CENTER for COMPETITIVE POLITICS
Congress shall make no law...
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March 11, 2016

The Honorable David Ralston
332 State Capitol
Atlanta, GA 30334

The Honorable David Shafer
321 State Capitol
Atlanta, GA 30334

Re: H.B. 370; Analysis of Proposed Amendment to Regulate So-Called "Election Targeted Issue Advocacy"

Dear Speaker Ralston and President Pro Tempore Shafer:

The Center for Competitive Politics (CCP)[1] respectfully submits the following comments analyzing a proposed amendment to regulate "election targeted issue advocacy," which we understand some legislators intend to reinsert into H.B. 370 in conference committee. This amendment would severely inhibit the ability of advocacy groups to engage in legislative advocacy, and of educational organizations to distribute nonpartisan voter guides and other materials to inform the electorate. The sheer amount of speech that would be regulated, and the inordinate reporting burdens and invasion of privacy that would be imposed on citizen groups exercising their core First Amendment rights, are unprecedented and are highly susceptible to being invalidated by courts as an unconstitutional burden on speech.

If this amendment language becomes law, there is a high likelihood that it will be found unconstitutional if challenged in court. Any potential legal action will cost the state a great deal of money defending the case, and will distract the Attorney General's office from meritorious legal work. Additionally, it is probable that the state will be forced by the courts to award legal fees to successful plaintiffs. Legal fee awards are frequently costly – often well over one hundred thousand dollars.

I. Overview of the Amendment

The amendment in question creates a new form of regulated speech to be known as "election targeted issue advocacy," defined as any "communication" "made within 180 days of an election" that does not expressly advocate the election or defeat of a state or local candidate or ballot measure, but that:

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

(A) Refers to one or more clearly identified candidates in such election;
(B) Depicts the name, image, likeness, or voice of one or more clearly identified candidates in such election;
(C) Refers to a political party or body having candidates on the ballot at such election; or
(D) Refers to a constitutional amendment, referendum, or other question being submitted to the voters in such election.[2]

Notably, the amendment refers to communications "made within 180 days of an election," which could mean both communications that are made within 180 days *before* an election, as well as those that are made within 180 days *after* an election.[3] Thus, for an election year such as the current one, in which the primary election for state offices is being held on May 24 and the general election is being held on November 8,[4] issue speech could be regulated not only during *the entire calendar year*, but also during the final five weeks of the preceding year and for roughly four months the following year after the general election. In short, over 72% of the time in every two-year cycle, issue communications would be regulated by this provision. Moreover, this does not account for the possibility of general run-off elections, special elections, and special run-off elections.[5] And even if the amendment's use of the adverb "within" is intended to mean "before" an election, issue speech could still be regulated for over 47% of each two-year cycle and the entire year leading up to Election Day.

A "communication" is broadly defined to include paid periodical, billboard, broadcast, Internet, and other electronic advertisements; paid telephone calls or mailings made or sent to 100 or more households; and printed materials that exceed 1,000 copies.[6]

"Election targeted issue advocacy" would be regulated as a political "expenditure" in the same way that communications expressly advocating the election or defeat of candidates and ballot measures are regulated.[7] Specifically, under Georgia law, this means that any sponsor of so-called "election targeted issue advocacy" would have to register and report with the Georgia Government Transparency and Campaign Finance Commission as a political "committee."[8] While groups that spend $25,000 or less per year on regulated expenditures with respect to candidates are exempt from these requirements, groups that spend so much as $500.01 on regulated expenditures with respect to constitutional amendments, referenda, and ballot measures would be required to file detailed registration and reporting forms.[9]

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[2] *See* House Comm. on Gov't Affairs Substitute to H.B. 370 § 2 (to be codified at Ga. Code § 21-5-3(10.1)).
[3] *See*, e.g., "Canceling a Contract," Georgia Dept. of Law Consumer Protection Unit. Retrieved on March 11, 2016. Available at: http://consumer.georgia.gov/consumer-topics/canceling-a-contract (noting that certain contracts in Georgia may be canceled "*within* three business days *after* signing.") (emphasis added).
[4] *See* "2016 Elections and Voter Registration Calendar," Georgia Secretary of State. Retrieved on March 11, 2016. Available at: http://sos.ga.gov/index.php/elections/2016_election_dates (2016).
[5] *Id.*; *see also* Ga. Code § 21-5-3(9) (defining an "election").
[6] *Id.* (to be codified at Ga. Code § 21-5-3(5.1)).
[7] *Id.* (to be codified at Ga. Code § 21-5-3(12)).
[8] Ga. Comp. R. & Regs. § 189-4-.01(1).
[9] *Id.* § 189-04.01(2) and Ga. Code § 21-5-34(a)(2)(A).

Political committees in Georgia are required to file reports on the same schedule as candidates if their expenditures are deemed to support or oppose a candidate, or a pre- and post-election report if their expenditures are deemed to support or oppose a constitutional amendment, referendum, or ballot measure.[10] Thus, for example, in the current election year, any group that sponsors so-called "election targeted issue advocacy" triggering the registration and reporting thresholds would have to file up to six reports under the proposed amendment.[11]

These reports are required to include, among other information, the name, mailing address, occupation, and employer of any person making a "contribution" of more than $100 to the organization.[12] While the term "contribution" is defined as funds or "anything of value conveyed or transferred for the purpose of influencing" an election,[13] elsewhere in the Georgia law, a political "committee" is defined broadly as any "association . . . which receives donations."[14] Thus, an organization that is required to register and report its issue advocacy may also have to publicly report the private information of its supporters who gave more than $100, regardless of whether those donations were given to influence any election. Making matters worse, the term "influencing" an election has been repeatedly found to be unconstitutionally vague and would exacerbate the constitutional issues with the proposal.

II. The amendment is out of step with how the vast majority of other states regulate issue advocacy.

Only four states (Alaska, Montana, New York, and Ohio) purport to treat issue advocacy as political expenditures that require sponsors to register and file reports as political committees.[15] None of these four states regulate issue speech during the entire year leading up to the election, as the provision in question would do:

- Alaska, which has one of the most hyper-regulatory campaign finance regimes in the nation, only regulates electioneering communications for the "30 days preceding *a general* or municipal election."[16]

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[10] Ga. Code §§ 21-5-34(a) and (e); "Committee Reports" Brochure, Georgia Government Transparency and Campaign Finance Commission. Retrieved on March 11, 2016. Available at: http://ethics.ga.gov/wp-content/uploads/2015/02/2015-NCC.pdf, (2015) p. 3-4.

[11] *See* "2016 Campaign Disclosure Report Filing Schedule," Georgia Government Transparency and Campaign Finance Commission. Retrieved on March 11, 2016. Available at: http://media.ethics.ga.gov/schedules/ScheduleInformation.aspx?CommitteeType=CNC&ReportYear=2016&ReportType=Election%20Year&Report_Election=0 (2016).

[12] Ga. Code Ann. § 21-5-34(b)(1)(A); Ga. Comp. R. & Regs. § 189-3-.01(1).

[13] *Id.* § 21-5-3(7).

[14] *Id.* § 21-5-3(20)(A).

[15] Florida requires sponsors of "electioneering communications" to register and report as "electioneering communication organizations," but defines "electioneering communications" as communications that are "susceptible of no reasonable interpretation other than an appeal to vote for or against a specific candidate." Fla. Stat. §§ 106.011(8)(a) and (9). Illinois treats "electioneering communications" as political "expenditures," but, like Florida, defines "electioneering communications" as communications that are "susceptible of no reasonable interpretation other than as an appeal to vote for or against a clearly identified candidate . . . a political party, or a question of public policy." 10 Ill. Comp. Stat. §§ 5/9-1.5 and -1.14. While the Connecticut statute could be read to suggest that sponsors of issue speech that refers to candidates are required to register and report as political committees, *see* Conn. Gen. Stat. §§ 9-601b and 9-601d(a), the U.S. District Court for the District of Connecticut rejected such a reading and held that the reporting requirements are much narrower. *Democratic Governors Assoc. v. Brandi*, 2014 U.S. Dist. LEXIS 78672 at *51-*53 (D. Conn. 2014).

[16] Alaska Stat. § 15.13.400(5)(C). (emphasis added).

- Montana, which also has one of the most hyper-regulatory campaign finance regimes in the nation,[17] only regulates electioneering communications "made within 60 days of the initiation of voting in an election" and that "refers to one or more clearly identified candidates [or political party, ballot issue, or other question] in that election."[18]

- New York only regulates communications that refer to a candidate "within [60] days before a general or special election for the office sought by the candidate or [30] days before a primary election."[19]

- Ohio only treats as political "expenditures" those communications that are made "[d]uring the [30] days preceding a primary or general election" that refer to a clearly identified candidate.[20]

Federal law, which does *not* treat electioneering communications as political expenditures subject to the political committee registration and reporting requirements,[21] also only regulates issue advocacy referring to federal candidates in the "30 days before a primary or preference election, or a convention or caucus . . . for the office sought by the candidate" or "60 days before a general, special, or runoff election . . . for the office sought by the candidate."[22] Furthermore, federal law only covers radio and television advertising, and excludes all other communications.

The proposed amendment would chill the ability of citizen groups to advocate for or against policies by urging their members and members of the general public to contact their elected representatives about those policies. For example, during this entire year – including the crucial period prior to and during the legislative session – neither the Georgia Chamber of Commerce nor the Georgia Association of Educators, to take two examples, would be able to spend more than $25,000 on communications asking Georgia residents to urge specific legislators to support or oppose any legislation, without having to register and file burdensome reports as a political committee, and to publicly disclose virtually all of their donors. Similarly, a group that sponsors public communications calling generally on Democrats or Republicans in the General Assembly to approve or reject a gubernatorial nominee subject to legislative approval also would be subject to these impediments. And while the $25,000 threshold may seem high, consider that a full-page ad in the *Atlanta Journal Constitution* costs approximately $70,000.[23] Moreover, as noted before,

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[17] *See, e.g.*, Eric Wang, "Proposed Changes to Admin. Rules of Mont. § 44.11.101 *et seq*. (Commissioner of Political Practices)," Center for Competitive Politics. Retrieved on March 11, 2016. Available at: http://www.campaignfreedom.org/wp-content/uploads/2015/11/2015-11-16_Wang-Comments-To-Interim-SAVA-Committee_MT_COPP-Rulemaking_Commissioners-Proposed-Changes.pdf (November 16, 2015); Eric Wang, "Comments on Mont. Admin. Reg. Notice No. 44-2-207," Center for Competitive Politics. Retrieved on March 11, 2016. Available at: http://www.campaignfreedom.org/wp-content/uploads/2015/08/2015-08-18_Wang-CCP-Comments_MT_COPP-Rulemaking.pdf (August 18, 2015); Eric Wang, "Comments regarding proposed changes to ARM § 44.10.301 *et seq.*," Center for Competitive Politics. Retrieved on March 11, 2016. Available at: http://www.campaignfreedom.org/wp-content/uploads/2015/07/2015-07-14_Wang-CCP-Comments_MT_COPP-Rulemaking.pdf (July 14, 2015).

[18] Mont. Code § 13-1-101(15)(a).

[19] N.Y. Election Law § 14-107(a)(iii).

[20] Ohio Rev. Code § 3517.01(C)(6).

[21] *See* 52 U.S.C. § 30104(f)(3)(B)(ii).

[22] *Id.* § 30104(f)(3)(A)(i).

[23] *See* "Media Kit," *Atlanta Journal Constitution*. Retrieved on March 11, 2016. Available at: http://ajcmediakit.com/specs-rates/general-rates/; "Newspaper Column Inches," Spokane Falls Community College. Retrieved on March 11, 2016. Available at: http://graphicdesign.spokanefalls.edu/tutorials/tech/column_inches/col_inches.htm (explaining "column inches" for newspaper advertising rates).

the registration and reporting threshold is only $500 for materials concerning constitutional questions, referenda, and ballot measures.

Nor are these burdens limited to advocacy communications. Even a nonpartisan educational voter guide published by Project Vote Smart or a group like the League of Women Voters of Georgia that identifies all of the candidates who are up for election in a neutral manner, or that provides factual information about a constitutional question, referendum, or ballot measure, could be regulated as "election targeted issue advocacy," and the sponsors of such guides would be subject to the political committee registration and reporting requirements.

III. The amendment is highly susceptible to being invalidated in court as unconstitutionally overbroad.

At this point, if one is asking, "What's the big deal? It's just disclosure," make no mistake: The proposed amendment would impose severe burdens on the ability of advocacy and educational organizations to freely engage in the discussion of public ideas and to inform the public about matters of public concern.

As the U.S. Supreme Court has noted, the types of political committees that groups engaged in so-called "election targeted issue advocacy" would have to register and report as are "burdensome," "expensive to administer," and subject to "onerous restrictions."[24] As the Supreme Court and the U.S. Court of Appeals for the Eleventh Circuit (in whose jurisdiction Georgia lies) have held, campaign finance "'disclosure requirements may burden the ability to speak,'" and are thus subject to "'exacting scrutiny,' which requires a 'substantial relation' between the disclosure requirement and a 'sufficiently important' governmental interest."[25] In considering this measure, the Georgia General Assembly has made no showing or fact finding that such information is necessary for any governmental interest.

Of the four states discussed above with laws that are similar to the proposed amendment, only Alaska's law specifically has been upheld against a constitutional challenge.[26] The 180-day time window during which this amendment would regulate issue speech is much more than *six times* the length of time during which issue speech is regulated in Alaska. To wit, Alaska's time window only covers 30 days before a general or municipal election, while this amendment, on its face, applies the 180 time-window to the period *before and after any* election. In a constitutional challenge against this proposed amendment, such a substantially material difference could very well cause a court to conclude that the provision is an unconstitutionally overbroad burden on issue speech and educational materials.

To be perfectly clear: CCP is not suggesting that these constitutional and practical flaws in the proposed amendment can simply be fixed by shortening the time windows during which issue speech is regulated, or limiting the windows to only pre-election periods. Doing so would still fail

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[24] *Citizens United v. Fed. Election Comm'n*, 558 U.S. 310, 337-339 (2010).
[25] *Worley v. Cruz-Bustillo*, 717 F.3d 1238, 1242-43 (11th Cir. 2013) (quoting *Citizens United*, 558 U.S. at 366-67).
[26] *See Ala. Right to Life Comm. v. Miles*, 441 F.3d 773 (9th Cir. 2006). The U.S. District Court for the Southern District of Ohio did not rule on the merits of the constitutional challenge to Ohio's electioneering communications disclosure requirements due to procedural and jurisdictional issues. *See Ohio Right to Life Soc., Inc. v. Ohio Elections Comm'n*, 2010 U.S. Dist. LEXIS 103401 at *20-22 (S.D. Ohio 2010).

to resolve the fundamental harm of forcing sponsors of issue speech and educational materials to publicly report their donors, which will result in junk disclosure that misleads the public and create a risk of harassment for donors.

Consider "the following not unlikely scenario" offered by the U.S. Court of Appeals for the D.C. Circuit in a ruling pertaining to the federal electioneering communications reporting requirement:

> A Republican donates $5,000 to the American Cancer Society (ACS), eager to fund the ongoing search for a cure. Meanwhile, Republicans in Congress, aware of a growth in private donations to ACS, push for fewer federal grants to scientists studying cancer in order to reduce the deficit. In response to their push, the ACS runs targeted advertisements against those Republicans, leading to the defeat of several candidates in the upcoming election. Wouldn't a rule requiring disclosure of ACS's Republican donor, who did not support issue ads against her own party, convey some misinformation to the public about who supported the advertisements?[27]

Substitute "Republicans in Congress" with "Republicans [or Democrats] in the Georgia General Assembly," and "federal grants" with "state grants," and the same scenario would apply to this amendment.

Or take the following two examples provided by the Federal Election Commission (FEC) in justifying the agency's decision not to require sponsors of electioneering communications with respect to federal candidates to indiscriminately disclose their general-purpose donors, and which the D.C. Circuit quoted approvingly:

> A corporation's general treasury funds are often . . . in the case of a non-profit corporation, donations from persons who support the corporation's mission. These . . . donors do not necessarily support the corporation's electioneering communications. Likewise, the general treasury funds of labor organizations and incorporated membership organizations are composed of member dues obtained from individuals and other members who may not necessarily support the organization's electioneering communications.[28]

The proposed amendment would require a sponsor of so-called "election targeted issue advocacy" to publicly disclose all of its donors who have given more than $100 to the group for any purpose if the group triggers the $25,000 or $500 thresholds. This would result in precisely the type of junk disclosure that the U.S. Court of Appeals for the D.C. Circuit and the FEC were concerned about preventing.

This type of overly broad, indiscriminate junk disclosure also could lead to the harassment of donors who are unnecessarily disclosed. In today's polarized political environment, more and more individuals have suffered violent threats, harassment, and property damage as a result of this

[27] *Van Hollen v. Fed. Election Comm'n*, No. 15-5016 (D.C. Cir. Jan. 21, 2016) slip op. at 20.
[28] *Id.* at 19-20 (quoting Fed. Election Comm'n, Explanation and Justification for Final Rules on Electioneering Communications, 72 Fed. Reg. 72899, 72911 (Dec. 26, 2007)).

compulsory disclosure information. For example, during the hotly contested debate over same-sex marriage in California in 2008, the personal information of supporters of traditional marriage was exposed due to overly broad disclosure laws. Some traditional marriage supporters recounted being told, "Consider yourself lucky. If I had a gun I would have gunned you down along with each and every other supporter."[29] In New York, the state ACLU chapter has documented that its employees and members have been the subject of death threats.[30] If the private information of donors to similar groups in Georgia were forcibly and publicly disclosed, these citizens also would be at risk.

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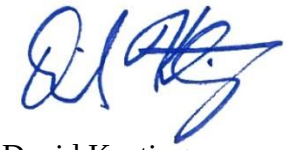
Thank you for your consideration of CCP's analysis of the proposed amendment to House Bill 370 to regulate so-called "election targeted issue advocacy." Should you have any further questions regarding these issues or any other campaign finance proposals, please do not hesitate to contact CCP Director of External Relations Matt Nese at (703) 894-6835 or by e-mail at mnese@campaignfreedom.org.

Respectfully yours,



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[29] *Citizens United*, 558 U.S. at 481 (J. Thomas, concurring).
[30] Donna Lieberman and Irum Taqi, "The Contents Of A Lobbyist's Statement Of Registration: 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," New York Civil Liberties Union. Retrieved on March 11, 2016. Available at: http://www.nyclu.org/content/contents-of-lobbyists-statement-of-registration (April 11, 2007).
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