CENTER for COMPETITIVE POLITICS

Congress shall make no law...

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VIA U.S. MAIL AND ELECTRONIC MAIL

The Honorable Larry Hogan
100 State Circle
Annapolis, MD 21401-1925

RE: Constitutional and Practical Issues with House Bill 898

Dear Governor Hogan:

On behalf of the Center for Competitive Politics ("the Center"),[1] we respectfully submit the following comments addressing constitutional and practical issues with portions of House Bill 898, which has passed the General Assembly and will soon be delivered to your desk.[2] Among other things, this legislation amends the state's election law to create an overly broad definition of "coordinated expenditure" and sets out criteria for determining when particular communications qualify as such. The legislation further defines "coordinated spender" for the purpose of enforcing these provisions. The provisions of H.B. 898 would appear to make such a broad universe of publicly available information about candidates' campaign plans the basis of coordination that it would force independent speakers to choose between shutting their eyes and ears, on the one hand, or shutting their mouths on the other. Additionally, the measure unjustifiably and irrationally prohibits family members from independently supporting their relatives' campaigns.

H.B. 898 suffers from four fundamental practical and constitutional flaws, each of which effectively limit basic campaign activity. First, it extends the definition of coordination beyond reasonable bounds and without any evidence that such a broad definition is necessary. A far better path in regulating coordination would have been to follow the federal definitions to the extent possible. Second, the measure contains no exemption for publicly available information, such as news accounts. Third, H.B. 898 unconstitutionally discriminates against the immediate families of candidates, despite no evidence that such restrictions prevent corruption or its appearance. Finally, the bill gives discretionary authority to the Maryland State Board of Elections that, as history elsewhere has proven, could be used for partisan prosecutions.

[1] The Center 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. Just this past year, we secured judgments in federal court striking down laws in the states of Colorado and Utah on First Amendment grounds. We are also currently involved in litigation against California, Missouri, and the federal government.

[2] Election Law – Campaign Finance – Coordinated Expenditures, H.B. 898, 2017 Reg. Sess. (MD 2017) (as passed General Assembly) ("H.B. 898").

I. The "coordinated expenditure" definition is overbroad and would have been better served by following the definition, exemptions, and safe harbors provided by the federal regulation of "coordination."

House Bill 898 uses vague and broad terms in defining a "coordinated expenditure." A much better means of ensuring the independence of independent expenditures would have been to follow the multi-factor test used by the federal government to define coordination. This important tweak to H.B. 898 would have ensured that the citizens of Maryland may continue to speak freely while providing a system to regulate coordinated expenditures that is already well understood. Regrettably, H.B. 898 passed the General Assembly without any effort to follow the federal guidelines, despite the Center's recommendation.

The federal regulation of "coordination" was written on a bipartisan basis and has been tested in federal court. It uses multiple factors to clearly define expenditures that are not independent. Under the Federal Election Commission's regulations, a communication is coordinated when it is "paid for, in whole or in part, by a person other than" a candidate or political party *and* the communication satisfies one of several content standards *and* one of several conduct standards in the regulation.[3]

The *content* standards include, among other things, republishing or redistributing campaign materials,[4] referencing candidates or political parties by name shortly before the election,[5] or expressly advocating for candidates.[6] The *conduct* standards include, among other things, a candidate or party: requesting or suggesting the advertisement;[7] having material involvement in its creation;[8] or having a "substantial discussion" of a candidate or political party's campaign plans, projects, activities, or needs.[9] Thus, under the federal system, there must be some financial support and evidence in the form of content and conduct to suggest coordination.

Likewise, the federal regulation provides common sense exemptions and safe harbors that cannot give rise to a finding of "coordination." For example, coordination is not triggered "if the information material to the creation, production, or distribution of the communication was obtained from a publicly available source."[10] H.B. 898 has no similar exemption, which means that prosecutions for violations could occur if a person solely acted on information contained in a newspaper article or political blog. Similarly, one candidate endorsing another candidate is not "coordination."[11] The federal system also exempts communications discussing a candidate who is "identified only in his or her capacity as the owner or operator of a business that existed prior to [their] candidacy."[12]

By contrast, H.B. 898 defines as a "coordinated expenditure" a communication that "republishes or disseminates, in whole or in part, a video, a photograph, audio footage, a written graphic, or any other form of campaign material" prepared by a candidate or political party.[13] This overbroad language would have absurd effects and illustrates why Maryland should emulate the federal rules. How can a simple use

[3] 11 C.F.R. § 109.21(a).
[4] 11 C.F.R. § 109.21(c)(2).
[5] 11 C.F.R. § 109.21(c)(4).
[6] 11 C.F.R. § 109.21(c)(3); *see also* 11 C.F.R. § 109.21(c)(5) (providing for communications that do not have express words of advocacy, but contain the "functional equivalent" of express advocacy).
[7] 11 C.F.R. § 109.21(d)(1).
[8] 11 C.F.R. § 109.21(d)(2).
[9] 11 C.F.R. § 109.21(d)(3).
[10] 11 C.F.R. § 109.21(d)(2).
[11] 11 C.F.R. § 109.21(g)(1).
[12] 11 C.F.R. § 109.21(i). That is, provided that the timing, content, and distribution of the communication was arranged prior to the candidacy and the ad does not "promote, support, attack, or oppose" the candidate or opponents in the race. 11 C.F.R. § 109.21(i)(1)-(2).
[13] H.B. 898 § 13-249.(A)(4)(II).

of a publicly available photo of a candidate trigger coordination? If a public communication quotes a candidate's campaign promise to clean up Maryland's lakes and rivers or support charter schools, why should that be presumed to be a coordinated communication? These types of questions are why the federal rules provide exemptions for republished material that include the following common sense situations:

- [the material] is incorporated into a communication that advocates the defeat of the candidate or party that prepared the material…; or
- [the] material used consists of a brief quote of materials that demonstrate a candidate's position as part of a person's expression of its own views….[14]

Federal law, therefore, requires there to be satisfaction of a number of factors before there may be a finding of "coordination" and provides multiple and reasonable exemptions and safe harbors. This clarity in the law protects speakers from inadvertently violating the law while still ensuring independent expenditures remain independent.

H.B. 898 also presumes coordination during numerous 18-month periods. This number appears to come out of thin air. Where is the evidence that any campaign could be run or supported with 18-month old information? There is simply no reason to believe that 18-month old information could form the basis of coordinated action. The federal standard is a four-month period. Additionally, federal regulations say the value of candidate polling information declines by 95% after 60 days and has no value after 180 days.[15] It defies belief that any useful "inside" information has any value after 6 months, much less 18 months.

It is troublesome to enact a law, like H.B. 898, that attempts to vaguely prohibit First Amendment activity. The problem is not just that a vague law may be applied inconsistently or arbitrarily, but that such a law might also "operate to inhibit protected expression by inducing citizens to steer far wider of the unlawful zone."[16] The First Amendment needs "'breathing space to survive, [and so] government may regulate in the area only with narrow specificity.'"[17]

If Maryland is concerned about coordination between political parties and candidates with those making independent expenditures, then the state should follow the federal standard for "coordination" found at 11 C.F.R. § 109.21 to the extent possible. Unfortunately, H.B. 898 takes a different tack – to the detriment of Marylanders' First Amendment rights.

II. The proposal unjustifiably and irrationally discriminates against a candidate's family members.

Under H.B. 898, if the sponsor of an independent expenditure is "established, financed, directed, or managed by a member of the immediate family of the candidate who is the beneficiary of the disbursement, or the [sponsor] or an agent of the [sponsor] has had substantive discussions about the candidate's campaign with a member of the immediate family of the candidate," the expenditure is presumed to be coordinated.[18]

The U.S. Supreme Court has held repeatedly that campaign contributions may be regulated only to the extent they "protect against corruption or the appearance of corruption."[19] Similarly, restrictions on

[14] 11 C.F.R. § 109.23(b).
[15] 11 C.F.R. § 106.4(g).
[16] *Buckley*. 424 U.S. at 41 n. 48 (quoting *Grayned v. City of Rockford*, 408 U.S. 104, 108-109 (1972) (quoting *Baggett v. Bullitt*, 377 U.S. 360, 372 (1964) (quoting *Speiser v. Randall*, 357 U.S. 513, 526 (1958)))) (internal quotation marks omitted).
[17] *Id.* (quoting *NAACP v. Button*, 371 U.S. at 433).
[18] H.B. 898 § 13-249.(A)(5)(II).
[19] *See, e.g., McCutcheon v. Fed. Election Comm'n*, 134 S. Ct. 1434, 1441 (2014).

direct speech may be regulated only to the extent they are rooted in a "substantial governmental interest in stemming the reality or appearance of corruption in the electoral process."[20]

Regardless of whether this provision with respect to family members funding or controlling independent expenditures is characterized as a contribution ban or a ban on direct speech, it begs the question: Where is the corruption here? Are we really concerned about mothers and fathers corrupting their sons and daughters by supporting their children's bid for elective office?[21] This provision essentially bars family members from independently speaking in support of their loved ones, a policy subject to strict scrutiny and a poor statement of Maryland's view of the family. Absent some record that family members are more – not less – likely to enter into corrupt quid pro quo agreements with each other, this cynical provision cannot possibly survive constitutional scrutiny.

If corruption is not the concern, then the only public policy rationale for this proposal seems to be to "level the playing field" so that certain candidates who have greater family wealth do not have an "unfair" advantage over other candidates. Whatever one personally thinks of this public policy concern, the Supreme Court has made it emphatically and repeatedly clear that campaign finance laws aimed at "leveling the playing field" are unconstitutional.[22]

Paradoxically, a candidate's third cousin, who is a lobbyist for the Acme Widget Corporation, or the Acme Widget Corporation itself – both of whom would like to see a candidate elected who favors the widget industry – could give unlimited amounts to an independent expenditure effort in support of the candidate, as long as that independent group had the resources to hire attorneys capable of complying with H.B. 898's byzantine coordination rules.

III. Investigations of illegal coordination – as history has demonstrated and as will be dictated by House Bill 898 – are necessarily invasive and ripe for abuse.

In addition to defining coordination in an overly broad manner, H.B. 898 grants the State Board of Elections significant discretion to investigate any supposed coordination violations.[23] Such a blanket grant of power, combined with the invasive nature of coordination investigations, which necessarily target the most sensitive information (internal communications, membership and vendor lists, and conversations with political allies) is a recipe for abusive and selective enforcement. Consider just two real-world examples:

1) In Wisconsin, allegations of coordination were used as a muscular political tool to silence nonprofit groups supportive of Governor Scott Walker's policies. As *The Wall Street Journal* editorialized, "[p]rosecutors had justified their dawn raids and harassment in the name of exposing illegal coordination between the Walker campaign and conservative groups… Whether or not they ever

[20] *Citizens United*, 558 U.S. at 313 (quoting *Buckley v. Valeo*, 424 U.S. 1, 47-48 (1976)).

[21] Although the Supreme Court upheld the contribution limits under the Federal Election Campaign Act as applied to candidates' family members, the Court acknowledged that the potential for corruption is not as great in such contexts. *See Buckley v. Valeo*, 424 U.S. 1, 53 n. 59 (1976). The provision at issue here, however, does not even pertain to direct contributions to candidates, but rather to independent expenditures, which the Supreme Court has held "do not lead to, or create the appearance of, *quid pro quo* corruption. In fact, there is only scant evidence that independent expenditures even ingratiate." *Citizens United v. FEC*, 558 U.S. 310, 360 (2010).

[22] *See Buckley*, 424 U.S. at 48-49 (invalidating the Federal Election Campaign Act's limitations on the amount of political expenditures that individuals may make); *Davis v. FEC*, 554 U.S. 724 (2008) (invalidating the "Millionaire's Amendment" under the Bipartisan Campaign Reform Act providing for increased contribution limits for candidates running against self-funding opponents); *Citizens United*, 558 U.S. at 350 ("The rule that political speech cannot be limited based on a speaker's wealth is a necessary consequence of the premise that the First Amendment generally prohibits the suppression of political speech based on the speaker's identity."); *Ariz. Free Enterprise Club's Freedom PAC v. Bennett*, 131 S. Ct. 2806, 2825 (2011) ("We have repeatedly rejected the argument that the government has a compelling state interest in 'leveling the playing field' that can justify undue burdens on political speech.").

[23] *See* Section § 13-249.(G)(1) ("The State Board may investigate a potential violation of this section.").

brought charges, [the prosecutors] also knew their probe would effectively shut down center-right spending as Mr. Walker and Republicans tr[ied] to win re-election… Like the IRS targeting of conservative nonprofits, the Wisconsin [coordination investigation] shows how campaign-finance laws have become a…weapon to silence political opponents."[24]

2) In Vermont, the State Attorney General announced that he had filed a lawsuit against a candidate who sent a mass e-mail in conjunction with the Vermont Democratic Party valued at just $255 under the guise that the e-mail amounted to an illegal campaign contribution. The lawsuit asked for over $70,000 in penalties from the candidate, who lost the election.[25]

Will there be a government official at the Maryland State Board of Elections in the future who could use the overbroad definitions in this bill to target groups on the left or right? For anyone without a crystal ball, bestowing a future government regulator with significant power to investigate any group of their choosing with analysis done after the fact is a grave danger to free speech and First Amendment rights. Future candidates, organizations speaking about public policy, and concerned citizens alike have much to fear from the extensive gift of power levied on the State Board of Elections by H.B. 898.

It's worth emphasizing that the aforementioned examples in Wisconsin and Vermont are not outliers, but rather paradigmatic examples of the intrusive and speech-inhibiting nature of executive agencies afforded too much power. Consider also that under H.B. 898, the State Board can legally enforce the law in a partisan way.

Suppose a local chamber of commerce runs a series of ads supportive of a particular candidate. Suppose a local union runs ads against the same candidate. The State Board of Elections could investigate the chamber of commerce on the grounds that the ads were "coordinated expenditures" because the chamber's ad used a photograph of the candidate that someone claimed came from the campaign. Over the course of the investigation, the State Board could discover that the photo in question was not, in fact, a campaign photo. However, the investigation also reveals that the candidate's wife had visited the local chamber's headquarters a year prior to the election and had discussed the campaign's message. The State board could rule that an "agent" of the chamber had "substantive discussions" with "a member of the immediate family of the candidate" and, therefore, all communications by the local chamber were coordinated. The State Board could do so without any investigation of possible coordination into the union. Alternatively, the State Board could do the reverse: Begin an investigation of the union under some pretense; discover everyday political activity over the course of that investigation; and determine that such activity is illegal "coordination" under H.B. 898.

* * *

House Bill 898 seeks to define coordination between campaigns and independent groups, but goes too far, ultimately leading to the criminalization and silencing of basic political activity. What H.B. 898 will do is stifle political discourse in Maryland, particularly among small, independent groups. In so doing, it further opens the door to potentially partisan abuses of administrative agency power. Therefore, we respectfully suggest that your office carefully consider the constitutional and practical difficulties posed by H.B. 898.

[24] Editorial, "Political Speech Wins in Wisconsin," *The Wall Street Journal*. Retrieved on April 13, 2017. Available at: http://www.wsj.com/news/articles/SB10001424052702304885404579547790710504208?KEYWORDS=%22irs%22&mg=reno64-wsj (May 7, 2014).

[25] Lisa Rathke, "Sorrell: Publicly funded candidate violated finance law," *Associated Press*. Retrieved on April 13, 2017. Available at: http://www.washingtontimes.com/news/2015/mar/25/ag-publicly-funded-candidate-violated-campaign-fin/ (March 25, 2015).

Thank you for allowing me to submit comments on House Bill 898. 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 submitted,

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