CENTER *for* COMPETITIVE POLITICS
Congress shall make no law...

March 13, 2013

Maryland House of Delegates
Ways and Means Committee
Room 131
House Office Building
Annapolis, Maryland 21401

Dear Chairwoman Hixson, Vice Chairman Turner, and members of the Committee:

My name is Allen Dickerson, and I serve as Legal Director of the Center for Competitive Politics ("the Center"), a 501(c)(3) nonprofit organization dedicated to protecting our political rights to speech, petition, and assembly. We have participated in many of the most significant campaign finance cases of the past several years. We also regularly comment on proposed legislation and rulemakings at all levels of government. Indeed, last June we testified before the Commission to Study Campaign Finance Law.

Thank you for the opportunity to testify again today. Already, House Bill 1499 ("HB-1499") incorporates three major suggestions the Center provided last June. First, we wish to congratulate Maryland for proposing to increase candidate contribution limits from a mere $1,000 to an improved $6,000 per cycle. This is a significant step to bring the candidate contribution limits more in line with the current value of the dollar.

Second, HB-1499 increases the aggregate limits. Previously, a citizen could not even "max out" his contributions for the governor, state senate, and state house candidates of his choosing.[1] Increasing the limits from $10,000 to $24,000 is a significant, if incomplete, step in protecting the political speech rights of Maryland's citizens.

Third, HB-1499 will provide for contribution limits to be indexed to inflation, which is essential to keeping the contribution limits meaningful over time. The bill

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

will also safeguard constitutional rights by specifically providing that the contribution limits will not "ratchet down" during a few bad years.[2]

The Center has grave constitutional concerns, however, about some other provisions of HB-1499. The definition of "political committee," though improved, is still vague and overbroad. In addition, the regulation of independent expenditures is inconsistent with federal case law, specifically the *SpeechNow* case. Finally, the electioneering communications disclosure provisions reach impermissibly far into an organization's donor base, posing a potential threat to donors who support unpopular causes.

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

In 2011, the Maryland General Assembly established the Commission to Study Campaign Finance Law ("the Commission").[3] The Commission noted that Maryland's definition of "political committee" is "unconstitutionally overbroad."[4] The Commission rightly stated that "an entity generally may not be regulated as a political committee unless it is controlled by a candidate or has as its major purpose the election or defeat of a candidate or ballot issue."[5] To that end, HB-1499 adds a major purpose element to its definition for "political committee." This is a step in the right direction.

The definition, however, remains unconstitutionally vague and overbroad in the current version of HB-1499, which reads:

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

The phrase, "assisting or attempting to assist" is impermissibly vague and overbroad. The Election Code does not define the phrase in its entirety, the term "assist," or the term "attempt." Moreover, no existing case law or other official guidance provides adequate clarification of these inherently ambiguous terms in

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[2] *See Randall v. Sorrell*, 548 U.S. 230, 261-62 (2006) (opinion of Breyer, J.) (finding that a failure to index contribution limits to inflation, in combination with other factors, may substantially burden First Amendment rights and therefore render a state's contribution regime unconstitutional).

[3] COMMISSION TO STUDY CAMPAIGN FINANCE LAW, FINAL REPORT, iii (Dec. 2012) ("COMMISSION REPORT").

[4] COMMISSION REPORT at 17.

[5] *Id.*

[6] Campaign Finance Reform Act of 2013, House Bill 1499, pp. 4-5 at lines 29-2 (emphasis added).

this particular context.[7] Thus, the meaning of this crucial language under Maryland campaign finance law remains unclear.

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

Thus, rather than defining "political committee" using discernible terms of art—such as "contribution," "expenditure," and "express advocacy,"—HB-1499 employs vague language insufficient for such a significant classification. Worse still, it defies Supreme Court precedent in so doing.

In addition to its vagueness, HB-1499's definition of "political committee" is overbroad because the term "assisting or attempting to assist" can potentially encompass the nonpolitical activity of groups speaking on public issues. For example, a group of crabbers may wish to discuss the importance of their industry in the context of environmental policy for the Chesapeake Bay. Such speech could happen to prove helpful to a delegate running for reelection, even if only by happenstance. The quandary then becomes drawing the line between issue speech and support of a candidate.

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

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[7] The guidance on point is limited. In examining a prior iteration of the Election Code, the Court of Appeals held that merely contributing to an existing political cause does not make one a member of a political committee. *Phifer v. State*, 278 Md. 72, 79 (1976). The Attorney General implicitly defined "assisting or attempting to assist" by examining the parallel language of "expenditure" in the Election Code, but provided no further clarification on the scope of this phrase. *Elections—Campaign Finance—Whether Campaign Finance Entity May Make Unlimited Contribution to a Political Party by Designating it for Ongoing Administrative Expenses*, 92 Op. Att'y Gen. Md. 92, 94 (2007).

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

[9] *Id.*

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

[11] *Buckley* at 43.

[12] *Id.* at 42.

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

Finding the phrase, "for the purpose of... influencing" in the federal statute to be vague, the Supreme Court created the major purpose test.[15] Consideration of that phrase in its entirety, however, is essential to understanding the narrowness of the activity *Buckley* encompassed: "[t]o fulfill the purposes of the Act they need only encompass organizations that are under the control of a candidate or the major purpose of which is *the nomination or election of a candidate*."[16]

HB-1499's use of "assisting or attempting to assist" may well be understood to encompass more activity than that which has the purpose of "nominate[ing] or electi[ng]... a candidate." This is because "assisting or attempting to assist" can be understood to be almost *any* activity that—for whatever reason—ultimately affects a candidate's electoral chances. Tracking the language of *Buckley* will ensure constitutional clarity. Defining regulated activity narrowly and precisely will ensure that issue speech is not improperly regulated or chilled.

II. The regulation of independent expenditures is inconsistent with federal case law.

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

Viewed as a whole, Maryland's statutory scheme effects a dollar limit on independent expenditures and independent expenditure-only committees (so-called "super PACs"). But the Supreme Court held in *Citizens United* that such independent expenditures do not give rise to corruption or the appearance of

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[13] *FEC v. Wis. Right to Life, Inc.*, 551 U.S. 449, 477 (2007).

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

[15] *Buckley* at 79.

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

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

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

corruption.[19] Thus, there is no constitutionally permissible justification for limiting this form of speech. In the wake of *Citizens United*, the U.S. Court of Appeals for the District of Columbia Circuit clarified that the Constitution prohibits limitations on independent expenditures.[20] There is simply no constitutionally-sufficient governmental interest in limiting independent expenditures.[21]

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

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

Current state law does not require persons making independent expenditures or electioneering communications to disclose their donors unless the donor specifically intends her donation to be used for such activity.[25] HB-1499, however, removes this link. Entities making independent expenditures or electioneering communications must disclose certain information about all individuals who make donations of $10,000 or more *even if* the donors did not intend their donation to be used for independent expenditures or electioneering communications.[26] While the Center appreciates the legislature's efforts to protect donors' privacy by setting a high disclosure threshold, the lack of a link between the purpose of a general donation to a multi-purpose organization, and the disclosure of that donation as a political act, is problematic. Nonpolitical organizations[27] need not turn over their donor rolls for government inspection.[28]

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

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

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

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

[23] COMMISSION REPORT at 15.

[24] *Id.* at 17.

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

[26] Campaign Finance Reform Act of 2013, House Bill 1499, p. 22 at lines 11-13; p. 27 at lines 29-31.

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

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

As the Committee likely knows, non-profit organizations like 501(c)(4) social welfare organizations may engage in some degree of political activity. HB 1499 presents such organizations with two burdensome options: either they can establish separate PACs so as to protect donors, or disclose all donors over $10,000. This functionally results in deterring speech, requiring organizations to pause before speaking. Such restrictions require a compelling state interest,[29] but the state simply does not have a compelling interest in disclosure of donors who may not support the political activity of recipient organizations.

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

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

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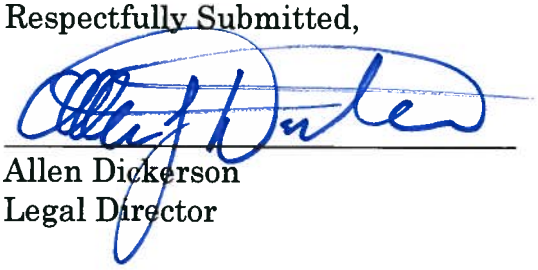
The Center for Competitive Politics appreciates the Committee's willingness to consider comments on House Bill 1499. Campaign finance regulations strike at the heart of the First Amendment rights to political speech and association, and must be crafted with great care. Presently, while House Bill 1499 has several good qualities, it contains provisions that raise serious legal concerns. They should be revised.

Respectfully Submitted,



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[29] *See, e.g., Buckley v. Valeo* at 43-44.
[30] COMMISSION REPORT at 17-18.