



March 15, 2019

Via Electronic Mail

The Honorable John J. Burzichelli
New Jersey General Assembly
State House
P.O. Box 098
Trenton, NJ 08625-0098

The Honorable Gary S. Schaer
New Jersey General Assembly
State House
P.O. Box 098
Trenton, NJ 08625-0098

RE: Constitutional and Practical Issues with A. 1524 (Reporting Requirements for Advocacy Nonprofits)

Dear Chair Burzichelli, Vice-Chair Schaer, and Members of the Assembly Appropriations Committee:

On behalf of the Institute for Free Speech¹ (IFS), I write to express concerns with A. 1524,² which is scheduled for a hearing in the Assembly Appropriations Committee on March 18, 2019.

A. 1524 would subject advocacy groups to unconstitutionally vague, broad, and invasive new “disclosure” requirements for merely providing factual information to their members and the public about matters of public concern. These chilling requirements would violate the freedom to associate of those organizations’ members and donors and would invite threats, harassment, and violence against those organizations’ members, donors, employees, and officers. Even if such terrible consequences did not materialize, A. 1524 would still, at a minimum, impose prohibitive administrative and legal costs on these organizations. All of these consequences are ones that the New Jersey Election Law Enforcement Commission (“ELEC”), in applying binding U.S. Supreme Court rulings, has explained may not constitutionally be imposed on groups that do not have as their “‘major purpose’ the support or opposition of candidates.”³

The torrent of punitive burdens that this bill would rain down on the building blocks of civil society is a direct assault on participatory democracy. A. 1524 would have the opposite effect of its purported goal of enhancing political transparency. Instead, the bill would diminish accountability and make government more opaque by silencing civic organizations trying to monitor and publicize the actions of elected representatives.

¹ The Institute for Free Speech is a nonpartisan, nonprofit 501(c)(3) organization focused on promoting and protecting 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.

² A. 1524 (218th Leg.), as introduced (*hereinafter*, “A. 1524”), was introduced on January 9, 2018 and referred to the Assembly State and Local Government Committee.

³ ELEC, Adv. Op. No. 01-2011 (April 27, 2011) at 5.

Examples of commonplace activities of advocacy groups that would trigger these draconian requirements, if this bill became law, include:

- Sending a legislative alert for members or the public to contact their elected state officials about a pending bill (such as A. 1524)
- Circulating an informational document that presents opposing arguments for and against a state ballot measure
- Publicizing a mayor’s town hall meeting
- Publishing city council members’ voting records

To the extent this bill is being considered as a response to the actions of advocacy organizations with close ties to elected officials,⁴ a more targeted response than that contemplated by this bill is warranted. Both lawmakers and New Jersey residents would be much better served by a serious, measured response to the issue at hand rather than a slapdash, overbroad reaction, such as that embodied by A. 1524. The Institute for Free Speech is willing to work with lawmakers to this end.

I. Overview of A. 1524

A. 1524 would create a new category of regulated entity under New Jersey’s campaign finance law known as an “independent expenditure committee” (*hereinafter*, “IE committee”). The bill would define such groups as any organization formed or operating under Sections 501(c)(4) (advocacy groups) and 527 (political organizations) of the federal Internal Revenue Code, so long as the organization:

engages in *influencing or attempting to influence* the outcome of any election or the nomination, election, or defeat of any person to any State or local elective public office, or the passage or defeat of any public question, or *in providing political information* on any candidate or public question,⁵ and raises or expends \$3,000 or more in the aggregate for any such purpose annually, but does not coordinate its activities with any candidate or political party.⁶

Although A. 1524 would not formally regulate “IE committees” as political committees by name, in practice, an “IE committee” would be subject to the same regulatory burdens, such as:

- Being required to register with the New Jersey Election Law Enforcement Commission and provide, among other information, the names, “*home address[es]*,” and “name and mailing address of the individual’s employer” of any individual who –

⁴ See, e.g., Colleen O’Dea, “Murphy-Sweeney Feud Could Lead to Laws Shining More Light on Dark Money,” NJSpotlight.com. Retrieved on March 15, 2019. Available at: <https://www.njspotlight.com/stories/19/01/09/murphy-sweeney-feud-could-lead-to-laws-shining-more-light-on-dark-money/#> (January 10, 2019).

⁵ Although A. 1524 does not appear to define “public question,” we assume the definition of this term under ELEC’s existing regulations would continue to apply. Under those regulations, a “public question” is what is commonly known as a ballot measure or initiative. See N.J. Admin. Code § 19:25-1.7.

⁶ A. 1524 § 1 (to be codified at N.J. Stat. § 19:44A-3(t)) (emphasis added).

- participates in forming the “IE committee”;
 - runs the committee;
 - “direct[s] or suggest[s]” the committee’s fundraising; or
 - who participates in the committee’s decisions “to expend funds for the purpose of influencing or attempting to influence the outcome of any election . . . or in providing political information on any candidate or public question.”⁷
- Being required to file quarterly reports on the same basis as political party committees and legislative leadership committees, which must itemize:
 - “*all moneys . . . contributed to [the committee] during the period . . . and all expenditures made, incurred, or authorized by [the committee] during the period,*” regardless of “whether or not such expenditures were made, incurred or authorized in furtherance of the election or defeat of any candidate, or in aid of the passage or defeat of any public question or to provide information on any candidate or public question.” Individual contributors’ names, mailing addresses, occupations, and the names and mailing addresses of their employers must also be reported.⁸
 - Being required to file certain expedited reports under a convoluted array of thresholds, schedules, and unclear standards for the activities triggering such reports:
 - any time the committee receives contributions or makes expenditures of more than \$300 “in influencing or attempting to influence the outcome of any election . . . or in providing political information on any candidate or public question.”⁹
 - For expenditures, this particular reporting requirement, applies to expenditures “for electioneering communications, voter registration, get-out-the-vote efforts, polling, and research.” This list is non-exhaustive.¹⁰
 - However, the reporting requirement for receiving “contributions” (which also includes reporting donors’ names, addresses, and employer information) is broader and appears to cover funds donated for any purpose whatsoever.¹¹ In addition, the basic registration and reporting requirements for “IE committees” appear to be triggered by the broader universe of activities discussed above.¹²

⁷ *Id.* § 3 (to be codified at N.J. Stat. § 19:44A-8.1(a)(3)) (emphasis added).

⁸ *Id.* § 2 (to be codified at N.J. Stat. § 19:44A-8(c)) (emphasis added).

⁹ *Id.* § 2 (to be codified at N.J. Stat. § 19:44A-8(d)(1)).

¹⁰ *Id.* § 2 (to be codified at N.J. Stat. § 19:44A-8(d)(2)).

¹¹ *Id.* §§ 2 (to be codified at N.J. Stat. §§ 19:44A-8(d)(1) (reporting requirement)) and 1 (to be codified at N.J. Stat. § 19:44A-3(d) (defining “contributions”)).

¹² Compare *id.* § 2 (to be codified at N.J. Stat. § 19:44A-8(d)(2)) with *id.* § 1 (to be codified at N.J. Stat. § 19:44A-3(t)).

- These reports must be filed “on the same schedule as required for political committees and continuing political committees” – which appears to be a reference to the 13-day period preceding each election.¹³
- any time between the end of a quarterly reporting period and before an election if the committee receives contributions from a single source totaling more than \$1,400.¹⁴
- any time between March 31 and the primary election or between September 30 and the general election if the committee makes an expenditure totaling more than \$1,400, “or incurs any obligation therefor [sic], to support or defeat a candidate in an election, or to aid the passage or defeat of any public question.”¹⁵
- Being subject to the same organizational, depository, and recordkeeping requirements and strict deadlines for depositing contributions as PACs.¹⁶

II. Constitutional Problems with A. 1524

A. 1524 suffers from the duo of interrelated vagueness and overbreadth violations that comprise much of First Amendment law. As the U.S. Supreme Court has stated, “[W]here a vague statute ‘abut[s] upon sensitive areas of basic First Amendment freedoms,’ it ‘operates to inhibit the exercise of [those] freedoms.’ Uncertain meanings inevitably lead citizens to ‘steer far wider of the unlawful zone . . . than if the boundaries of the forbidden areas were clearly marked.’”¹⁷ Even when a law “merely” imposes registration and reporting requirements on political speakers, the Supreme Court has ruled that such requirements still “burden the ability to speak,” and are subject to an “exacting scrutiny” standard of judicial review.¹⁸

Accordingly, as ELEC has explained, “Under the constitutional parameters for the protection of First Amendment rights of political expression established by the U.S. Supreme Court . . . a communication must contain explicit words of advocacy of election or defeat of a candidate in order to be subject to the campaign recordkeeping and reporting requirements of federal or State reporting legislation.”¹⁹

Admittedly, in the more than 17 years since ELEC’s pronouncement on this particular point, the U.S. Supreme Court has slightly expanded the universe of political speech that may be subject to regulation (under both vagueness and overbreadth concerns) to include certain “electioneering communications” that “refer[] to a clearly identified candidate” within certain limited pre-election time windows,²⁰ as well as communications that are the “functional

¹³ *Id.* § 2 (to be codified at N.J. Stat. §§ 19:44A-8(d)(2) and -8(a)(1)); *see also* “2018 Compliance Manual for Political Committees,” New Jersey Election Law Enforcement Commission. Retrieved on March 15, 2019. Available at: http://www.elec.state.nj.us/pdffiles/forms/compliance/man_pc.pdf (February 2018), p. 8.

¹⁴ *Id.* § 2 (to be codified at N.J. Stat. § 19:44A-8(e)).

¹⁵ *Id.*

¹⁶ *Id.* §§ 4, 5, and 9.

¹⁷ *Grayned v. City of Rockford*, 408 U.S. 104, 109 (1972) (internal citations omitted).

¹⁸ *Citizens United v. FEC*, 558 U.S. 310, 366 (2010).

¹⁹ ELEC, Adv. Op. No. 10-2001 (October 4, 2001) at 2 (citing *Buckley v. Valeo*, 424 U.S. 1, 40-45 (1976)).

²⁰ See *McConnell v. Fed. Election Comm’n*, 540 U.S. 93 (2003) and 52 U.S.C. 30104(f)(3)(A).

equivalent” of express advocacy.²¹ As to the latter, the Court held that “an ad is the functional equivalent of express advocacy *only if* the ad is susceptible of *no reasonable interpretation other than* as an appeal to vote for or against a specific candidate.”²² Arguably, this “functional equivalent” standard may “only [be] triggered if the speech meets the bright line requirements of [an electioneering communication] in the first place.”²³

A. 1524 fails the constitutional constraints imposed by the First Amendment on account of both overbreadth and vagueness. First, A. 1524 defines the types of communications that would subject a speaker to regulation as an “independent expenditure committee” to include those that “influenc[e] or attempt[] to influence the outcome of any election” or that “provid[e] political information on any candidate or public question.”²⁴ This standard goes far beyond New Jersey’s current regulation of “political communications”²⁵ and “independent expenditures,”²⁶ which ELEC has determined may apply only to express advocacy and not “issue advocacy.”²⁷ More importantly, the standard in A. 1524 also goes far beyond what the U.S. Supreme Court has permitted.

The bill’s regulation of any communications “providing political information on any candidate or public question” covers an incredibly exhaustive, overbroad universe of speech. The bill would rely on the existing statutory definition of “political information,” which includes “any statement . . . which reflects the opinion of the members of the organization on any candidate or candidates for public office, on any public question, or which contains *facts* on any such candidate, or public question whether or not such facts are within the personal knowledge of members of the organization.”²⁸

Thus, an advocacy group could be subject to the onerous registration, reporting, and administrative requirements described above even if it merely provides *purely factual information* about any elected official²⁹ or ballot measure, such as:

- Sending a legislative alert for members or the public to contact their elected state officials about a pending bill (such as A. 1524)
- Circulating an informational document that presents opposing arguments for and against a state ballot measure
- Publicizing a mayor’s town hall meeting
- Publishing city council members’ voting records

²¹ *Fed. Election Comm’n v. Wisconsin Right to Life, Inc.*, 551 U.S. 449 (“WRTL II”).

²² *Id.* at 469-470 (emphasis added).

²³ *Id.* at 474 n.7.

²⁴ A. 1524 § 1 (to be codified at N.J. Stat. § 19:44A-3(t)).

²⁵ N.J. Admin. Code § 19:25-10.10.

²⁶ *Id.* § 19:25-12.7. The current definition of an “independent expenditure” depends on whether a communication is made to “support or defeat a candidate.” *Id.* Because A. 1524 uses the standard of whether a communication “influenc[es] or attempt[s] to influence” an election, the bill presumably intends this to be a different standard than that in the existing law.

²⁷ ELEC, Adv. Op. No. 01-2011 (April 27, 2011) at 3-4.

²⁸ See A. 1524 § 1 and N.J. Stat. § 19:44A-3(h) (emphasis added).

²⁹ Elected officials generally would meet the definition of a “candidate.” See A. 1524 § 1 (to be codified at N.J. Stat. § 19:44A-3(c)).

As the U.S. Supreme Court has held, campaign finance reporting requirements “could be justified based on a governmental interest in ‘provid[ing] the electorate with information’ about the sources of election-related spending.”³⁰ However, the types of speech that A. 1524 would regulate go far beyond anything that could reasonably be regarded as “election-related.” And although A. 1524 provides a \$3,000 expenditures threshold before those requirements would be triggered, the threshold is notably low once one factors in the myriad communications that would trigger registration as an “independent expenditure committee.”

A. 1524 also fails the overbreadth doctrine because it would subject organizations to these onerous requirements and prohibitions even if “providing political information” is only a small fraction of the group’s activities. As ELEC has noted, in order to be required to register and report as a political committee, “an entity must have as its ‘major purpose’ the support or opposition of candidates in order to comply with constitutional requirements set forth [by the U.S. Supreme Court] in *Buckley* [v. *Valeo*] The Commission does not believe that the recent federal case law compels the Commission to apply a different analysis”³¹ ELEC’s pronouncement on this particular point was made in 2011 and continues to be an accurate statement of the applicable law.³² If an organization may not constitutionally be regulated as a political committee unless its “major purpose” is to “support or oppos[e]” candidates, then certainly A. 1524 also may not seek to regulate groups as political committees for merely “providing political information” as one of the group’s incidental activities.

Lastly, and importantly, A. 1524 also fails the vagueness doctrine by relying on standards with “[u]ncertain meanings” that fail to articulate any “clearly marked,” bright-line “boundaries” under which speech about an elected official or ballot measure may be subject to regulation.³³ Specifically, the bill’s regulation of speech that “influenc[es] or attempt[s] to influence the outcome of any election” goes far beyond the regulation of express advocacy, the “functional equivalent” of express advocacy, and “electioneering communications” that the U.S. Supreme Court has approved.³⁴ The requirement to report communications “that *can be* interpreted by a reasonable person as” election advocacy is also materially different – and far more expansive – than the “*no reasonable interpretation other than as*” election advocacy standard that the Court has approved.³⁵ The two standards under which speech would be regulated by A. 1524 cover an indeterminable universe of speech, and impermissibly leave speakers at the mercies, whims, and prejudices of government regulators.

³⁰ *Citizens United*, 558 U.S. at 367 (quoting *Buckley*, 424 U.S. at 66). IFS does not necessarily agree with this policy rationale or governmental interest the Court has articulated, and notes that research calls into question this proposition. See, e.g., David M. Primo, Ph.D., “Full Disclosure: How Campaign Finance Disclosure Laws Fail to Inform Voters and Stifle Public Debate,” Institute for Justice. Retrieved on March 15, 2019. Available at: http://www.ij.org/images/pdf_folder/other_pubs/fulldisclosure.pdf (October 2011).

³¹ ELEC, Adv. Op. No. 01-2011 (April 27, 2011) at 5-6.

³² The “major purpose” standard, admittedly, has not been followed universally in the various U.S. district courts and courts of appeals. See *Corsi, et al. v. Ohio Elections Comm'n*, U.S. Sup. Ct. No. 12-1442, Pet. for Writ of Certiorari (filed Jun. 11, 2013) at 13-16, cert. denied 134 S. Ct. 163 (2013). However, we are not aware of any rulings on this issue by the U.S. Court of Appeals for the Third Circuit (in whose jurisdiction New Jersey lies) or the U.S. Supreme Court, since ELEC issued Advisory Opinion No. 01-2011. Thus, ELEC’s statement of U.S. Supreme Court precedent has not been superseded.

³³ *Grayned*, 408 U.S. at 109.

³⁴ *Buckley*, 424 U.S. at 40-45; *WRTL II*, 551 U.S. at 469-470; *McConnell*, 540 U.S. 93.

³⁵ Compare A. 1524 § 1 (to be codified at N.J. Stat. § 19:44A-3(v)) with *WRTL II*, 551 U.S. at 469-470 (emphasis added).

III. Additional Specific Examples of A. 1524's Overbreadth Problems

It is one thing to discuss in the abstract constitutional doctrines of vagueness and overbreadth, but these problems really hit home when one considers some real-life consequences that A. 1524 is likely to create.

A) The Bill's "Disclosure" Requirements Will Facilitate Threats and Harassment Against Employees and Donors.

In today's highly polarized and, unfortunately, sometimes violent political environment, we have seen (from all sides of the political spectrum):

- Death threats made against individuals for their political contributions to candidates³⁶
- Death threats made against individuals for their political contributions to ballot measure committees³⁷
- Threats and harassment against employees of advocacy groups at their workplaces and homes due to their groups' positions³⁸
- Death threats made against newspapers for their political endorsements³⁹
- Death threats made against delegates to both major political parties' nominating convention⁴⁰

A. 1524 would facilitate these types of threats and harassment by requiring donors to nonprofit groups to be publicly identified with activities deemed to be "political" on campaign finance reports, even if: (1) those activities consist merely of providing factual information to the public and the groups' members about their state and local government and issues of public concern; or (2) if political activities are only an incidental part of a group's overall activities, and the donors did not contribute specifically to support those political activities. Notwithstanding all this, A. 1524 would require donors' home addresses and employer information, as well as the home addresses of many of the groups' officers and employees, to be publicly reported.

³⁶ See, e.g., Staci Zaretsky, "Legal Recruiter Receives Death Threat After Making Political Donation To Hillary Clinton," *Above the Law*. Retrieved on March 15, 2019. Available at: <https://abovethelaw.com/2016/10/legal-recruiter-receives-death-threat-after-making-political-donation-to-hillary-clinton/> (October 12, 2016).

³⁷ See, e.g., Brad Stone, "Prop 8 Donor Web Site Shows Disclosure Law Is 2-Edged Sword," *The New York Times*. Retrieved on March 15, 2019. Available at: <http://www.nytimes.com/2009/02/08/business/08stream.html> (February 7, 2009).

³⁸ See, e.g., Donna Lieberman and Irum Taqi, "Testimony of Donna Lieberman and Irum Taqi on Behalf of the New York Civil Liberties Union Before the New York City Council Committee on Governmental Operations Regarding Int. 502-b, in Relation to the Contents of a Lobbyist's Statement of Registration," New York Civil Liberties Union. Retrieved on March 15, 2019. Available at: <http://www.nyclu.org/content/contents-of-lobbyists-statement-of-registration> (April 11, 2007); Tracie Sharp and Darcy Olsen, "Beware of Anti-Speech Ballot Measures," *The Wall Street Journal*. Retrieved on March 15, 2019. Available at: <http://www.wsj.com/articles/beware-of-anti-speech-ballot-measures-1474586180> (September 22, 2016).

³⁹ See, e.g., Kelsey Sutton, "Arizona Republic receives death threats after Clinton endorsement," *Politico*. Retrieved on March 15, 2019. Available at: <http://www.politico.com/blogs/on-media/2016/09/arizona-republic-receives-death-threats-for-clinton-endorsement-228889> (September 29, 2016).

⁴⁰ See, e.g., Alan Rappeport, "From Bernie Sanders Supporters, Death Threats Over Delegates," *The New York Times*. Retrieved on March 15, 2019. Available at: <http://www.nytimes.com/2016/05/17/us/politics/bernie-sanders-supporters-nevada.html?r=0> (May 16, 2016); Eli Stokols and Kyle Cheney, "Delegates face death threats from Trump supporters," *Politico*. Retrieved on March 15, 2019. Available at: <http://www.politico.com/story/2016/04/delegates-face-death-threats-from-trump-supporters-222302> (April 22, 2016).

The overbreadth of A. 1524's "disclosure" requirements fail to be "justified based on a governmental interest in 'provid[ing] the electorate with information' about the sources of election-related spending."⁴¹ Rather, the "disclosure" requirement appears to be calculated at burdening, intimidating, and punishing civic groups into silence. This is especially true for groups involved in contentious social issues, such as Planned Parenthood, New Jersey Right to Life, the Human Rights Campaign, or the National Organization for Marriage, just to name a few examples.

B) Retroactively Requiring the Reporting of Advocacy Group Supporters is Improper and a Violation of New Jerseyans' Long-Held Expectations of Privacy.

A. 1524's Senate companion, S. 1500, was amended in that body to retroactively require the reporting of donors to any group that the bill would regulate as an "independent expenditure committee."⁴² In particular, the names, homes addresses, occupations, and employers of all donors over \$300 to such groups from January 1, 2018 onward would be publicly reported.⁴³

Such reporting is unfair, improper, and begs questions about why such a condition is necessary. It is fundamentally unfair to expose the sensitive, private information of individuals who donate to the causes of their choice when those individuals gave believing their contributions would remain private. If the Legislature deems it appropriate for donations to advocacy nonprofits to be reported moving forward, the citizens of New Jersey will have an opportunity to weigh the costs of reporting when choosing whether or not to donate to their favorite causes in the future. Forcing donors to be reported retroactively and involuntarily strips New Jersey residents of this choice. Given the hyper-political climate today – and the serious threats of harassment and intimidation documented above – this is a critical concern. Those who donated to various causes in New Jersey have done so for decades presuming their donation was made in private and that their name, address, occupation, employer, and donation amount would similarly remain private. It is improper to change the rules on residents of this state after the fact. Lawmakers should avoid taking a similar course with A. 1524.

C) The Requirement for 527 Organizations to Also Register and Report in New Jersey is Gratuitous.

As overtly political groups, 527 organizations are already required to publicly report to the IRS their donors of \$200 or more if they are not reporting under state campaign finance laws.⁴⁴ Thus, A. 1524's requirement for 527 organizations to file mostly duplicative reports in New Jersey is a gratuitous transaction cost imposed on such groups simply for exercising their right to speak that serves no legitimate governmental interest.

⁴¹ *Citizens United*, 558 U.S. at 367. See also note 30, *supra*.

⁴² See S. 1500 (218th Leg.), Third Reprint; see also "Sweeney Endorses Disclosure Requirements for Independent Advocacy Organizations," New Jersey Senate Democrats. Retrieved on March 15, 2019. Available at: <https://www.njsendems.org/sweeney-endorses-disclosure-requirements-for-independent-advocacy-organizations/> (January 9, 2019).

⁴³ S. 1500 § 17.

⁴⁴ See, e.g., "Instructions for Form 8872," Internal Revenue Service. Retrieved on March 15, 2019. Available at: <https://www.irs.gov/pub/irs-pdf/f18872.pdf> (November 2018).

* * *

For the above reasons, the Institute for Free Speech therefore recommends that A. 1524 be set aside and re-worked. If legislators are serious about perceived issues with the current political environment, targeted options exist that will resolve legislators' concerns while safeguarding much of civil society from onerous and destructive regulation. Should you have any further questions regarding this legislation, please contact the Institute's Director of External Relations, Matt Nese, at (703) 894-6800 or by e-mail at mnese@ifs.org.

Respectfully,



Eric Wang
Senior Fellow⁴⁵

⁴⁵ Eric Wang is also Special Counsel in the Election Law practice group at the Washington, D.C. law firm of Wiley Rein, LLP. Any opinions expressed herein are those of the Institute for Free Speech and Mr. Wang, and not necessarily those of his firm or its clients.