March 21, 2013

The Honorable Joan Carter Conway
2 West Miller Senate Building
11 Bladen Street
Annapolis, MD 21401

The Honorable Roy P. Dyson
102 James Senate Office Building
11 Bladen Street
Annapolis, MD 21401

Re: Constitutional Issues with Senate Bill 1039

Dear Chairwoman Conway, Vice Chairman Dyson, and Members of the Committee:

On behalf of the Center for Competitive Politics, we respectfully submit the following comments on constitutional issues with portions of Senate Bill 1039, currently being considered before the Senate Education, Health, and Environmental Affairs Committee.

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. The Center has participated in many of the most significant campaign finance cases of the past several years. We also regularly comment on proposed legislation and rulemakings at all levels of government. Indeed, last June we testified before the Commission to Study Campaign Finance Law.

Already, Senate Bill 1039 incorporates three major suggestions the Center provided last June. First, we wish to congratulate Maryland for proposing to increase candidate contribution limits from a mere $4,000 to an improved $6,000 per cycle. This is a significant step to bring the candidate contribution limits more in line with the current value of the dollar.

Second, S.B. 1039 increases the state's aggregate limits. Previously, a citizen could not even "max out" their contributions for gubernatorial, state senate, and state house of delegates candidates of their choosing.[1] Increasing the limits from $10,000 to $24,000 is a significant, if incomplete, step in protecting the political speech rights of Maryland's citizens.

Third, S.B. 1039 will provide for contribution limits to be indexed to inflation, which is essential to keeping campaign contribution limits meaningful over time. The bill will also

[1] This is a simple function of the arithmetic of Maryland's aggregate contribution limit. For example, if an individual wants to contribute to a candidate for governor, lieutenant governor, and delegate, the individual can only give the maximum of $4,000 to two of those candidates. After making two contributions of $4,000, the individual only has $2,000 left to contribute before hitting the $10,000 aggregate limit.

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safeguard constitutional rights by specifically providing that the contribution limits will not decrease during poor economic years.[2]

However, the Center also has serious constitutional concerns about other provisions of S.B. 1039. The definition of "political committee," though improved, is still vague and overbroad. In addition, the regulation of independent expenditures is inconsistent with federal case law, specifically the *SpeechNow* decision. Finally, the electioneering communications disclosure provisions reach impermissibly far into an organization's donor base, likely chilling the speech of many groups.

I outline these three significant issues surrounding S.B. 1039 in greater detail below.

I. The definition of "political committee" is vague and overbroad.

In 2011, the Maryland General Assembly established the Commission to Study Campaign Finance Law ("the Commission").[3] The Commission noted that Maryland's definition of "political committee" is "unconstitutionally overbroad."[4] The Commission rightly stated that "an entity generally may not be regulated as a political committee unless it is controlled by a candidate or has as its major purpose the election or defeat of a candidate or ballot issue."[5] To that end, S.B. 1039 adds a major purpose element to its definition for "political committee." This is a step in the right direction.

However, as written in S.B. 1039, the definition remains unconstitutionally vague and overbroad:

> "Political committee" means a combination of two or more individuals that has as its major purpose *assisting or attempting to assist* in promoting the success or defeat of a candidate, political party, or question submitted to a vote at any election.[6]

The phrase, "assisting or attempting to assist" is impermissibly vague and overbroad. The Election Code does not define the phrase in its entirety, the term "assist," or the term "attempt." Moreover, no existing case law or other official guidance provides adequate clarification of these inherently ambiguous terms in this particular context.[7] Thus, the meaning of this crucial language under Maryland campaign finance law remains unclear.

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[2] *See Randall v. Sorrell*, 548 U.S. 230, 261-62 (2006) (opinion of Breyer, J.) (finding that a failure to index contribution limits to inflation, in combination with other factors, may substantially burden First Amendment rights and therefore render a state's contribution regime unconstitutional).
[3] COMMISSION TO STUDY CAMPAIGN FINANCE LAW, FINAL REPORT, iii (Dec. 2012) ("COMMISSION REPORT").
[4] COMMISSION REPORT at 17.
[5] *Id.*
[6] Campaign Finance Reform Act of 2013, Senate Bill 1039, pp. 4-5 at lines 29-2 (emphasis added).
[7] The guidance on this point is limited. In examining a prior iteration of the Election Code, the Court of Appeals held that merely contributing to an existing political cause does not make one a member of a political committee. *Phifer v. State*, 278 Md. 72, 79 (1976). The Attorney General implicitly defined "assisting or attempting to assist" by examining the parallel language of "expenditure" in the Election Code, but provided no further clarification on the scope of this phrase. *Elections – Campaign Finance – Whether Campaign Finance Entity May Make*

The "attempting to assist" standard in particular presents an additional vagueness problem because of its imposition of an intent requirement. In *Federal Election Commission v. Wisconsin Right to Life, Inc.*,[8] the Supreme Court explicitly "decline[d] to adopt a test for as-applied challenges turning on the speaker's intent to affect an election."[9] It rejected such a test because "[a]n intent-based standard 'blankets with uncertainty whatever may be said,' and 'offers no security for free discussion.'"[10] Surely, the regulation of an entity does not depend upon whether it achieves its desired outcome in an election.

Thus, rather than defining "political committee" using discernible terms of art – such as "contribution," "expenditure," and "express advocacy," – S.B. 1039 employs vague language insufficient for such a significant classification. Worse still, it defies Supreme Court precedent in so doing.

In addition to its vagueness, S.B. 1039's definition of "political committee" is overbroad because the term "assisting or attempting to assist" can potentially encompass the nonpolitical activity of groups speaking on public issues. For example, a group of crabbers may wish to discuss the importance of their industry in the context of environmental policy for the Chesapeake Bay. Such speech could happen to prove helpful to a delegate running for re-election, even if only by happenstance. The quandary then becomes drawing the line between issue speech and support of a candidate.

The United States Supreme Court has consistently expressed concern about such a scenario. In its landmark *Buckley v. Valeo* decision, the Court noted the distinction between issue speech, which may not be regulated, and express advocacy, which may.[11] The Court noted that "the distinction between discussion of issues and candidates and advocacy of election or defeat of candidates may often dissolve in practical application."[12] Yet, this does not convert this larger political discussion into something other than issue speech.

Since *Buckley*, the Supreme Court has "reject[ed] the contention that issue advocacy may be regulated because express election advocacy may be."[13] The Court determined that a mere "desire for a bright line rule...hardly constitutes the *compelling* state interest necessary to justify any infringement on First Amendment freedom."[14]

Finding the phrase, "for the purpose of... influencing" in the federal statute to be vague, the Supreme Court created the major purpose test.[15] Consideration of that phrase in its entirety, however, is essential to understanding the narrowness of the activity *Buckley* encompassed: "[t]o

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Unlimited Contribution to a Political Party by Designating it for Ongoing Administrative Expenses, 92 Op. Att'y Gen. Md. 92, 94 (2007).

[8] 551 U.S. 449, 467 (2007).

[9] *Id.*

[10] *Id.* citing *Buckley v. Valeo*, 424 U.S. 1, 43 (1976).

[11] *Buckley* at 43.

[12] *Id.* at 42.

[13] *Federal Election Commission v. Wisconsin Right to Life, Inc.*, 551 U.S. 449, 477 (2007).

[14] *Id.* at 479 (quoting *Federal Election Commission v. Massachusetts Citizens for Life, Inc.*, 479 U.S. 238, 263 (1986) (emphasis in original)).

[15] *Buckley* at 79.

fulfill the purposes of the Act they need only encompass organizations that are under the control of a candidate or the major purpose of which is *the nomination or election of a candidate*."[16]

S.B. 1039's use of "assisting or attempting to assist" may well be understood to encompass more activity than that which has the purpose of "nominat[ing] or electi[ng]... a candidate." This is because "assisting or attempting to assist" can be understood to be almost *any* activity that – for whatever reason – ultimately affects a candidate's electoral chances. Tracking the language of *Buckley* will ensure constitutional clarity. Defining regulated activity narrowly and precisely will ensure that issue speech is not improperly regulated or chilled.

II. The bill's proposed regulation of independent expenditures is inconsistent with federal case law.

Under current Maryland law, contributions to candidates are limited to $4,000, and aggregate contributions to all campaign finance entities are limited to $10,000.[17] The term "campaign finance entity" extends to every entity regulated by campaign finance law, including political action committees (PACs).[18]

Viewed as a whole, Maryland's statutory scheme effects a dollar limit on independent expenditures and independent expenditure-only committees (so-called "super PACs"). But the Supreme Court held in *Citizens United* that such independent expenditures do not give rise to corruption or the appearance of corruption.[19] Thus, there is no constitutionally permissible justification for limiting this form of speech. In the wake of *Citizens United*, the U.S. Court of Appeals for the District of Columbia Circuit clarified that the Constitution prohibits limitations on independent expenditures.[20] There is simply no constitutionally sufficient governmental interest in limiting independent expenditures.[21]

Whatever qualms the state may have about independent expenditures, the law is clear: states may not limit independent expenditures.[22] The final report of the Commission unambiguously recognizes that "contributions to a political committee that makes only independent expenditures may not be limited."[23] The Commission recommends that the state recognize that independent expenditure-only committees are not subject to contribution limits.[24] The Center fully agrees, and emphasizes that S.B. 1039 should be revised to respect this constitutionally mandated recommendation.

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[16] *Id.* (emphasis supplied).

[17] MD. ELECTION LAW CODE § 13-226(b).

[18] MD. ELECTION LAW CODE § 1-101(h) (defining "campaign finance entity"), § 1-101(ff) (defining "political action committee"), § 13-202 (stipulating that "all campaign finance activity for an election under this article shall be conducted through a campaign finance entity").

[19] *Citizens United v. Federal Election Commission*, 558 U.S. 310 (2010).

[20] *SpeechNow.org v. Federal Election Commission*, 599 F.3d 686, 695 (D.C. Cir. 2010).

[21] *Id.* ("As we have observed in other contexts, 'something...outweighs nothing every time.'") (internal citations omitted).

[22] *American Tradition Partnership v. Bullock*, 657 U.S. ___, 132 S. Ct. 2490, 2491 (2012) (citing U.S. Const., Art. VI, cl. 2, (the "Supremacy Clause")).

[23] COMMISSION REPORT at 15.

[24] *Id.* at 17.

III. The disclosure requirements for electioneering communications are overly invasive.

Current state law does not require persons making independent expenditures or electioneering communications to disclose their donors unless the donor specifically intends their donation to be used for such activity.[25] S.B. 1039, however, removes this link. Entities making independent expenditures or electioneering communications must disclose certain information about all individuals who donate $10,000 or more *even if* the donors did not intend their donation to be used for making independent expenditures or electioneering communications.[26] While the Center appreciates the General Assembly's efforts to protect donors' privacy by setting a high disclosure threshold, the lack of a link between the purpose of a general donation to a multi-purpose organization, and the disclosure of that donation as a political act, is problematic. Nonpolitical organizations[27] need not turn over their donor rolls for government inspection.[28]

As the Committee likely knows, nonprofit organizations like 501(c)(4) social welfare organizations may engage in some degree of political activity. S.B. 1039 presents such organizations with two burdensome options: either they can establish separate PACs so as to protect their donors, or they must disclose all donors over $10,000. This functionally results in deterring speech, requiring organizations to pause before speaking. Such restrictions require a compelling state interest,[29] but the state simply does not have a compelling interest in the disclosure of donors who may not support the political activity of recipient organizations.

The Commission also placed undue emphasis on the prospect of nonprofit organizations abusing disclosure requirements.[30] The Commission feared that organizations, such as 501(c)(4)s, will accept money *nominally* for general purposes, but in fact will spend that money on political activity. By law, these tax-exempt groups cannot have political activity as their major purpose. Consequently, a nonprofit, which receives $10,000 in donations, can only spend less than half of that amount on political activity. A wealthy donor who wishes to conceal his identity through a 501(c)(4) organization will effectively have to *double* his donation to a 501(c)(4) organization, compared to what could be accomplished through a donation to an independent-expenditure-only committee.

Therefore, the disclosure of *all* major donors of entities which make independent expenditures or electioneering communications – no matter how slight a portion of the group's overall activity – is poorly tailored and will doubtless chill speech, not only concerning candidates, but also concerning issues of public policy.

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[25] MD. ELECTION LAW CODE §§ 13-306(a)(2) and §§13-307(a)(2) (defining "donation" in the context of reporting independent expenditures and electioneering communications, respectively, as being made "for the purpose of furthering" these activities).

[26] Campaign Finance Reform Act of 2013, Senate Bill 1039, p. 22 at lines 11-13; p. 27 at lines 29-31.

[27] That is, those that are not political committees and the like with the major purpose of the nomination, election, or defeat of a candidate or ballot measure.

[28] *See NAACP ex rel. Patterson v. Alabama,* 357 U.S. 449 (1958); *Bates v. Little Rock*, 361 U.S. 516 (1960).

[29] *See, e.g., Buckley v. Valeo* at 43-44.

[30] COMMISSION REPORT at 17-18.

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Campaign finance regulations strike at the heart of the First Amendment rights to political speech and association, and must be crafted with great care. In its current form, S.B. 1039 relies upon an unclear and overbroad definition of "political committee," attempts to regulate independent expenditures in a manner inconsistent with recent federal jurisprudence, and contains disclosure provisions for electioneering communications that could subject donors to disclosure for communications they may not even support. Taken together, while Senate Bill 1039 makes several desirable improvements to Maryland's campaign finance law, it also contains provisions that raise serious legal concerns. These provisions should be reconsidered and revised.

Thank you for allowing me to submit comments on Senate Bill 1039. I hope you will find this information helpful. Should you have any further questions regarding this legislation 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
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