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# Analysis of Arkansas H.B. 1705 (2019): Silencing Speech Under the Guise of "Protecting Public Confidence"

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## INTRODUCTION AND EXECUTIVE SUMMARY

The Institute for Free Speech[2] provides the following analysis of H.B. 1705,[3] which would impose sweeping new regulations on speech deemed to somehow "influence" Arkansas state Court of Appeals and Supreme Court elections. The bill purports to "[s]afeguard[] the public's confidence in the State's judicial elections," despite: (1) presenting no empirical evidence for its premise that "independent expenditures… have eroded public confidence in the integrity" of such elections; (2) incorrectly asserting that such independent expenditures are "undisclosed" under existing law; and (3) imposing an unconstitutionally vague speech content standard and overbroad reporting requirement that would deter speech about judicial elections, thereby reducing voter information about such elections.

Specifically, under H.B. 1705:

- An entirely different set of rules would apply to independent speech about Arkansas judicial elections than those that apply to speech about legislative and executive branch races.

- Speech about a state judicial election would be regulated if it is deemed as an "[a]ttempt[] to influence" the election. Even speech that does not identify a candidate and merely discusses an issue closely identified with a judicial candidate, or that takes sides on a contentious issue being discussed in the campaign generally, could be regulated.

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[2] The Institute for Free Speech is a nonpartisan, nonprofit § 501(c)(3) organization that promotes and protects the First Amendment political rights of speech, press, assembly, and petition. Originally known as the Center for Competitive Politics, it was founded in 2005 by Bradley A. Smith, a former Chairman of the Federal Election Commission. In addition to scholarly and educational work, the Institute is actively involved in targeted litigation against unconstitutional laws at both the state and federal levels. Its attorneys have secured judgments in federal court striking down laws in Colorado, South Dakota, and Utah on First Amendment grounds. The Institute is currently involved in litigation against California, Connecticut, Massachusetts, Missouri, South Dakota, Tennessee, and the federal government.

[3] To Protect the Public Confidence in the Integrity of Judicial Elections; And to Require Additional Reporting and Transparency of Independent Expenditures in Related Campaigns, H.B. 1705, 92nd Gen. Assy, Reg. Sess. (Ark. 2019) (as Introduced on Mar. 5, 2019) (*hereinafter*, "H.B. 1705").

- H.B. 1705 also specifically would regulate communications that urge voters to ask judicial candidates about their positions or records, or even the distribution of nonpartisan factual voter guides about judicial candidates.

- Groups that spend as little as $500.01 on regulated speech about judicial elections would have to file burdensome reports that publicly identify donors who have given as little as $50.01 to the group over any period of time. H.B. 1705 also purports to require the sources of donors' funds – and *the sources of the sources* of donors' funds – to be identified.

  The bill provides no sufficient justification for this heavy-handed and almost certainly unconstitutional infringement on donor and associational privacy. Nor does the bill provide any practical standard for how this highly complex donor reporting scheme could function in practice.

- Voters would be empowered to file frivolous and politically motivated lawsuits against groups that independently speak about judicial elections or issues related to the judiciary. A prevailing defendant would not be able to recover attorney's fees.

- Taxpayers would be on the hook to pay for the costs of defending this unconstitutional bill and attorney's fees for a successful plaintiff should it be enacted into law.

## ANALYSIS

### A) The First Amendment Still Applies to Speech About Judicial Elections

H.B. 1705 would apply an entirely different set of rules to members of the general public who speak about state Court of Appeals and Supreme Court elections than to those who speak about elections for state legislative and executive branch offices.[4] Before addressing the bill's particulars, it is important to first note that although a state may regulate judicial election campaigns differently in certain limited respects, it does not have *carte blanche* to do so. This is especially so when the object of the proposed regulation is independent groups and core First Amendment speech.

H.B. 1705 is premised on the notion that "[s]afeguarding the public's confidence in the State's judicial elections extends beyond the state's interest in preventing the appearance of corruption in legislative and executive elections."[5] This premise is taken almost verbatim from the U.S. Supreme Court's *Williams-Yulee v. Florida Bar* decision.[6]

At a general level, the U.S. Supreme Court has held that judicial elections may be regulated differently in certain limited respects because judges, even when elected, are not politicians. Unlike elected legislative and executive branch officials, who "are expected to be appropriately

[4] In the interest of efficiency, this analysis will use the term "judicial elections" and "judicial candidates" hereinafter to refer specifically to elections and candidates for Arkansas Court of Appeals and Supreme Court positions.
[5] H.B. 1705 § 6(a).
[6] 135 S. Ct. 1656, 1666 (2015).

responsive to the preferences of their supporters," judges are expected to be perfectly objective and impervious to their supporters' preferences.[7]

Nonetheless, the Court has cautioned that states may **not** impose "unnecessary interference with judicial elections."[8] In the *Williams-Yulee* case, the Court held that judicial candidates may be prohibited from personally soliciting contributions to their campaigns (although others, including their own campaign aides, could still solicit contributions on their behalf).[9] The Court found that the risk to the public's confidence in the impartiality of the judiciary "is especially pronounced because most donors are lawyers and litigants who may appear before the judge they are supporting."[10]

In *Caperton v. A.T. Massey Coal Co.*, the Court held that a state supreme court justice could be required to recuse from a case under "extreme" circumstances where a single party with a matter pending before the judge had spent approximately $3 million on independent expenditures to support the judge's election – an amount that exceeded the total amount spent by the candidates themselves.[11] The Court noted that "[t]he temporal relationship between the campaign [spending], the justice's election, and the pendency of the case" were "critical" to the Court's holding.[12]

The U.S. Supreme Court's holdings do **not** support the propositions:

(1) That a state may regulate speech about judicial elections, or even policy issues that arise during judicial elections, based on vague and essentially standardless criteria, as H.B. 1705 would do; or

(2) That a state may violate the donor and associational privacy rights of independent groups that speak about judicial elections, or even policy issues that arise during judicial elections, as H.B. 1705 would do.

As the Arkansas Ethics Commission has explained:

> "political" speech enjoys the highest constitutional protection: "Discussion of public issues and debate on the qualification of candidates are integral to . . . our Constitution. The First Amendment affords the broadest protection to such political expression in order to assure the unfettered interchange of ideas . . . [T]here is practically universal agreement that a major purpose of that Amendment was to protect the free discussion of governmental affairs . . . of course includ[ing] discussions of candidates . . . ."[13]

There is nothing in the U.S. Supreme Court's decisions addressing campaign spending on state judicial elections suggesting that independent groups have any lesser First Amendment interests when speaking about judicial elections. In this respect, by distinguishing between

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[7] *Id.*
[8] *Caperton v. A.T. Massey Coal Co.*, 556 U.S. 868, 887 (2009).
[9] 135 S. Ct. at 1668-69.
[10] *Id.* at 1667.
[11] 556 U.S. at 885, 887.
[12] *Id.* at 886.
[13] Ark. Ethics Comm'n, Adv. Op. No. 2006-EC-004 (Apr. 21, 2006) (quoting *Buckley v. Valeo*, 424 U.S. 1, 14 (1976)).

independent speech about judicial elections and speech about legislative and executive branch elections, H.B. 1705 also may function as an unconstitutional content-based speech regulation (i.e., it provides insufficient justification for regulating speech differently based on the subject matter of the speech and is not narrowly tailored).[14]

### B) H.B. 1705 Would Regulate Speech Concerning Judicial Elections Based on an Unconstitutionally Vague and Overbroad Content Standard

Under existing Arkansas campaign finance law, independent speech is regulated only when it "expressly advocates the election or defeat of a clearly identified candidate for office."[15] The law is limited in this manner in order to avoid the "uncertainty" of a vaguer standard, which would result in judicial "invalidation of [the] regulation of political speech."[16]

H.B. 1705 would impose a new regulatory standard specifically for organizations and individuals that speak about Arkansas judicial elections. Under this standard, speakers that spend as little as $500.01 in a calendar year on public communications would trigger burdensome reporting requirements if their speech is considered an "[a]ttempt[] to influence a vote for or against a specific candidate or specific set of candidates or the public's perception of a specific candidate or specific set of candidates" for judicial office.[17]

This sweeping "attempt to influence" standard would be met specifically if a communication:

- "asks a voter or other person to contact a candidate about the candidate's actions or positions";
- the communication is made in proximity to the date of the election; or
- the communication is distributed "to a significant number of registered voters for that candidate's election."[18]

While the Arkansas Ethics Commission would be charged with issuing regulations to clarify these three criteria, the bill also would give the agency broad discretion to regulate speech based on any other criteria indicating an "attempt to influence" judicial elections.[19]

H.B. 1705's "attempt to influence" standard is unconstitutionally vague and overbroad.

The U.S. Supreme Court ruled more than forty years ago that the federal campaign finance statute's reliance on a "for the purpose of influencing any election" standard was unconstitutionally vague. Accordingly, the Court limited the federal law to apply only to "communications that in

[14] *Reed v. Town of Gilbert, Ariz.*, 135 S. Ct. 2218, 2226 (2015) ("Content-based laws – those that target speech based on its communicative content – are presumptively unconstitutional and may be justified only if the government proves that they are narrowly tailored to serve compelling state interests.") (collecting authority).
[15] Ark. Code §§ 7-6-201(11), -220.
[16] Ark. Ethics Comm'n, Adv. Op. No. 2006-EC-004 (Apr. 21, 2006).
[17] H.B. 1705 § 1 (to be codified at Ark. Code § 7-6-201(11)(A)(ii)(b)).
[18] *Id.* § 5 (to be codified at Ark. Code § 7-6-231(b)(1)(B)).
[19] *Id.*

express terms advocate the election or defeat of a clearly identified candidate for federal office."[20] H.B. 1705's "attempt to influence" standard is functionally equivalent to the federal "for the purpose of influencing" standard that the U.S. Supreme Court held to be unconstitutional.

Moreover, H.B. 1705 would impose this "attempt to influence" standard in addition to the express advocacy standard that already exists in the Arkansas statute.[21] Therefore, the bill's intent is clearly to regulate a much broader universe of speech that is not specifically defined. The Arkansas Ethics Commission would be hard-pressed to issue regulations to sufficiently narrow this standard when such a broad legislative intent is evident. Compounding this vagueness is the right that private parties would have under H.B. 1705 to bring their own enforcement actions for alleged noncompliance with the bill's provisions (as discussed more below).[22] It is unclear whether speakers would even be able to rely on the Arkansas Ethics Commission's regulations when defending against such private enforcement actions.

Under H.B. 1705's vague "attempt to influence" standard, it is impossible to know, for example:

- whether a civil liberties or law enforcement organization will be regulated for sponsoring an issue advocacy campaign for or against civil asset forfeiture if a judicial candidate has issued rulings supporting or opposing the practice;

- whether a pro-choice or pro-life group will be regulated for sponsoring an issue advocacy campaign on abortion if a judicial candidate merely has a public perception of being pro-choice or pro-life; or

- whether a doctors' or plaintiffs' attorneys association will be regulated for sponsoring an issue advocacy campaign on medical malpractice laws if a judicial candidate merely has expressed a public opinion on the issue.

As the U.S. Supreme Court has cautioned, "[c]andidates, especially incumbents, are intimately tied to public issues . . . Not only do candidates campaign on the basis of their positions on various public issues, but campaigns themselves generate issues of public interest."[23] H.B. 1705 is unconstitutionally vague because groups speaking about these issues will be unable to determine with any certainty whether their speech will be regulated as an "attempt to influence" a judicial election, thereby causing them to "hedge and trim" their speech or not speak at all.[24] The bill's vague standard also will "foster 'arbitrary and discriminatory application'" by those enforcing it.[25]

H.B. 1705 also is unconstitutionally overbroad. As the U.S. Court of Appeals for the Eighth Circuit (which has jurisdiction over Arkansas) has explained, campaign finance reporting laws are

[20] *Buckley*, 424 U.S. 1 at 43.
[21] *See* H.B. 1705 § 1 (to be codified at Ark. Code § 7-6-201(11)(A)(ii)(a)).
[22] *Id*. § 5 (to be codified at Ark. Code § 7-6-232).
[23] *Buckley*, 424 U.S. at 42.
[24] *Id.* at 43 (quoting *Thomas v. Collins*, 323 U.S. 516, 535 (1945)).
[25] *Id.* at 41 n. 48 (quoting *Grayned v. City of Rockford*, 408 U.S. 104, 108-09 (1972)).

subject to "exacting scrutiny."[26] This means there must be a "'substantial relation' between the disclosure requirement and a 'sufficiently important' governmental interest."[27]

H.B. 1705 purports to further the state's interest in "[s]afeguarding the public's confidence in" "the integrity of the state's judicial elections."[28] However, it is unclear what relation exists at all – let alone a "substantial" one – between this purported interest and many of the bill's reporting burdens. As mentioned previously:

- A group "ask[ing] a voter. . . to contact a candidate about the candidate's actions or positions" would be regulated. For example, a civil liberties or law enforcement group that merely urges voters to ask a judicial candidate about his or her views on civil asset forfeiture would trigger burdensome reporting requirements.

- Merely disseminating a communication in proximity to an election or "to a significant number of registered voters for that candidate's election" would be regulated. For example, a nonprofit voter education organization that distributes a nonpartisan voter guide simply listing all judicial candidates' issue positions or factual background and qualifications would trigger burdensome reporting requirements. The bill also does not provide any guidance on how many is a "significant number of registered voters" or how close to an election a communication must be disseminated so as to trigger regulation.

In short, H.B. 1705 would broadly regulate activities that increase voter knowledge about judicial candidates and issues. These activities have nothing to do with "public confidence in the integrity of the state's judicial elections" except to the extent that they enhance public confidence by creating a more informed electorate. If anything, H.B. 1705's significant regulatory burdens would undermine the integrity of judicial elections by discouraging groups from educating voters about judicial candidates or issues. In short, there is no "substantial relation" between H.B. 1705's broad regulatory sweep and its purported regulatory goals.

### C) H.B. 1705 Would Unconstitutionally Infringe on Donor and Associational Privacy

The right to speak freely that is protected by the First Amendment necessarily involves the right to make expenditures and to receive donations. As the U.S. Supreme Court has explained, "[t]he right to join together for the advancement of beliefs and ideas is diluted if it does not include the right to pool money through contributions, for funds are often essential if advocacy is to be truly or optimally effective."[29]

When organizations are forced to publicly identify their donors, the Court has explained, "the invasion of privacy of belief may be as great when the information sought concerns the giving and spending of money as when it concerns the joining of organizations, for financial transactions can reveal much about a person's activities, associations, and beliefs."[30] Compulsory donor

[26] *Ia. Right to Life Comm. v. Tooker*, 717F.3d 576, 591 (8th Cir. 2013) (citing *Citizens United v. FEC*, 558 U.S. 310, 366-67 (2010)).
[27] *Id.*
[28] H.B. 1705 § 6(a).
[29] *Buckley*, 424 U.S. at 65-66 (internal quotation marks and citations omitted).
[30] *Id.* at 66 (internal quotation marks, brackets, and citations omitted).

reporting requirements, the Court warned, "will deter some individuals who otherwise might contribute. In some instances, disclosure may even expose contributors to harassment or retaliation. These are not insignificant burdens on individual rights. . . ."[31] Therefore, donor reporting requirements are subject to the same "exacting scrutiny" judicial review standard discussed above.[32]

The threats to donor privacy the U.S. Supreme Court described more than forty years ago have only become more pressing over time. "Doxxing" – the posting of individuals' personal information online in retaliation against their political activities – has become increasingly common in today's polarized society.[33] The aim is to encourage harassment and threats against the victims.

Arkansas' existing reporting requirements strike the constitutionally appropriate balance between protecting donor privacy and informing the public about campaign spending on so-called "independent expenditures" that expressly advocate the election or defeat of candidates for Arkansas state office. Independent groups that spend more than $500 in a calendar year on regulated speech are required to report their donors if they qualify as "independent expenditure committees."[34] An "independent expenditure committee" is defined as a group "that receives contributions from one (1) or more persons in order to make an independent expenditure."[35]

In other words, a group making independent expenditures is required to report its donors if they contribute for the specific purpose of funding those independent expenditures. On the other hand, groups that merely make independent expenditures of more than $500 in a calendar year using general revenues are required to report their spending on independent expenditures, but are not required to report their donors.[36]

H.B. 1705 would drastically expand the donor reporting requirement for groups that speak about judicial candidates. Specifically, the bill would require any group that spends as little as $500.01 on regulated speech about a judicial election to publicly report the source of all contributions of more than $50 (apparently over any time period) that "[w]ere used for the independent expenditure."[37] In other words, in contrast to existing law, donors and members who give to support an organization's general activities would have to be reported. As discussed above, H.B. 1705 also would impose an unconstitutionally vague and overbroad content standard for speech that would trigger the donor reporting requirement.

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[31] *Id.* at 68.
[32] *Id.* at 64.
[33] *See, e.g.*, Samuel Chamberlain, *GOP-doxxing suspect arrested; worked or interned for Feinstein, Jackson Lee, other Dems*, FOX NEWS (Oct. 3, 2018), *at* https://www.foxnews.com/politics/gop-doxxing-suspect-arrested-worked-or-interned-for-feinstein-jackson-lee-other-dems.
[34] Ark. Code § 7-6-220; Ark. Ethics Comm'n, Independent Expenditure Report for Committees, Individuals, and Other Entities (rev. Aug. 2015) (*hereinafter*, "IE Reporting Form"), *at* http://www.arkansasethics.com/forms/2019%20REVISED%20FORMS/11.2%20Independent%20Expenditure%20Report...%20(2015).pdf.
[35] Ark. Code § 7-6-201(12).
[36] *See id.* § 7-6-220; Ark. Ethics Comm'n, IE Reporting Form.
[37] H.B. 1705 § 3 (to be codified at 7-6-220(b)(5)(A)).

The bill's expansive reporting requirement – including reporting of donors' names, addresses, and employer information[38] – fails the "exacting scrutiny" test for constitutionally permissible encroachments on donor privacy. As noted previously, the bill purports to "[s]afeguard[] the public's confidence in" "the integrity of the state's judicial elections." However, there is no plausible scenario under which any of the following examples threaten "the integrity of the state's judicial elections" such that donors should have to be listed on a group's campaign finance reports, as H.B. 1705 would require:

- a small business owner pays $51 to join a trade association; the group spends $501 distributing a nonpartisan voter guide listing all judicial candidates' qualifications and campaign positions;

- a parent pays $11 a year over five years to support a school choice advocacy group; a judicial candidate has expressed skepticism of allowing government-funded vouchers to be used at religious schools, and the group spends $501 on mailers urging voters to ask the candidate to explain his or her position;

- an individual pays $6 annually in membership dues over a decade to a hunting organization; a judicial candidate is closely identified with her rulings consistently upholding laws restricting hunting, and the hunting organization spends $501 on social media ads in the normal course of its activities advocating for laws making it easier to hunt.

In other words, there is no "substantial relation" – the test to satisfy the "exacting scrutiny" standard – or any relation at all between H.B. 1705's purported purpose and how the bill would actually function in practice. Instead, H.B. 1705 would force organizations to choose between violating their donors' and members' privacy or remaining silent.

For donors that must be reported, H.B. 1705 also requires groups to report the sources of those donors' funds "received [] by transfer from another person," as well as "any other contributor to the other person."[39] H.B. 1705 provides no explanation for how groups or donors are even to determine these *secondary* and *tertiary* sources of funds.

For example, if a small business owner who pays dues to a trade association receives a "transfer" from Customer A, and that customer in turn receives funds from Customer B, H.B. 1705 appears to require the trade association to identify on its independent expenditure report not only the small business owner, but also Customer A and Customer B. Requiring groups to report their donors who give for general purposes is already irrelevant to H.B. 1705's purported goal of protecting the "integrity" of state judicial elections. By also requiring groups to report those donors' sources of funds, and *the sources of funds of those sources of funds*, H.B. 1705 enters the realm of the absurd.

### D) H.B. 1705 Provides No Sufficient Justification for Infringing on First Amendment Freedoms

[38] *Id.* (to be codified at 7-6-220(b)(5)(B)).
[39] *Id.* § 3 (to be codified at Ark. Code § 7-6-220(b)(5)(E)); *see also id.* (to be codified at Ark. Code § 7-6-220(f)(1)).

According to H.B. 1705, "[t]he General Assembly finds and determines that unrestricted and undisclosed independent expenditures made to influence races for appellate judicial offices in Arkansas have eroded public confidence in the integrity of the state's judicial elections."[40] This conclusory statement is the only justification the bill provides for its significant encroachments on First Amendment freedoms. The bill presents no empirical evidence for this conclusion.

Moreover, the bill's premise that independent expenditures otherwise are "undisclosed" is demonstrably false. As discussed above, any person or entity that spends more than $500 in a calendar year on independent expenditures is required to report such spending, and any group that raises or receives money specifically for such a purpose is required to report its donors.

Nor can the bill simply rely on the U.S. Supreme Court's holdings in *Caperton* and *Williams-Yulee* for the presumption that independent expenditures "have eroded public confidence in the integrity of the state's judicial elections." As discussed above, *Caperton* addressed a party that spent approximately $3 million on independent expenditures to support a state supreme court candidate where the party had a case that was all but certain to come before the court. That is a far cry from the $500 threshold that would trigger reporting requirements under H.B. 1705, and an even further cry from the $50 threshold that would trigger reporting of donors.

Additionally, *Williams-Yulee* involved personal solicitations of campaign contributions by judicial candidates, where the U.S. Supreme Court noted that most donors are "lawyers and litigants who may appear before the judge they are supporting."[41] By contrast, H.B. 1705 only regulates independent speech about judicial elections and does not regulate direct contributions to judicial candidates – which, as a matter of law, present a greater concern about impropriety.[42] As the examples discussed above illustrate, most of the donors who would be reported under H.B. 1705 also likely have no relationship at all to any judicial candidates.[43]

H.B. 1705's failure to provide any factual record to justify its infringements on free speech would be constitutionally fatal. As the U.S. Supreme Court has noted, "we 'have never accepted mere conjecture as adequate to carry a First Amendment burden.'"[44]

### E) Concerns About the Integrity of Judicial Elections Are Better Addressed by Alternative Means

For the reasons discussed above, H.B. 1705 would impose unconstitutionally overbroad and impermissibly vague regulations on speech that is deemed to "attempt to influence" state judicial elections. Even if there is sufficient evidence to support the bill's conclusory claim that independent speech has "eroded public confidence in the integrity of the state's judicial elections,"

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[40] *Id.* § 6(a).
[41] *See* note 10, *supra*.
[42] *Citizens United*, 558 U.S. at 357.
[43] Although courts have typically held that the "exacting scrutiny" standard does not require campaign finance reporting laws to be as "narrowly tailored" as possible, independent groups whose donors are required to be reported under H.B. 1705 nonetheless would have a good "as applied" challenge to the extent they have no relationship to judicial candidates. Moreover, to the extent H.B. 1705 regulates speech differently based on its content, a good argument exists that "strict scrutiny" should apply here, in which case narrow tailoring is required.
[44] *McCutcheon v. FEC*, 572 U.S. 185, 210 (2014) (quoting *Nixon v. Shrink Missouri Government PAC*, 528 U.S. 377, 392 (2000)).

the U.S. Supreme Court's *Williams-Yulee* decision provides a roadmap for a preferable and constitutionally permissible way to address this concern.

Specifically, attorneys and parties appearing before the Arkansas Court of Appeals and Supreme Court could be required to disclose to the court any amounts they have spent on independent expenditures in connection with state judicial elections, including contributions to independent expenditure committees. Based on such disclosures, judges could be required to recuse themselves.

Importantly, however, such requirements should be imposed by the state judiciary itself through its Code of Judicial Conduct,[45] as any legislation in this area arguably would violate the separation of powers. It is no coincidence that both of the recent U.S. Supreme Court decisions addressing campaign spending on state judicial elections have involved state judiciaries' own conduct codes and not legislatively enacted statutes.[46]

### F) H.B. 1705 Would Create a Private Right of Action for Any Arkansas Registered Voter to Enforce the Bill's Reporting Provision

H.B. 1705 provides that any registered voter in the state may bring a lawsuit for alleged violations of the bill's independent expenditure reporting requirements.[47] The bill would incentivize such suits by awarding plaintiffs with attorneys' fees and costs.[48] However, prevailing defendants who have not violated the law would not be able to recover attorneys' fees and costs.

Deputizing citizens to enforce campaign finance laws in this manner can result in a complete free-for-all, where politically motivated and frivolous lawsuits run rampant. For example, Colorado's private enforcement system allowed one gadfly to file scores of complaints alleging trivial violations, and the complaints often raised questions about his own personal political ambitions.[49] In another case, school board officials weaponized the state's campaign finance laws by filing a politically motivated complaint against a Colorado concerned parent who purchased newspaper ads about a school board election.[50] The lawsuits got so out of hand that a federal judge ruled Colorado's private enforcement system posed an unconstitutional burden on citizens' First Amendment rights,[51] and Colorado has since implemented a new enforcement system.[52]

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[45] *See* Ark. Code of Judicial Conduct, *at* https://www.arcourts.gov/rules-and-administrative-orders/arkansas-code-of-judicial-conduct; *see also id.* R. 2.4 and 2.11 (providing that judges may not permit any "political [] interests" to influence their decisions and requiring them to recuse themselves in any proceedings in which their "impartiality might reasonably be questioned").

[46] *See Caperton*, 556 U.S. at 874; *Williams-Yulee*, 135 S. Ct. at 1662.

[47] H.B. 1705 § 5 (to be codified at Ark. Code § 7-6-232).

[48] *Id* (to be codified at Ark. Code § 7-6-232(b)).

[49] *See* Ernest Luning, *Matt Arnold scores win against county GOP amid charges he's waging proxy state chair battle*, COLORADOPOLITICS.COM (Mar. 9, 2017), *at* https://coloradopolitics.com/matt-arnold-scores-win-against-county-gop-amid-charges-waging-proxy-state-chair-battle/; Charles Ashby, *Court finds citizens' complaints a problem*, THE DAILY SENTINEL (Jun. 14, 2018), *at* https://www.gjsentinel.com/news/western_colorado/court-finds-citizens-complaints-a-problem/article_31ff9800-6f91-11e8-9969-10604b9f1ff5.html.

[50] *See* Press Release: Politicians Sue Colorado Mom into Silence Over Newspaper Ads, Institute for Justice (Jan. 21, 2016), *at* https://ij.org/press-release/politicians-sue-colorado-mom-into-silence-over-newspaper-ads/.

[51] *Holland v. Williams*, Case No. 16-CV-00138, slip op. (D. Colo. Jun. 12, 2018).

[52] Press Release: Secretary of State Williams adopts new campaign finance rules, Colo. Sec'y of State (Jun. 19, 2018), *at* https://www.sos.state.co.us/pubs/newsRoom/pressReleases/2018/PR20180619CPFRules.html.

### G) H.B. 1705 May Leave Arkansas Taxpayers on the Hook for Attorneys' Fees

For the reasons discussed above, H.B. 1705 is unconstitutionally vague and overbroad. Should its constitutionality be challenged in court successfully, Arkansas taxpayers may become liable for costly attorneys' fees.[53]

## CONCLUSION

State judicial elections may be regulated differently from elections for legislative and executive branch positions in certain limited respects. However, the First Amendment does not permit H.B. 1705 to discriminate against independent speech about Arkansas state judicial elections by imposing unconstitutionally vague and overbroad rules on such speech. Groups that spend as little as $500.01 on such speech, and donors who give as little as $50.01 to such groups, pose no plausible threat to the integrity of state judicial elections, and yet they are the ones targeted by this bill. H.B. 1705 is a misguided attempt to implement the U.S. Supreme Court's recent decisions addressing campaign spending on state judicial elections. Those decisions demonstrate that there are better and more narrowly tailored rules that states may adopt that protect both the integrity of judicial elections and First Amendment freedoms.

[53] *See* 42 U.S.C. §§ 1983 and 1988; *see also, e.g.*, Utah Agrees to Pay $125,000 in Free Speech Lawsuit, Institute for Free Speech (Aug. 10, 2016), *at* https://www.ifs.org/news/utah-agrees-to-pay-125000-in-free-speech-lawsuit/; Colorado closes free speech case, changes law, pays $220K in attorney's fees, Institute for Free Speech (Apr. 7, 2017), *at* https://www.ifs.org/news/colorado-closes-free-speech-case-changes-law-pays-220k-in-attorneys-fees/.