(20)(D)(iv).
[30] Proposed Code § 7-6-201(20)(D)(i)(b) (emphasis supplied).
[31] Ark. Code. Ann.§ 7-6-218.
[32] Similarly, Internet communications that *are* regulated as electioneering communications are regulated if "the advertisement or communication is intended to be viewed by" a certain number of persons. Changing this provision – which is hopelessly vague and could require invasive discovery and document requests to prove – to simply read "capable of being viewed by" would be preferable. Proposed Code § 7-6-201(22)(C).
[33] Proposed Code § 7-6-230(a)(1)(A-B).
[34] *ProtectMarriage.com – Yes on 8 v. Bowen*, 752 F.3d 827, 835 (9th Cir. 2015) (noting that once information is disclosed and disseminated online, it cannot be clawed back).
[35] *Calif. Bankers Ass'n v. Shultz*, 416 U.S. 21, 78-79 (1974).

Club."[36] "[C]ompelled disclosure of the kind of information" that House Bill 1005 will "exact[] can work a substantial infringement of the associational rights of those whose organizations take public stands on public issues," and – indeed, given the breadth of disclosure required by the bill, groups wholly unconnected with an electioneering communication.[37] Such a "tenuous…nexus" between the government's interests means "the interest of a group engaging in nonpartisan discussion ascends to a high plane, while the governmental interest in disclosure correspondingly diminishes."[38]

To date, the Supreme Court has only upheld an electioneering communication disclosure regime that compels an organization to publicly report the names and addresses of persons giving $10,000 earmarked to fund a discretely defined communication. Generalized donor disclosure has not been condoned, nor has the Court ever blessed a statute that required publication of employee salaries nor the publication of donations several steps removed from the actual communication, as this measure does.

Indeed, after the state of Utah passed a law that would have demanded generalized donor disclosure for electioneering communications of a similar breadth to those proposed by House Bill 1005, the Center for Competitive Politics, representing a number of Utah civil society groups, sued. The State ultimately capitulated without trial, effectively conceding that there was no valid constitutional defense for its unwieldly and uncabined disclosure statute – which is no longer in effect in that State. Nonetheless, the United States District Court for the District of Utah still ordered a six-figure settlement to cover legal fees incurred during that litigation.

Arkansas's electioneering communication reports, which must be submitted every 72 hours after an additional electioneering communication is run, impose more wide-ranging burdens than the Utah statute.

First, for non-individuals such as nonprofit associations, the report requires the disclosure of any "officer, director, executive director or its equivalent, partner, and in the case of unincorporated organizations, an owner…making the disbursement for the electioneering communication." Essentially, the names of members of an organization's board of directors.

Second, non-individuals must provide the State "[a] list of all employees and independent contractors and the amounts the employees and independent contractors were paid during the period covered by the statement."[39] Even the taxing authorities do not require the *publication of employee names and salaries on the Internet*, let alone as a condition of an organization engaging in speech protected by the First Amendment.

Third, House Bill 1005 seeks to impose a byzantine and colossal paperwork burden in reporting contributions. Ostensibly, disclosure is dual-tracked. If an organization sets up a segregated bank account for disclosure, it need only report the names and addresses of those making contributions that aggregate $100 or more to that "bank account…since the first day of the calendar year."[40] But if an organization does not set up a separate bank account, it must report the names and addresses of those making contributions that aggregate $250 "since the first day of the preceding calendar year."[41]

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[36] *United States v. Nat'l Comm. for Impeachment*, 469 F.2d 1135, 1142 (2d Cir. 1972).
[37] *Buckley v. Valeo*, 519 F.2d 821, 872 (D.C. Cir. 1975) (*en banc*).
[38] *Buckley*, 519 F.2d at 872-873.
[39] Proposed Code § 7-6-230(b)(1)(E).
[40] Proposed Code § 7-6-230(b)(1)(J).
[41] Proposed Code § 7-6-230(b)(1)(K).

In practice, then, there is no earmarking limitation on disclosure.[42] But House Bill 1005 goes much further and seeks to reveal – regardless of whether a non-individual contributor gave to a segregated or non-segregated fund – a "chain of custody" of the donated funds.[43]

In either case, if a contribution was made by an organization that finances itself "with funds contributed by" others – such as virtually every labor union or nonprofit corporation, the entity making an electioneering communication must report the date, amount, name, and address "of each person" who gave more than $500 in "the preceding calendar year."[44] The speaker must also report the board members, partners, et cetra, of such "Second Degree Contributors," just as it must for itself.

And if any Second Degree Contributor raises its funds from others – the speaker must report those giving $1,000 or more since the preceding calendar year – as well as all members of the board, partners, et cetra of a "Third Degree Contributor."[45]

Such a "Russian Nesting Doll" scheme of attributing contributions to second and third-order contributors does not serve the government's interest in disclosure. It is likely to invade the privacy of groups and organizations that are not involved in politics, and attribute political intentions to them – possibly with consequences with the Internal Revenue Service.[46] House Bill 1005 does not even do the courtesy of limiting such concentric reporting to funds from entities that solely operate within the borders of the state of Arkansas.[47]

Additionally, the law requires detailed and itemized reporting of "each item contributed to producing, airing, mailing, printing, or distributing the electioneering communication that is not money and that has a value of more than" $250, including "staff salaries" of third-party vendors – and plausibly even the names and addresses of staffers.[48] In this manner, House Bill 1005 adds to the already burdensome recordkeeping requirements imposed through its unnecessarily extensive reporting system by requiring staff to track and value their time on the most minute elements of producing an electioneering communication, as well as estimate the "fair market value" of basic office supplies, such as a printer or scanner.[49] After all, who knows what the Arkansas Ethics Commission might find "relevant to its determination" that an electioneering communication was produced.

Compounding these burdens, House Bill 1005 requires all of these records to be maintained for four years[50], and that an affidavit be filed guaranteeing that "the information provided in the statement is a

[42] *Van Hollen*, 811 F.3d at 500-501 (noting the constitutional problems with non-earmarked disclosures).

[43] The requirement that an organization set up a separate bank account to engage in speech is also constitutionally disfavored. *See Mass. Citizens for Life, Inc. v. Fed. Election Comm'n*, 479 U.S. 238, 254-255 (O'Connor, J., concurring) (denouncing requirements that entities engage in a "more complex and formalized organization" in order to engage in speech).

[44] Proposed Code §§ 7-6-230(b)(1)(J)(iii)(a); (b)(1)(K)(iii)(a).

[45] Proposed Code §§ 7-6-230(b)(1)(J)(iii)(c)(1); (b)(1)(K)(iii)(c)(1).

[46] Nonprofit organizations are heavily limited – and sometime prohibited – from even remote engagement in the political process. *See* 26 U.S.C. § 501(c).

[47] It does, however, state that a "multistate organization" – an undefined term – with a segregated bank account *only for making electioneering communications in Arkansas*, need "disclose only the required information concerning the funds that are received and distributed for electioneering communications in Arkansas." In practice, of course, this means little and does not limit the reporting of Second and Third Degree Contributors.

[48] Proposed Code § 7-6-230(b)(1)(L) ("A list of each item contributed…[i]f the person that contributes the item is an individual, the name and address of the individual…amounts of disclosures shall include without limitation...[s]taff salaries…").

[49] Proposed Code § 7-6-230(b)(1)(L). Such burdens are almost certainly unconstitutional, and especially so as-applied to grassroots organizations. *Coal. for Secular Gov't v. Williams*, 815 F.3d 1267, 1277 (10th Cir. 2016) ("The average citizen cannot be expected to master on his or her own the main campaign financial-disclosure requirements set forth") (internal quotation marks and citation omitted, punctuation altered).

[50] Proposed Code § 7-6-230(e).

complete, true, and accurate financial statement of the person's distributions made, expenditures made, amounts agreed to be paid, and contributions and nonmonetary items received."[51]

Thus, the State now seeks to make talking about a politician – at any time, in any media, and subject to the subjective determinations of a bureaucratic board – legal only at the expense of hunting down the business partners of unincorporated associations that may have given some money over the past two years to a § 501(c)(4) organization that made a legal contribution to a covered entity's general treasury. This is a regime designed to stifle speech, to suppress it, and to concomitantly leave the public with less information about candidates, issues, and policies – not more.

III. Coordinated Communication Regulations

House Bill 1005 also seeks to regulated so-called "coordinated communications," which are typically perceived of as instances where a candidate, who is limited in the amount of money she may receive from contributors, goes to an independent group that is unburdened by contribution limits, and tells that group what to do. In doing so, the independent group becomes, functionally, a part of the candidate's campaign, and the same governmental interest that undergirds contribution limits to candidates kicks in.[52]

In the past, Arkansas has sought to impose new coordination requirements, and the Center has weighed in, urging caution. Improper coordination standards inherently limit freedom of speech and association by restricting who can speak with whom, and ought to be carefully and narrowly drawn. Thus, the bill's granting of a roving instruction ("without limitation") to the Arkansas Ethics Commission to investigate coordination ought to be sharply curtailed in favor of bright-line rules.[53]

Precision is important. For the purposes of a coordinated communication, the bill defines "candidate" as the person "positioned to benefit" from the activity[54] – which ignores that negative political advertisements can have the inadvertent effect of elevating alternative candidates within a party primary or general election.

Other provisions attack general safe harbors – such as the partial use of images already prepared and placed into the public arena by a campaign.[55] But this is not a bright-line rule – it is only one factor the Ethics Commission may, in its discretion, choose to consider, and then only *after* a communication is made. This is a recipe for selective enforcement.

It must be remembered that coordination investigations inevitably target extremely sensitive information: internal communications, membership lists, and conversations with political allies – all with great potential to harm First Amendment rights.

IV. Covered Transfer Regulations

Finally, the law requires the filing of disclosure statements if a "person has made one…or more covered transfers in an aggregate amount exceeding one thousand dollars" in a single calendar year.[56]

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[51] Proposed Code § 7-6-230(c)(1).
[52] *SpeechNow.org v. Fed. Election Comm'n*, 599 F.3d 686, 695 (D.C. Cir. 2010) (*en banc*) ("In light of the Court's holding as a matter of law that independent expenditures do not corrupt or create the appearance of *quid pro quo* corruption, contributions to groups that make only independent expenditures also cannot corrupt or create the appearance of corruption").
[53] Proposed Code § 7-6-231(c)(1).
[54] Proposed Code § 7-6-231(c)(2).
[55] Proposed Code § 7-6-231(c)(1)(B).
[56] Proposed Code § 7-6-232(a)(i).

A covered transfer is a new concept created by House Bill 1005. As with the electioneering communication definition, "covered transfer" is impermissibly vague, and must – at a minimum – be tightened. House Bill 1005 defines a "covered transfer" as "a transfer or payment of funds to another person if the person *making* the transfer or payment" conducts an additional action.[57] There are five different types of covered transfers.

(1) The first regulates monies that are "designate[d], request[ed], or suggest[ed] to be used for "[c]ontributions, independent expenditures, or electioneering communications" or transferred to another person to do such activity.[58] Designation and request are capable of intelligible understanding – a "suggestion" is not.
(2) The second regulates funds given in response to a direct solicitation for any of the above purposes.[59]
(3) The third regulates funds given after the donor "[e]ngaged in discussions or otherwise communicat[ed]" with a recipient regarding any of the above purposes.[60]
(4) The fourth essentially posits that a transferor that itself made independent expenditures, electioneering communications, or "covered transfers" within a two-year period "ending on the date of the transfer or payment" valued at $5,000 or more is, itself, a "covered transfer." It also imposes an unusual *scienter* standard: if a person gave money of that amount and "knew or had reason to know that the person receiving" the funds made $5,000 worth of expenditures or covered transfers during that same two-year period.[61]
(5) The fifth form of covered transfer is when the transferor of funds "[k]new or had reason to know that the person receiving the transfer or payment would make one…or more independent expenditures, expenditures for electioneering communications, or covered transfers in an aggregate amount of five thousand dollars ($5,000) or more during the two-year period *beginning* on the date of the transfer or payment."[62] Essentially, this fifth category imposes regulatory burdens on a person who gives to an organization without first determining whether or not that group will not conduct an electioneering communication, which, as discussed previously, is an impossibly vague category of speech.

There are exceptions to covered transfers. Affiliated groups are shielded when distributing funds to each other, as long as the payment is not given to a group that exists "for the purpose of making contributions, independent expenditures, or electioneering communications."[63] But, simply having "the purpose" is undefined – and in practice this makes even exchanges between affiliated entities, such as a "state or local entity associated with a membership organization,[64]" "covered transfers."[65]

Only a direct "prohibit[ion] in writing" by the transferor that funds not be used for electioneering communications or other covered activity may truly suffice to ensure that a transaction does not become a covered transfer. But given how opaque House Bill 1005's definitions are for what is and what is not an electioneering communication, groups that receive such funds with such a prohibition will, in practice, steer far clearer of the proper demarcation line.

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[57] Proposed Code § 7-6-201(19)(A) (emphasis supplied).
[58] Proposed Code § 7-6-201(19)(A)(i).
[59] Proposed Code § 7-6-201(19)(A)(ii).
[60] Proposed Code § 7-6-201(19)(A)(iii).
[61] Proposed Code § 7-6-201(19)(A)(iv).
[62] Proposed Code § 7-6-201(19)(A)(v).
[63] Proposed Code § 7-6-201(19)(B)(iii)(a).
[64] Proposed Code § 7-6-201(19)(C)(i).
[65] *See Corsi v. Ohio Elections Comm'n*, 981 N.E.2d 919 (Ohio Ct. of App. 2012) (upholding finding that an organization with a number of different goals had a "primary or major purpose" of electoral advocacy); *see also* Pet. for Writ of *Certiorari* at 7-9, *Corsi v. Ohio Elections Comm'n*, 134 S. Ct. 163 (2013).

V. Covered Transfer Disclosure Regime

House Bill 1005 also sets up a disclosure regime for covered transfers. Any person that makes more than $1,000 in covered transfers must "file a disclosure statement with the Secretary of State," unless the "person making a covered transfer has written confirmation from the person making the electioneering communication that" all information has or will be filed pursuant to the new electioneering communication disclosure regime discussed previously. Otherwise, the burden of reporting shifts from merely the organization making an expenditure or electioneering communication to both the donor and the expending entity.

At this point, a number of things are worth noting. First, covered transfers are not limited to electioneering communications – they cover funds given that may be used for independent expenditures or contributions, which logically implies that anyone that makes a covered transfer for those purposes is unable to opt out of this reporting regime. Presently, for instance, those who actually make independent expenditures must merely report the names and addresses of those who give more than $50 – without any requirement to burrow further into the weeds.[66] The covered transfer disclosure regime is a backdoor into those donations – but without placing the burden on groups actually receiving contributions or making independent expenditures.

Second, certain covered transfers, such as the fifth category, are entirely prospective with a two-year timeframe under which monies may be used for covered activity. Yet, the covered transfer reporting regime requires filing within 72 hours of crossing the $1,000 threshold and repeated filings for all future covered transfers made after that point. In practice, lots of covered transfer filings will likely be generated – just to avoid being prosecuted by the Ethics Commission for failure to file.

And this covered transfer reporting regime is virtually identical to the electioneering communications regime discussed earlier. Board members and partners of the transferor must be reported, as well as itemizations "of each covered transfer made…that amounts to two hundred fifty dollars ($250) or more."[67]

The covered transfer regime also requires the disclosure of Second and Third Degree Contributors, in the amount of $1,000 and $3,000 in aggregate contributions in the preceding calendar year.[68] As with electioneering communications, at both levels, the name and address of such "contributors" must be reported, as well as those "person[s] sharing or exercising direction or control" of any such contributor. Once again, this means that transferors will – within 72 hours of making a covered transfer – be reporting an incredible and varied swath of not-readily-identifiable and unrelated information.

While there is an option, as with electioneering communications, to report only second and third-degree "contributions" from covered transfers made exclusively from a segregated account for covered transfers, the scope and reach into organizations that may be unaware of their tangential connection to a covered transfer – itself a tangential connection to a communication or expenditure – remains vast.

And while the still-undefined term "multistate organization" is protected if "funds were dispersed from an account segregated for the purpose of ultimately making electioneering communications in Arkansas, then the disclosure statement shall disclose only the required information concerning the funds

[66] Ark. Code Ann. § 7-6-220.
[67] Proposed Code § 7-6-232(c)(4).
[68] Proposed Code § 7-6-232(c)(6).

that are received and distributed for the purpose of making electioneering communications in Arkansas."[69] There does not seem to be an option for simply "making covered transfers in Arkansas."

Transferors must file this report with "an affidavit of the person that made the covered transfer[70] verifying that to the best of the person's knowledge, the information provided in the statement is a complete, true, and accurate financial statement of the person's covered transfers."[71] Records must be kept for four years.[72]

VI. Effects on Nonprofit Organizations

Given the roving investigative powers constantly granted to the Arkansas Ethics Commission, the vagueness with which terms are defined, and the incredible breadth of disclosure required, the effect on this measure on nonprofit organizations – and especially § 501(c)(3) organizations – and their donors is incredible, perhaps greater under House Bill 1005 than any other piece of legislation enshrined in statute in any of the 50 states.

As drafted, it is possible that a § 501(c)(3) organization – groups that are explicitly prohibited by law from engaging in political campaigns – that gives a donation to another group, which legally gives a different sum – a year later – to a group that engages in speech that could be construed as an electioneering communication might find itself being reported as a contributor to a political campaign. And the covered transfer regime only doubles down on these insecurities.

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House Bill 1005, as drafted, is an affront to the First Amendment. Given the enormity of the constitutional and practical issues inherent in the legislation, which directly impacts important First Amendment rights, lawmakers should seriously consider the implications of this draconian measure before allowing it to become law.

Thank you for allowing us to submit comments on House Bill 1005. Should you have any further questions regarding these issues or any other campaign finance proposals, please do not hesitate to contact us at (703) 894-6835 or by e-mail at mnese@campaignfreedom.org.

Respectfully yours,

Matt Nese
Director of External Relations

Zac Morgan
Staff Attorney

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[69] Proposed Code § 7-6-232(g)(1).
[70] An officer of that person if it is not an individual. Proposed Code § 7-6-232(d)(2).
[71] Proposed Code § 7-6-232(d)(1).
[72] Proposed Code § 7-6-232(f).