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**ANALYSIS OF “ONLINE ELECTIONEERING TRANSPARENCY AND
ACCOUNTABILITY ACT”
(H.B. 981)**

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INTRODUCTION AND EXECUTIVE SUMMARY

The Institute for Free Speech² provides the following analysis of H.B. 981,³ which currently awaits a concurrence vote in the House of Delegates. Despite its Orwellian title, H.B. 981 is not primarily aimed at regulating “electioneering.” Rather, the bill would broadly regulate and even criminalize online speech that discusses virtually any matter of public concern. Moreover, the bill would additionally burden and therefore deter online speech that urges citizens to contact their state elected officials about pending legislation, or that provides nonpartisan information to voters about hard-to-understand ballot questions. In so doing, H.B. 981 would make Maryland state government less transparent and state elected officials less accountable. For these reasons, the bill is also likely unconstitutional.

Specifically, H.B. 981 would:

- Impose burdensome reporting, recordkeeping, and disclaimer requirements for advertisers and online platforms for ads that “relate[] to” a candidate, prospective candidate, ballot question, or prospective ballot question. This undefined legal standard is so vague and broad that it could very well cover speech about police brutality, redistricting reform, or any number of issues that could be associated with a candidate or prospective candidate or become the subject of a ballot question.
- Subject online speakers to criminal liability if they do not correctly identify their speech as “campaign material” or a “qualifying paid digital communication” and include the proper disclaimer.

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² The Institute for Free Speech is a nonpartisan, nonprofit § 501(c)(3) organization that promotes and protects the First Amendment political rights of speech, press, assembly, and petition. Originally known as the Center for Competitive Politics, 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 Institute is actively involved in targeted litigation against unconstitutional laws at both the state and federal levels. Its attorneys have secured judgments in federal court striking down laws in Colorado, Utah, and South Dakota on First Amendment grounds. We are also currently involved in litigation against California, Missouri, Tennessee, and the federal government.

³ This analysis is based on the text of H.B. 981 as passed by the House of Delegates on March 16, 2018, as amended by the Senate Education, Health, and Environmental Affairs Committee on March 29, 2018, and as further amended on the Senate floor on March 30 and April 2, 2018. All references and citations to “H.B. 981” in this analysis are to the bill as so amended.

- Set a threshold of a mere 500 individuals that an online ad would have to be disseminated to for the requirements for “qualifying paid digital communications” to apply. Based on average “click-through” rates for online advertising, an ad that doesn’t even engage one viewer on average would be regulated.
- Apply an analog-age “public file” regulatory scheme for broadcasters to digital-age online platforms and advertisers without sufficient legal justification.
- Impose additional burdensome “electioneering communication” registration and reporting requirements for online ads that merely refer to candidates or ballot questions within two months preceding any election. This time window coincides with when the General Assembly is still in regular or extended session, and when the Governor is still considering whether to sign or veto legislation. Therefore, the bill would regulate online ads that urge citizens to contact their elected officials about pending legislation, or that provide nonpartisan information to voters about ballot questions.
- The threshold at which online “electioneering communications” would be regulated is so low that an ad that doesn’t even engage three viewers on average would be regulated.

ANALYSIS

A) H.B. 981 Would Broadly Regulate Internet Speech on Any Matter of Public Concern.

H.B. 981 would impose exceedingly broad and burdensome reporting, recordkeeping, and disclaimer requirements for online ads of even a modest distribution that pertain to virtually any matter other than a commercial transaction. Moreover, the bill would compel the sponsors of such ads to declare that their ads either “support or oppose” a candidate or ballot question, even when the ads do neither and do not even discuss or allude to any candidate or ballot question.

The bill also would invite bureaucrats at the State Board of Elections to rummage through these records and scrutinize the speech of civic-minded individuals and groups. These heavy-handed regulations would deter, chill, and burden core First Amendment speech regarding matters of public concern, and are likely unconstitutional.

Specifically, H.B. 981 would regulate any “qualifying paid digital communication,” defined as:

any electronic communication that:

- (1) is campaign material;
- (2) is placed or promoted for a fee on an online platform;
- (3) is disseminated to 500 or more individuals; and
- (4) does not propose a commercial transaction.⁴

⁴ H.B. 981 (to be codified at Md. Election Law § 1-101(LL-1)).

“Campaign material” is defined, in relevant part, as “any material that . . . relates to a candidate, a prospective candidate or the approval or rejection of a [ballot] question or prospective [ballot] question.”⁵ In a circular manner, H.B. 981 also expands the definition of “campaign material” to include a “qualifying paid digital communication.”⁶

An “online platform” is defined as “any public-facing website, web application, or digital application, including a social network, ad network, or search engine, that: (1) has 100,000 or more unique monthly United States visitors or users for a majority of months during the immediately preceding 12 months; and (2) receives payment for qualifying paid digital communications.”⁷

Any sponsor of a “qualifying paid digital communication” that is not a political committee (a.k.a. PAC) is required to report the following information:

- “1. the name of the person and any contact information for the person required by the State Board [of Elections], of the person; and
2. the identity of the individuals exercising direction or control over the activities of the person, including the chief executive officer or board of directors, if applicable; and
3. the total amount paid by the purchaser to the online platform for the placement of the qualifying paid digital communication.”⁸

This information is required to be provided to the online platform.⁹ If the online platform does not have a specific method for accepting and maintaining such information, the platform is deemed to be “not in compliance” with the Maryland law, and the information is required to be provided to the State Board of Elections.¹⁰ The required information must be publicly accessible and searchable within 48 hours after a “qualifying paid digital communication” is purchased, and must be maintained for at least a year after the general election “to which the [communication] relate[s].”¹¹

In addition, the following information is required to be maintained by the online platform and made available in a searchable format to the State Board of Elections, but is not required to be made publicly available:

- (i) the candidate or ballot issue to which the qualifying paid digital communication relates and whether the qualifying paid digital communication supports or opposes that candidate or ballot issue;

⁵ Md. Election Law § 1-101(k)(1)(ii). H.B. 981 would recodify this existing definition in the Maryland statute without any change.

⁶ H.B. 981 (to be codified at Md. Election Law § 1-101(k)(2)(I)).

⁷ *Id.* (to be codified at Md. Election Law § 1-101(DD-1)).

⁸ *Id.* (to be codified at Md. Election Law § 13-405(B)(5)(II)).

⁹ *Id.* (to be codified at Md. Election Law § 13-405(A)(2)).

¹⁰ *Id.* (to be codified at Md. Election Law § 13-405(A)(3)).

¹¹ *Id.* (to be codified at Md. Election Law § 13-405(B)(1)-(3)).

- (ii) the dates and times that the qualifying paid digital communication was first disseminated and last disseminated;
- (iii) a digital copy of the content of the qualifying paid digital communication;
- (iv) an approximate description of the geographic locations where the qualifying paid digital communication was disseminated;
- (v) an approximate description of the audience that received or was targeted to receive the qualifying paid digital communication; and
- (vi) the total number of impressions generated by the qualifying paid digital communication.¹²

Under existing Maryland law, any “campaign material” also must include a disclaimer identifying the sponsor and the sponsor’s address (if the sponsor is not a PAC).¹³ “Campaign material” that is deemed to be “in support of or in opposition to a candidate” also must include the following additional disclaimer language:

This message has been authorized and paid for by (name of payor or any organization affiliated with the payor), (name and title of treasurer or president).
This message has not been authorized or approved by any candidate.¹⁴

These reporting, recordkeeping, and disclaimer requirements would apply to a sweepingly large and indeterminate universe of speech, and would exclude only commercial advertising. This is because the bill relies on a deeply flawed definition of “campaign material” that purports to regulate any speech that “*relates to*” a candidate, prospective candidate, ballot question, or prospective ballot question.¹⁵ While this term under existing Maryland statute is likely unconstitutionally vague and overbroad, H.B. 981 doubles down on the problem by recodifying this term, and even expanding how it is used with respect to online speech.

Under a dictionary definition of “relates to,” any speech that has any theoretical connection whatsoever to a candidate, prospective candidate, ballot question, or prospective ballot question – or even speech that a candidate or prospective candidate responds to favorably or unfavorably – would be regulated.¹⁶

For example, even a modest social media ad campaign sponsored by “Black Lives Matter” activists calling attention to the 2015 death of Baltimore native Freddie Gray in police custody could have been regulated under H.B. 981. After all, then-Baltimore Mayor Stephanie Rawlings-Blake was so closely associated with her handling of the incident that she decided not to run for

¹² *Id.* (to be codified at Md. Election Law § 13-405(C)(4)).

¹³ Md. Election Law § 13-401(a)(1)(ii). H.B. 981 does not change this requirement.

¹⁴ *Id.* § 13-401(b). H.B. 981 also does not change this requirement.

¹⁵ The State Board of Elections’ regulations do not further define “campaign material,” or when it is deemed to “relate to” a candidate or prospective candidate.

¹⁶ See Merriam-Webster, “Relates,” at <https://www.merriam-webster.com/dictionary/relates> (“the readings relate to his lectures”; “the way a child relates to a teacher”; “can’t relate to that kind of music”).

re-election largely because of the issue.¹⁷ No matter. Under H.B. 981, online ads calling for the protest of Gray’s death would have “related to” to the mayor – a “prospective candidate” for reelection.

Another example is the issue of partisan gerrymandering. Critics argue that this practice is so outcome-determinative to elections that “it lets politicians choose their voters rather than the other way around.”¹⁸ Under this view, it cannot be said that gerrymandering doesn’t “relate to” candidates or prospective candidates. Yet, if the League of Women Voters of Maryland were to sponsor even a small online ad campaign advocating for redistricting reform,¹⁹ its ads would be regulated by H.B. 981.

Even if an issue were not considered to “relate to” a candidate, there is always the possibility that ballot questions or prospective ballot questions about an issue could be presented to voters at some time. Thus, ads about issues generally, such as taxes, education, or health care, also would be subject to the reporting, recordkeeping, and disclaimer burdens of H.B. 981.

Indeed, it is clear from the face of the bill that its reporting, recordkeeping, and disclaimer requirements – including the requirement for an advertiser to declare the candidate or ballot question its ad “relates to,” and whether it “supports or opposes” that candidate or ballot question – are not limited to ads that specifically identify candidates or ballot questions. This is because, elsewhere, the bill separately addresses so-called “electioneering communications” that are made online (a point which we address more below), and which are defined specifically as ads that “refer[] to a clearly identified candidate or ballot [question].”²⁰ Thus, the separate reporting and recordkeeping requirements for “qualifying paid digital communications” necessarily apply even to ads that do not refer to any candidates or ballot questions.²¹

Of particular concern, an online speaker that fails to correctly identify its speech as “campaign material” or a “qualifying paid digital communication” and include the requisite disclaimer is treated as a criminal. Specifically, existing Maryland law – which H.B. 981 would not change – punishes disclaimer violations as misdemeanors subject to up to a year in prison, a \$1,000 fine, or both, even if the violation was unintentional and unknowing.²² And it is not just sponsors of “qualifying paid digital communications” that would risk being jailed. H.B. 981 also would recodify an even broader part of the existing statutory definition of “campaign material,” which covers *any* other “material transmitted by or appearing on the Internet or other electronic medium” if it “relates to” a candidate, prospective candidate, ballot question, or prospective ballot

¹⁷ See Yvonne Wenger, *Baltimore Mayor Stephanie Rawlings-Blake won't seek re-election*, BALTIMORE SUN, Sep. 11, 2015, at <http://www.baltimoresun.com/news/opinion/editorial/bs-md-ci-rawlings-blake-20150911-story.html>.

¹⁸ See, e.g., *One less excuse for Md. Dems. to reject redistricting reform*, BALTIMORE SUN, Sep. 6, 2017, at <http://www.baltimoresun.com/news/opinion/editorial/bs-ed-0907-redistricting-20170906-story.html>.

¹⁹ See League of Women Voters of Md., *Redistricting Reform*, at https://www.lwvmd.org/tame_the_gerrymander.

²⁰ H.B. 981 (to be codified at Md. Election Law § 13-307(a)(3)(i)(1)).

²¹ See, e.g., *Central Bank of Denver v. First Interstate Bank*, 511 U.S. 164, 176-77 (1994) (“Congress knew how to impose aiding and abetting liability when it chose to do so . . . If . . . Congress intended to impose aiding and abetting liability [in the statute at issue], we presume it would have used the words ‘aid’ and ‘abet’ in the statutory text. But it did not.”).

²² Md. Election Law § 13-602(a)(9), (b)(1).

question.²³ Therefore, even someone who posts a personal opinion about any issue in an unpaid Facebook post or Twitter tweet could be thrown in jail if the post is deemed to “relate to” a Maryland candidate or ballot question and does not include the requisite disclaimer.

We also emphasize that H.B. 981 would apply the provisions that are specific to “qualifying paid digital communications” to online ads that are “disseminated to” as few as 500 individuals – an insignificantly low threshold.²⁴ To put that into perspective, the average click-through rate for online ads is .05%.²⁵ Therefore, H.B. 981 would regulate ads that do not even engage so much as one person.

Relatedly, while H.B. 981 uses a 100,000 monthly visitor threshold for defining the “online platforms” on which “qualifying paid digital communications” would be regulated, that is also not a very high threshold in the Internet context. *The Baltimore Sun* website receives 5.6 million unique monthly visitors,²⁶ while the Eye on Annapolis news website receives approximately 175,000 unique monthly visitors.²⁷

In short, H.B. 981 is not targeted at the Russian messages that may have been displayed to more than a hundred million Americans on Facebook during the 2016 election campaign.²⁸ Rather, the bill targets the speech of grassroots activists seeking to engage a handful of like-minded citizens on issues of public concern at the state and local level.

B) H.B. 981’s “Public File” Requirement is Likely Unconstitutional.

The reporting and recordkeeping requirements discussed above for online advertisers and advertising platforms clearly are modeled on the so-called “public file” that broadcasters are required to maintain under federal law for any “message relating to any political matter of national importance.”²⁹ However, there are significant differences in the policy and legal justifications for how broadcasters, on the one hand, and Internet platforms and advertisers, on the other hand, are regulated. Maryland lawmakers who apply a regulatory framework from the analog era to the digital world are setting the state up for a constitutional challenge.

As a preliminary matter, reporting requirements like H.B. 981’s public file requirement are generally subject to “‘exact[ing] scrutiny,’ such that the government interest served [must be] ‘substantial,’ and ‘sufficiently important to outweigh the possibility of infringement.’”³⁰ Although the U.S. Supreme Court upheld the constitutionality of the public file requirement for broadcast

²³ H.B. 981 (to be codified at Md. Election Law § 1-101(k)(2)(II)). (This provision is Md. Election Law § 1-101(k)(2)(i) under the existing statute.)

²⁴ H.B. 981 (to be codified at Md. Election Law § 1-101(LL-1)).

²⁵ Smart Insights, Average display advertising clickthrough rates, at <https://www.smartinsights.com/internet-advertising/internet-advertising-analytics/display-advertising-clickthrough-rates/>.

²⁶ BALTIMORE SUN, Media Kit, at <http://baltimoresunmediagroup.com/media-portfolio/websites/baltimoresuncom/>.

²⁷ Eye on Annapolis, Media Kit, at https://docs.google.com/viewerng/viewer?url=http://www.eyeonannapolis.net/wp-content/uploads/2017/05/EOA-2017-Media-Kit.pdf&hl=en_US.

²⁸ Mike Isaac and Daisuke Wakabayashi, *Russian Influence Reached 126 Million Through Facebook Alone*, N.Y. TIMES, Oct. 30, 2017, at <https://www.nytimes.com/2017/10/30/technology/facebook-google-russia.html>.

²⁹ 47 U.S.C. § 315(e).

³⁰ *McConnell v. FEC*, 251 F. Supp. 2d 176, 186, 811 (D. D.C. 2003) (Leon, J., with whom Kollar-Kotelly, J. joined, concurring) (internal citations omitted) (holding public file requirement under federal law was unconstitutional).

ads under federal law, it did so because broadcasters were already subject to extensive requirements to maintain records of:

- All written comments and suggestions received from the public regarding the broadcaster’s operations;
- Certain sponsorship identification information;
- Equal employment opportunities;
- Programs that have addressed “community issues”;
- Children’s programming;
- Ownership information;
- Management consultant agreements; and
- Time brokerage agreements.³¹

Broadcasters are so regulated because they are required to act in the “public interest” due to the scarcity of the portion of the electromagnetic spectrum over which content may be transmitted.³² By contrast, the “online platforms” that H.B. 981 would regulate are not at all like broadcasters and are not subject to spectrum limitations. Therefore, online platforms are not subject to these pre-existing recordkeeping requirements, and it would be rather presumptuous for Maryland lawmakers to purport to regulate online platforms as broadcasters.

In short, the extensive reporting and recordkeeping requirements H.B. 981 would impose on online issue speech are unconstitutional unless Maryland can demonstrate there is a “substantial” and “sufficiently important” governmental interest for these requirements – which there likely is not.

C) H.B. 981 Would Apply Additional Burdensome “Electioneering Communication” Registration and Reporting Requirements to Online Issue Advocacy and Voter Education.

On top of the reporting and recordkeeping requirements discussed above, H.B. 981 would additionally burden, deter, and chill online speech about issues and ballot measures within the two months preceding any election. This would be particularly harmful to efforts to call public attention to bills that are being voted on in the General Assembly, or that the Governor is considering signing

³¹ *McConnell v. FEC*, 540 U.S. 93, 233-36 (2003). Although the Supreme Court reversed the district court on this issue, it did not take exception to Judge Leon’s invocation of the “exacting scrutiny” standard for judicial review of the public file requirement.

³² See 47 U.S.C. § 309; FCC, Licensing, at <https://www.fcc.gov/licensing-databases/licensing>; FCC, *In re* Expansion of Online Public File Obligations to Cable and Satellite TV Operators and Broadcast and Satellite Radio Licensees (Jan. 28, 2016) ¶¶ 5-7, at https://apps.fcc.gov/edocs_public/attachmatch/FCC-16-4A1.pdf; FCC, Public Inspection Files, at <https://publicfiles.fcc.gov/>. Cable operators are regulated because they are thought to affect broadcast service. See FCC, Cable Television, at <https://www.fcc.gov/media/engineering/cable-television>.

or vetoing. It also would hurt nonpartisan efforts to educate the public about ballot measures, which studies have shown are typically not well-understood by voters.

Specifically, H.B. 981 would expand the state’s regulation of so-called “electioneering communications” to cover “qualified paid digital communications” that are disseminated to 5,000 or more individuals.³³ (Such a distribution threshold would cover an ad that engages, on average, a mere two-and-a-half individuals.³⁴) As noted above, an “electioneering communication” is one that “refers to a clearly identified candidate or ballot [question]” within 60 days before an election in which the candidate or ballot question is on the ballot.³⁵

Sponsors of “electioneering communications” (which include not just online ads, but also other forms of public communications³⁶) totaling \$5,000 or more in an election cycle are required to register with the State Board of Elections within 48 hours.³⁷ Reports of “electioneering communications” totaling \$10,000 or more in an election cycle also are required to be filed within 48 hours, and must identify the following information:

- (1) the identity of the person making disbursements for electioneering communications and of the person exercising direction or control over the activities of the person making the disbursements for electioneering communications;
- (2) the business address of the person making the disbursements for electioneering communications;
- (3) the amount and date of each disbursement for electioneering communications during the period covered by the report and the person to whom the disbursement was made;
- (4) the candidate or ballot issue to which the electioneering communications relate; and
- (5) the identity of each person who made cumulative donations of \$6,000 or more to the person making the disbursements for electioneering communications during the period covered by the report.³⁸

In non-presidential election years, Maryland holds its primary at the end of June, while in presidential election years, the primary is held at the end of April.³⁹ Therefore, in presidential election years, the regulated period begins right in the middle of the regular legislative session.⁴⁰ In non-presidential election years, the “electioneering communications” period begins when

³³ H.B. 981 (to be codified at Md. Election Law § 13-307(a)(3)).

³⁴ See note 25, *supra*.

³⁵ Note 20, *supra*.

³⁶ See Md. Election Law § 13-307(a)(3)(i).

³⁷ *Id.* § 13-307(b).

³⁸ *Id.* § 13-307(e).

³⁹ *Id.* § 8-201(a).

⁴⁰ See Md. Const., Art. III § 14.

legislators may still be in extended session.⁴¹ In both cases, the regulated period also covers the time when the Governor is still considering whether to sign or veto bills.⁴²

In practice, this means civic and advocacy groups that engage Maryland residents online to contact their state elected officials about pending legislation will be subject to even more extensive regulation. The deterrence effect H.B. 981 will have on civic engagement belies the bill's Orwellian title – unless the title's references to “transparency” and “accountability” mean less transparency regarding Maryland state government and less accountability for state elected officials.

H.B. 981 would be equally damaging to informational online ads about ballot questions. Even an ad reminding voters that a ballot question is on the ballot, or providing them with neutral information about the ballot question, would be regulated if the ad is disseminated within the 60-day pre-election time window – the time when voters are most likely to be paying attention. Studies show that voters generally have little understanding of the ballot questions they are presented with.⁴³ By deterring informational speech about ballot questions, H.B. 981 would further undermine an informed electorate and reasoned public decision-making.

Like the bill's general reporting and recordkeeping requirements for “qualifying paid digital communications,” the constitutionality of H.B. 981's expansion of “electioneering communication” regulations to online ads is highly questionable. The state will have to justify how the bill's regulatory burdens on speech holding elected officials accountable and providing voters with nonpartisan information about ballot questions further a “substantial” and “sufficiently important” governmental interest under the “exacting scrutiny” standard for judicial review.

⁴¹ See *id.* §§ 14, 15.

⁴² See *id.* § 30.

⁴³ See J.B. Wogan, *Studies Show Voters Need a Graduate-Level Education to Understand Ballot Measures*, GOVERNING, Nov. 6, 2017, at <http://www.governing.com/topics/politics/gov-rhode-island-ballot-measures-language.html>.