



January 10, 2019

Via Electronic Mail

Oklahoma Ethics Commission
2300 North Lincoln Boulevard, G-27
Oklahoma City, Okla. 73105

RE: First Amendment Concerns Regarding Amendment 2019-02

Dear Commissioners:

I write on behalf of the Institute for Free Speech (“Institute”), a nonpartisan, nonprofit organization dedicated to the protection and defense of the First Amendment political rights of speech, press, assembly, and petition.¹ The Institute is seriously concerned that both proposals for Amendment 2019-02 raise significant questions under the First Amendment. Each runs counter to landmark federal judicial precedents and will likely chill and deter constitutionally protected activities.

The Institute has already briefly commented on a draft of Amendment 2019-02 (“Amendment”) released less than 24 hours before a meeting at which it was to be discussed.² Consequently, at that time, the Institute was unable to provide meaningful feedback on the proposal.

Fortunately, the Commission released a draft of Amendment 2019-02 with more lead time before its January 11th meeting, although it reserves the right to alter or amend the noticed language. Instead of rewriting the draft, however, the Commission appeared to issue a competing version of the Amendment on Tuesday, January 8th. The two drafts are “Option 1” (the older version) and “Option 2” (Tuesday’s version).

Both Options operate in the constitutionally sensitive context of speaking about legislative issues. In such circumstances, the First Amendment is “at its zenith,” as it chiefly exists to protect “core political speech” and “interactive communication concerning political change.”³

“Whatever differences may exist about interpretations of the First Amendment,” it is a basic proposition that “a major purpose of that Amendment was to protect the free discussion of government affairs. This of course includes discussions of...structures and forms of government, the manner in which government is operated or should be operated, and all such matters relating to political processes.”⁴

¹ Originally known as the Center for Competitive Politics, the Institute for Free Speech 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 See Allen Dickerson, Institute for Free Speech, First Amendment Concerns with Amendment 2019-02 – (Disclosures for printed or broadcast communications advocating for or against pending legislation) (December 14, 2018) https://www.ifs.org/wp-content/uploads/2019/01/2018-12-14_Dickerson-Comments_OK_OEC-Amendment-2019-02_Indirect-Lobbying.pdf.

³ *Meyer v. Grant*, 486 U.S. 414, 422, 425 (1988).

⁴ *Mills v. Ala.*, 384 U.S. 214, 218-219 (1966).

Accordingly, the Supreme Court has determined that communications which “focus on a legislative issue, take a position on the issue, exhort the public to adopt that position, and urge the public to contact public officials with respect to the matter”⁵ should remain unencumbered unless the government demonstrates that a particular burden is narrowly connected to a “vital” interest.⁶

I will briefly walk through the content of the two Options, discuss the constitutional issues present in both drafts, and conclude by noting one major problem unique to each.

* * *

Option One

As drafted, Option 1 will amend Rules 5.2, 5.3, 5.19, 5.21, and 5.23 to cover a new form of regulated activity: “indirect lobbying.” Indirect lobbying is not lobbying in the usual sense – it is not an individual that works as an agent for hire to represent the interest of a principal. Rather, “indirect lobbying” is defined as *any* “communications made through radio, telephone, internet, cable, or other broadcast media, or communications in print indicating support or opposition of pending legislation made for the purpose of influencing a vote on pending legislation.”⁷

The draft provides only three exemptions from this all-encompassing definition. The first two cover efforts to directly deal with public officials on a public official’s terms, either by “testimony given before, or submitted in writing to, a committee or subcommittee of the Legislature”⁸, or through “communications made exclusively to one or more legislators, the governor, or the staff of the legislature or governor.”⁹

The third exemption appears to be a carve-out for the press, but reserves space for certain categories of “news or feature reporting activities and editorial comment” published by “working members of the press.”¹⁰

Next, the rules define an “indirect lobbyist.”¹¹ Oddly, an “indirect lobbyist” is not defined as a person who makes “communications...for the purpose of influencing a vote on pending legislation.”¹² That is, Option 1 does not define an “indirect lobbyist” as a person that engages in indirect lobbying. Rather, it “means a person funding indirect lobbying, or a person who organizes, directs, or otherwise coordinates the efforts of other persons to engage in lobbying for specifically identified legislation.”¹³ There is only one exemption for an indirect lobbyist, “an organization communicating solely with its members.”¹⁴

⁵ *Fed. Election Comm’n v. Wis. Right to Life, Inc.*, 551 U.S. 449, 470 (2007) (Roberts, C.J., controlling op.).

⁶ *United States v. Harriss*, 347 U.S. 612, 626 (1954).

⁷ Option 1 at 3, § 6.

⁸ *Id.* at § 6(a).

⁹ *Id.* at § 6(b).

¹⁰ *Id.* at § 6(c).

¹¹ *Id.* at § 7.

¹² *Id.* at § 6.

¹³ *Id.* at § 7.

¹⁴ *Id.*

These two new definitions of “indirect lobbying” and “indirect lobbyist” control the Option’s changes to Rules 5.3, 5.19, 5.21, and 5.23.

As amended, Rule 5.3 directs that “indirect lobbyists,” who, again, are not necessarily those who conduct indirect lobbying, “shall not be required to register with the Commission unless otherwise required to register as a legislative lobbyist or executive lobbyist.”¹⁵

However, “*all* communications qualifying as indirect lobbying must include either orally or in writing of sufficient size and contrast to be clearly readable to the recipient of the communication” what the regulation calls “disclosures.”¹⁶ This compelled speech is not triggered by communications that are coordinated, directed, or even written by indirect lobbyists, but by the communication’s content. “[A]ny communications” made through the relevant channels “for the purpose of influencing a vote on pending legislation” must carry this government-directed message, or else become illegal.¹⁷ The Commission would demand name-and-address information of the speaker, including a requirement that the speaker maintain a special website address, and in many cases provide a reference to the Commission’s own website.¹⁸

For “printed communications on the internet where the disclosure statement...would be impractical due to length,” the missive must still proclaim that it is a “Lobbyist Communication” and provide online address information for a special website hosted by the indirect lobbyist.¹⁹ In both cases, the speaker’s website must “include either a picture of or link to any reports filed with the Ethics Commission.”²⁰ But if a report has not been filed, the speaker’s website must still include “the names of any contributors required to be disclosed under these Rules, the amount of the indirect lobbying, the bill or resolution number supported or opposed, and whether the bill or resolution is supported or opposed.”²¹

The Option also requires that “[r]eports detailing indirect lobbying” must be filed by speakers within 24 hours of a monetary trigger – unstated in the draft – and that “subsequent reports will be required within twenty-four hours of each additional cost,”²² presumably of any amount.

These reports must contain “the name and address of the person engaged in indirect lobbying,”²³ contact and address information for the person filing the report,²⁴ a characterization of the indirect lobbying,²⁵ and “the date, amount, and aggregate total of each contribution received by an indirect lobbyist for indirect lobbying.”²⁶ An individual contributor’s name, address, occupation, and employer must be reported if that individual gives over “fifty dollars in the aggregate.”²⁷ Any

¹⁵ *Id.* at 7, sec. B.

¹⁶ *Id.* (emphasis added).

¹⁷ *Id.* at 3, § 6.

¹⁸ *Id.* at 7, sec. B(1).

¹⁹ *Id.* at 8, sec. B(2).

²⁰ *Id.* at 8, sec. B(3).

²¹ *Id.*

²² *Id.* at 9, sec. B.

²³ *Id.* at 12, sec. B(1).

²⁴ *Id.* at sec. B(2).

²⁵ *Id.* at sec. B(3).

²⁶ *Id.* at sec. B(4).

²⁷ *Id.* at sec. B(4)(a).

money given by a corporation or a political committee or party, whether they are regulated at the federal or state level, must also be listed.²⁸

Option 1 will also allow for filers to make *bona fide* amendments to their reports, just as for other types of filers.²⁹

Option Two

Tuesday's draft is broadly similar to Option 1, although it contains a number of important differences. This begins with the definition of indirect lobbying.

Option 2 defines "indirect lobbying" as "any communication or series of communications that advocate support or opposition of legislative bills or resolutions pending at the Oklahoma legislature," a definition that is itself broken into three categories.³⁰ The first category is "a paid advertisement to broadcast media such as radio, telephone, internet, or cable, or to print media such as a magazine, newspaper, direct mail, or other printed medium."³¹ The second is advocacy or opposition carried "through the efforts of an individual or individuals employed or retained by another to engage in such advocacy."³² The third category encompasses communications "by a person who receives funds or services valued in excess of Five Hundred (\$500.00) or who has made or will make expenditures in excess of Five Hundred (\$500.00) during any calendar year for the purpose of advocating support or opposition of legislation pending at the Oklahoma legislature."³³

The exemptions are also somewhat modified. The exemption for "communications made exclusively to one or more legislators, the governor, or the staff of the legislature or governor," has been removed.³⁴ Instead, the first exemption simply excludes "testimony given before, or submitted in writing to, a committee or subcommittee of the Oklahoma legislature."³⁵

The media exemption has also been refashioned, to fully encompass "the publishing or broadcasting of news items, editorial comments, or paid advertisements which advocate the support or opposition of pending legislation by a news medium or its employees or agents."³⁶

The third exemption appears to fold in the membership exemption from Option 1's definition of an "indirect lobbyist." This provision privileges "internal communications made by an organization with its members indicating the organization's position on legislation so long as the communications do not encourage its members to advocate for or against pending legislation."³⁷

²⁸ *Id.* at sec. B(4)(b-c).

²⁹ *Id.* at 13-14.

³⁰ Option 2 at 3, § 6.

³¹ *Id.* at § 6(a).

³² *Id.* at § 6(b).

³³ *Id.* at § 6(c).

³⁴ Option 1 at 3; § 6(b).

³⁵ Option 2 at 3, § 6(c)a.

³⁶ *Id.* at § 6(c)b.

³⁷ *Id.* at 3-4, § 6(c)c.

The definition of “indirect lobbyist” is essentially unchanged from Option 1. It still “means a person funding indirect lobbying, or a person who organizes, directs, or otherwise coordinates the efforts of others to engage in indirect lobbying.” Only the exclusion from this definition has changed. The term also privileges governmental actors, even if they otherwise meet the definition of indirect lobbyist, by excluding “an officer or employee of a state or the federal government acting in his or her official capacity and shall not include the governmental entity served by the officer or employee.”³⁸

Just as with Option 1, “[i]ndirect lobbyists shall not be required to register with the Commission unless otherwise required to register as a legislative lobbyist or executive lobbyist.”³⁹ But “all communications qualifying as indirect lobbying must include either orally or in writing of sufficient size and contrast to be clearly readable to the recipient of the communication” a Commission drafted script.⁴⁰ These disclosure scripts are identical to those of Option 1, including the separate website requirement.

As with Option 1, Option 2 outlines regulations for the filing of indirect lobbying reports. Like Option 1, this is a two-tier structure. Reports must be filed within 24 hours once a monetary threshold is reached, and “subsequent reports will be required within twenty-four hours of each additional cost.”⁴¹ Option 2, however, fills in this threshold. The requirement is triggered by “exceeding Five Thousand Dollars (\$5,000) for indirect lobbying.”⁴² Again, presumably a new report is required for any cost regardless of amount.

The contents of indirect lobbying reports are generally the same as Option 1, with one notable exception. Rather than requiring the revelation of “the date, amount, and aggregate total of each contribution received by an indirect lobbyist for indirect lobbying,”⁴³ Option 2 requires “the date, amount, and aggregate total of each contribution received by an indirect lobbyist *for the purpose of engaging in indirect lobbying.*”⁴⁴ “As used in” that section, ““for the purpose of” means that the funds are either (1) received by a person in response to a solicitation specifically requesting funds to pay for indirect lobbying or (2) specifically designated for indirect lobbying by the contributor.”⁴⁵

Finally, Option 2 also permits good faith amendments for honest errors.⁴⁶

Both Options Are Likely Unconstitutional

Neither Option should be adopted. Both drafts suffer from constitutional infirmities that would render them unconstitutional under longstanding U.S. Supreme Court precedent, as well as recent case law from the U.S. Court of Appeals for the Tenth Circuit, which has jurisdiction over Oklahoma.

³⁸ *Id.* at 4, § 7.

³⁹ *Id.* at 7, sec. B.

⁴⁰ *Id.* at 7-8, sec. B.

⁴¹ *Id.* at 9, sec. B(2).

⁴² *Id.* at sec. B(1).

⁴³ Option 1 at 12, sec. B(4).

⁴⁴ Option 2 at 12-13, sec. (B)(4) (emphasis added).

⁴⁵ *Id.* at 13, sec. (B)(5).

⁴⁶ *Id.* at 14-15.

In addition, both Options suffer from additional constitutional deficiencies unique to their own language. Two of those will be discussed below.

First, however, consider the major defects common to both Options:

1. On-Communication Disclosures

Both Options will require “*all* communications qualifying as indirect lobbying”⁴⁷ communications to carry government-drafted disclosures that will include the name and address of the “indirect lobbyist” sponsoring the communication. Option 2 *may* narrow the universe of regulable communications somewhat because it may be plausibly read to reach only paid communications or communications with at least some connection to money.⁴⁸ While this narrowing is preferable to Option 1, which takes a blunderbuss approach that brings all civil society within its ambit, it does not save Option 2.

At the threshold, this provision poses something of a trap for the unwary, as neither Option defines an indirect lobbyist merely as a person engaged in either Option’s definition of “indirect lobbying.” Rather, *both* Options hold that an indirect lobbyist is “a person funding indirect lobbying, or a person who organizes, directs, or otherwise coordinates the efforts of *others*.”⁴⁹ Whether or not this requires the archetypal “lone picketer,”⁵⁰ lone pamphleteer, or otherwise self-directed citizen activist to list her name on every communication, build a website, and place additional information on her website, is therefore unclear. If it does, it is manifestly unconstitutional under *Talley v. California*⁵¹ and *McIntyre v. Ohio Elections Commission*.⁵² In both of those cases, the Supreme Court struck down ordinances that banned anonymous speech about political questions.

Worse, both Options mandate that “all communications qualifying as indirect lobbying” *must* carry a “[l]obbyist communication authorized by” statement.⁵³ But under the plain reading of both Options, indirect lobbying communications need not be authorized by an “indirect lobbyist” at all! Thus, speakers must either state the “lobbyist communication” is authorized by *no one*, self-report as an indirect lobbyist, even if they do not fit the statutory definition because they neither fund indirect lobbying nor control others, or simply decline to discuss legislation.⁵⁴ The Supreme Court has long held that such circumstances “offer[] no security for free discussion. In these conditions it blankets with uncertainty whatever may be said. It compels the speaker to hedge and trim.”⁵⁵

⁴⁷ Options 1 at 7 (emphasis added); Option 2 at 7 (emphasis added).

⁴⁸ Option 2 defines “indirect lobbying” as communications “made...through the efforts of an individual or individuals employed or retained by another to engage in such advocacy.” Option 2 at 3, § 6(b). The average person would likely presume that “employed or retained,” especially when the provision is sandwiched between two other definitions of indirect lobbying that expressly deal with paid activity, means compensated action. However, similar language has been read by other states, such as Missouri, to cover unpaid activism. The Supreme Court has cabined the capacity of governments to regulate lobbying to determine “who is being hired, who is putting up the money, and how much.” *Harriss*, 347 U.S. at 625. Should the Commission move forward with Option 2, it should rewrite subsection b to read “employed or retained for compensation by another.”

⁴⁹ Option 2 at 4, §7; Option 1 at 3; §7 (stating same but saying “other persons”).

⁵⁰ *United States v. Grace*, 461 U.S. 171, 183 (1983).

⁵¹ 362 U.S. 60 (1960).

⁵² 514 U.S. 334 (1995).

⁵³ Option 1 at 7, sec. B(1); Option 2 at 8; sec. B(1). Option 1 uses the term “Lobbying communication authorized by”, but the differences are negligible.

⁵⁴ This poses additional issues for the required website address that must be maintained by the “indirect lobbyist” for every indirect lobbying communication. *See infra* at 3.

⁵⁵ *Thomas v. Collins*, 323 U.S. 516, 535 (1945).

In any event, because neither Option imposes a dollar value on the communication itself before it must be regulated as indirect lobbying and carry the State’s message, the proposals are likely unconstitutional.⁵⁶ A government’s capacity to compel speech from private actors is necessarily bounded by the First Amendment, as there is “no doubt that such an identification requirement would tend to restrict freedom to distribute information and thereby freedom of expression.”⁵⁷

In *Talley v. California*, the Court facially invalidated an identification requirement that barred the distribution of printed communications despite “the qualification that handbills can be distributed if they have printed on them the names and addresses of the persons who prepared, distributed[,] or sponsored them.”⁵⁸ By contrast, in both *McConnell v. Federal Election Commission*⁵⁹ and *Citizens United v. Federal Election Commission*,⁶⁰ identification requirements were upheld only because they applied to a discrete, limited category of speech, for no more than 90 days a year, and only on broadcast communications valued at a significant sum. By imposing a zero-dollar trigger for its disclosure scheme, which regulates large television buys as well as Twitter posts, both Options simply go too far.

Indeed, just last week, the United States District Court for the District of Maryland struck down a compelled speech requirement that would force online platforms to carry a government-drafted sponsorship message on even *de minimis* purchases of online ads, on the grounds that it impermissibly regulated content.⁶¹

Furthermore, unlike disclosure regimes that have been upheld in the context of regulating speech about issues or candidates shortly before an election, neither Option requires that the speech involved be targeted at Oklahomans. Speech directed at an audience of Californians that refers to activities of the Oklahoma Legislature will be placed under the purview of the Oklahoma Ethics Commission. But this State’s ability to regulate speech about its legislative processes is limited. It may only do so to the extent it provides either the Oklahoma electorate or Oklahoma legislators with information about pressure groups.⁶²

As an aside, it bears notice that both Options require these compelled disclosures to identify the communication at issue as a “Lobbying Communication” (Option 1) or “Lobbyist Communication” (Option 2). This is misleading. As both Options themselves admit, indirect lobbying and indirect lobbyists are categories distinct from what Americans typically think of as lobbying – a quiet, face-to-face conversation between a legislator and a paid hired gun. It is for this reason that “[l]ike ‘propaganda,’ the word ‘lobbying’ has negative connotations.”⁶³ But both Options simply regulate speech about legislation being proposed, debated, and enacted by this State’s Legislature.

⁵⁶ *E.g. Coal. for Secular Gov’t v. Williams*, 815 F.3d 1267 (10th Cir. 2016) (striking down \$200 reporting requirement).

⁵⁷ *Talley*, 362 U.S. at 64.

⁵⁸ *Id.* at 63-64 (quotation marks omitted).

⁵⁹ 540 U.S. 93 (2003).

⁶⁰ 558 U.S. 310 (2010).

⁶¹ *Wash. Post v. McManus*, Case No. 18-2527 (D. Md. Jan. 3, 2019).

⁶² *Harriss*, 347 U.S. at 625 (“Under these circumstances, we believe that Congress, at least within the bounds of the Act as we have construed it, is not constitutionally forbidden to require the disclosure of lobbying activities. To do so would be to deny Congress in large measure the power of *self-protection*”) (emphasis added).

⁶³ *Meese v. Keene*, 481 U.S. 465, 485 n.19 (1987).

Rather than suggest that these communications, which may simply be sponsored by civil society groups or engaged citizens, are instead being sponsored by legislative or executive lobbyists on behalf of a lobbyist principal, the phrase “Lobbyist Communication” should be excluded from any compelled disclosure statement. Whatever the State’s ability to compel private citizens or groups to disgorge information, the government has no interest in requiring communications to be misleadingly labeled.

2. Infinite Reporting Requirements

Both Options require speakers to file reports “detailing indirect lobbying...within twenty-four hours of exceeding” a monetary threshold.⁶⁴ While that monetary threshold goes unstated in Option 1, Option 2 requires filing after exceeding \$5,000 in indirect lobbying communications.⁶⁵ While Option 1 is somewhat vaguer as to the information that ought to be placed on these reports, Option 2 makes reasonably plain that donors making earmarked contributions for the purposes of indirect lobbying must be reported. Were indirect lobbying more finely cabined, this approach would be largely unobjectionable. In addition, a \$5,000 monetary trigger for reporting is not, on its face, unreasonable.

What is unreasonable, however, is the Commission’s imposition of an infinite reporting requirement upon speakers once they cross the \$5,000 threshold. Both Options state that “subsequent reports will be required within twenty-four hours of *each additional cost*.”⁶⁶ Notably, this provision does not require additional reporting within the expenditure of an additional \$5,000 on indirect lobbying, nor even the expenditure of any funds on more indirect lobbying, but merely the accrual of any additional *cost*. Taken literally, this imposes an endless Mobius strip of reporting obligations every time an indirect lobbyist incurs additional debts or makes any outlay.

Even if one assumes that “cost” simply means “making expenditures on indirect lobbying,” this still imposes a significant burden on speakers. This is certainly so for Option 1, which has an extraordinarily broad definition of what communications constitute indirect lobbying. But even Option 2 contains broad descriptions of what constitutes indirect lobbying – including a provision that states such lobbying is done when “a person...will make expenditures” in the future.⁶⁷

A small organization that regularly discusses legislative policy could find themselves triggering a new reporting obligation on a weekly, daily, or even hourly basis. Whatever “informational interest” the State may have in the making of these “disclosures,” it will be “far outweighed by the substantial and serious burdens” imposed by a potentially endless reporting scheme.⁶⁸

⁶⁴ Option 1 at 9 sec. B(1); Option 2 at 9, sec. B(1).

⁶⁵ *Id.*

⁶⁶ Option 1 at 9, sec. B(2) (emphasis added); Option 2 at 9, sec. B(2) (emphasis added).

⁶⁷ Option 2 at 3, § 6(c). This provision alone, which triggers obligations to the Commission upon indirect lobbying by a person who “will make” expenditures in the future, poses some notice and due process questions. At what point ought a speaker know they will expend \$500 sometime in the next year? If a person might do such things in the future, she either must start immediate compliance with the Amendment upon speaking about Oklahoma legislation, even if she does so for free on her own initiative, or self-silence until she is sure whether she will or will not cross the \$500 threshold.

⁶⁸ *Coal. for Secular Gov’t*, 815 F.3d at 1276.

This is particularly troubling because even regularized reporting forces groups or individuals to “spend[] a considerable amount of time tending to...disclosure obligations.”⁶⁹ The assignment of infinite busywork by the State, which will inevitably strain group resources to the point of encouraging self-silencing, serves no legitimate governmental interest and cannot survive even the most modest First Amendment review.

3. Compelled Website Maintenance, Compelled Speech, and Zero-Dollar Donor Disclosure Threshold

Both Options require that “all communications qualifying as indirect lobbying must include either orally or in writing...a website address to a page on the indirect lobbyist’s website.”⁷⁰ Unlike similar requirements that have been upheld in the context of federal campaign finance law, including those requiring a “display [of] the name and address (or Web site address) of the person or group that funded the advertisement,”⁷¹ this requirement – in both Options – unlocks an expansive and unnecessary compelled speech regime that is likely unconstitutional.

Note that the website address requirement in both Options is not a requirement that a person or group provide a link to their own site. Rather, it is a requirement that an “indirect lobbyist” build a page specifically in order to carry a Commission-directed script. “The website address...must contain *only* ‘Lobbying communication authorized by’ followed by the indirect lobbyist’s name, permanent street address, phone number, and must include either a picture of or link to any reports filed with the Ethics Commission.”⁷²

First, this somewhat undoes the requirement that all indirect lobbying communications include a spoken word or printed requirement to “See report at <http://guardian.ok.gov>.”⁷³ This inclusion of superfluous material is not inconsequential, especially for communications made over audio-only media, such as telephone or radio.

Simply stating “See report at <http://> (H-T-T-P, colon, backslash, backslash) guardian. (dot) ok. (dot) gov” at a normal pace takes between six and eight seconds, while speedily busting through the phrase will take at least three (rendering the information less useful to the listener). While even adding an additional line of text on the face of a communication⁷⁴ is not costless, adding seconds to a radio advertisement will force speakers to either reduce the length of their own message in order to save money, or expend additional funds to carry a duplicative state message.⁷⁵

⁶⁹ *Id.* at 1279.

⁷⁰ Option 2 at 7-8, sec. B; Option 1 at 7-8, sec. B.

⁷¹ *Citizens United*, 558 U.S. at 366.

⁷² Option 1 at 8, sec. (B)(3) (emphasis added); Option 2 at 8, sec. (B)(3) (emphasis added).

⁷³ Option 1 at 7, sec. B(1)(c); Option 2 at 8, sec. B(1)(c).

⁷⁴ Because, in the context of non-static visual media such as television, this text must stay up for an undefined amount of time. *Grayned v. City of Rockville*, 408 U.S. 104, 108 (1972) (“[B]ecause we assume that man is free to steer between lawful and unlawful conduct, we insist that laws give the person of ordinary intelligence a reasonable opportunity to know what is prohibited, so that he may act accordingly”).

⁷⁵ See *Wis. Right to Life, Inc. v. Barland*, 751 F.3d 804, 832 (7th Cir. 2014) (“The extra verbiage required by the rule goes well beyond the short disclaimer required...[and] consume[s] a significant amount of paid advertising time in a broadcast ad”); also *Pub. Citizen, Inc. v. La. Att’y Disciplinary Bd.*, 632 F.3d 212, 228-229 (5th Cir. 2011) (striking down “verbal disclaimers that require so much time that attorneys are unable to effectively use short (ten-to-sixty-second) television or radio advertisements” as “overly burdensome and violat[ive of] the First Amendment”).

Second, and more troubling, this requirement completely undoes any constitutional protections provided by the \$5,000 trigger for indirect lobbying reports. By the plain text of both Options, “[i]f a report has not been filed with the Ethics Commission, the following information must be included: the names of any contributors required to be disclosed under these Rules, the amount of the indirect lobbying required to be disclosed under these Rules, the number(s) of the legislative bill(s) or resolution number(s) assigned by the Oklahoma legislature that are supported or opposed, and whether such bill is supported or opposed.”⁷⁶

In the Tenth Circuit, imposing such significant burdens via a zero-dollar disclosure threshold (which will inevitably capture small, grassroots entities) triggered by speaking about legislative issues is presumptively unconstitutional – as it is in other appellate jurisdictions.⁷⁷ This is the case even if the disclosure only involves earmarked contributions – the *Coalition for Secular Government v. Williams* case dealt squarely with a group that sought to raise and spend \$3,500 and avoid disclosing contributors that specifically funded a communication.⁷⁸ Nonetheless, the Tenth Circuit ruled that the disclosures were unconstitutional, because the burdens imposed by Colorado’s reporting scheme were disproportionate to the governmental interest at issue.

Worse, in addition to eliminating the \$5,000 safe harbor from filing reports, the government has required that *only* its message may be listed on this website – none of the speaker’s own words may be included.⁷⁹ “[C]ompelling individuals” and groups “to speak a *particular* message...alter[s] the content of their speech.”⁸⁰ Worse, the Commission would be compelling the production of this specific website, to be maintained by the speaker, on the basis of the content of a person’s speech.

Such “government-drafted script[s]” are presumptively unconstitutional and are subject to the most intensive judicial review afforded by the courts.⁸¹ It is unlikely that the compelled website maintenance and concomitant compelled speech and disclosure provisions of either Option would survive a First Amendment challenge.

4. Inherently Vague Impracticality Standard

Both Options compel speech on the face of online communications.⁸² Both Options also seek to reduce the size and scope of the government-directed script at issue for “printed communications on the internet where the disclosure statement...would be impractical due to length.”⁸³ In such circumstances, “the phrase ‘Lobbyist Communication’ must be included and the phrase ‘Lobbyist Communication’ must hyperlink to” the specially maintained website discussed *supra*.⁸⁴

⁷⁶ Option 2 at 8-9, sec. B(3); Option 1 at 8-9, (with the only difference that the text in Option 1 did not include plurals, presumably as the result of a typographical error or the phrase “assigned by the Oklahoma legislature”).

⁷⁷ *Williams*, 815 F.3d at 1276; *Canyon Ferry Rd. Baptist Church of E. Helena, Inc. v. Unsworth*, 556 F.3d 1021, 1029-1030 (9th Cir. 2009).

⁷⁸ *Id.*

⁷⁹ Option 2 at 8, sec. B(3); Option 1 at 8, sec. B(3) (“...must contain only...”).

⁸⁰ *Nat’l Inst. of Family & Life Advocates v. Becerra*, 585 U.S. ___; 138 S. Ct. 2361, 2371 (2018) (“*NIFLA*”) (punctuation altered, citation and quotation marks omitted).

⁸¹ *NIFLA*, 138 S. Ct. at 2371; *Reed v. Town of Gilbert*, 576 U.S. ___; 135 S. Ct. 2218, 2227 (2015) (applying strict scrutiny).

⁸² Option 1 at 7-8, sec. B; Option 2 at 8., sec. B.

⁸³ Option 1 at 8, sec. B(2), Option 2 at 8, sec. B(2).

⁸⁴ *Id.* As already discussed at 7-8, deeming these forms of communication as “Lobbyist Communications” is inherently misleading.

Presumably, this carve-out is designed to deal with text messages, Facebook posts, and other sundry ads on websites or social media.⁸⁵

Unfortunately, the phrase “impractical due to length” is inherently vague. The experience of the Federal Election Commission with the federal disclaimer laws for campaign speech is instructive. Since 2011, after no fewer than *four* separate rounds of notice-and-comment, that agency has been unable to agree on a standard carve-out for which online ads ought to be excluded from the disclaimer requirements due to being “impractical due to length.”⁸⁶ This is perhaps unsurprising. Internet advertisements can be viewed on such a wide array of applications, devices, and machines that it is impossible to truly know how to comply with the law or to obtain an objective understanding of “length.” This sort of vagueness poses particular constitutional issues given that this provision “abuts upon sensitive areas of basic First Amendment freedoms.”⁸⁷

Either social media posts and internet ads ought to be excluded from regulation, or communications whereby the proposed disclaimer would eat up an objective percentage of characters ought to be shielded. But this provision, as written in both Options, should go.

Individually, Both Options Also Contain Different Unconstitutional Provisions

This surfeit of unconstitutional provisions counsels strongly against the adoption of either Option. That said, each of the two Options also contain significant constitutional issues of their own. A brief example from each is instructive.

For example, Option 1’s media exemption only applies to “working members of the press, radio, or television and the publication or dissemination thereof by a newspaper, book publisher, regularly published periodical, radio station, or television station.”⁸⁸ What constitutes a “working member of the press” is inherently uncertain, which is quite bad enough. But by tethering the definition with a conjunctive to “the publication or dissemination thereof by” non-online sources, all Internet-based reporting is arguably excluded from the exemption.

The inclusion of the phrase “regularly published periodical” provides no safe harbor for online speakers pursuant to the judicial principle of “*noscitur a sociis* – a word is known by the company it keeps,”⁸⁹ and is only “given more precise content by the neighboring words with which it is associated.”⁹⁰ Because “periodical” is listed along with non-electronic media, one should presume

⁸⁵ Oddly, it would basically ban the distribution of speech about legislative issues over Twitter. While posters may *include* links in Twitter ads or posts, they *cannot* make a specific phrase “hyperlink to a phrase.” This error, while easily correctable, ought to encourage some pause as to the Commission’s capacity to intelligently regulate online speech.

⁸⁶ The Institute submitted comments at every round of this interminable process, which remains ongoing. See Allen Dickerson and Tyler Martinez, Institute for Free Speech, Comments on Notice 2018-06 (May 25, 2018) https://www.ifs.org/wp-content/uploads/2018/05/2018-05-25_IFS-Comments_FEC_Internet-Communication-Disclaimers-NPRM.pdf; Allen Dickerson and Zac Morgan, Institute for Free Speech, Comments on Notice 2017-12 (Nov. 9, 2017) <http://sers.fec.gov/fosers/showpdf.htm?docid=358495>; Allen Dickerson and Zac Morgan, Center for Competitive Politics, Comments on Notice 2016-13 (Dec. 19, 2016) <http://sers.fec.gov/fosers/showpdf.htm?docid=354344>; Stephen M. Hoersting and Allen Dickerson, Center for Competitive Politics, Comments on Notice 2011-14 (Nov. 14, 2011) <http://sers.fec.gov/fosers/showpdf.htm?docid=98752>.

⁸⁷ *Grayned*, 408 U.S. 109 (brackets, quotation marks, and citation omitted).

⁸⁸ Option 1 at 3, § 6(c).

⁸⁹ *Yates v. United States*, 574 U.S. __; 135 S. Ct. 1074, 1085 (2015).

⁹⁰ *United States v. Williams*, 553 U.S. 285, 294 (2008).

it is more like a book or newspaper than not. This is especially so given that, by copiously making references to websites and online speech, Option 1 makes clear that the Commission knows how to regulate the internet when it so chooses.

Option 2's definition of "indirect lobbying" poses a different quandary. It seeks to protect membership communications, such as messages from a labor union to its dues-paying members. Thus, "internal communications made by an organization with its members indicating the organization's position on legislation" do not constitute indirect lobbying "so long as the communications do not encourage its members to advocate for or against pending legislation."⁹¹

While well-meaning, the caveat related to "encourag[ment]" throws up a constitutional minefield. Both the Supreme Court and other federal courts have found that the phrase "influencing" raises constitutional vagueness issues in the First Amendment space.⁹² "Encouraging" is unlikely to fare better. If a labor union informs its members that "enactment of this bill will destroy unions in Oklahoma," has it encouraged "its members to advocate for or against" the pending legislation? What if it encourages its members to "let your friends know about the bad things happening in Oklahoma City?"

The membership communication exemption would be better served by simply protecting all "internal communications made by an organization with its members indicating the organization's position on legislation."

* * *

The foregoing pages are not an exhaustive analysis of every constitutional infirmity imposed by either Option, nor do they address any particular issues they may have with Oklahoma law. The Institute strongly recommends that both Options be shelved, and that this Commission start over from scratch. Otherwise, enactment of either Option will only deter speech, association, and petition in this State and invite costly federal lawsuits under the successor statute to the Civil Rights Act of 1871.

Respectfully submitted,



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⁹¹ Option 2 at 3-4, § 6(c)c.

⁹² *Buckley v. Valeo*, 424 U.S. 1, 77 (1976) ("the ambiguity of [the] phrase [for the purpose of influencing] poses constitutional problems"); *see also Nat'l Org. for Marriage v. McKee*, 649 F.3d 34, 65 (1st Cir. 2011) ("Without more context, we believe the intended meaning of 'influence' to be uncertain enough that a person of average intelligence would be forced to guess at its meaning and modes of application") (internal quotation marks omitted).