

February 18, 2020

Testimony on HB949
Election Law - Disclosure of Qualifying Paid Digital Communications – Revisions
Ways and Means

Position: Informational

Common Cause Maryland takes no position on HB 949 which would require that online media platforms maintain and make available specific records on qualified paid digital communications disseminated on the online platform. This bill would change the recent, more transparent law, Online Electioneering Transparency and Accountability Act (OETA), passed in 2018. With this legislation, the law would now be that online media platforms would only have to turn over records kept in the ordinary course of business and they would only have to turn them over upon request by the State Board of Elections. Although we believe this bill would weaken transparency considering the growing amount of electioneering messaging on social media, we also understand this legislation is most likely the result of the *WaPo v. McManus* Fourth Circuit Court decision. Thus, this bill is likely a compromise, in which, by lessening disclosure requirements, the law will no longer be unconstitutional. However, we fear that the legislation presented in HB 949 could potentially be found to be unconstitutional, which is why we are not in favor or against.

Briefly, the facts of *WaPo v. McManus* are that Online Media Platforms with clients in Maryland sued Maryland election officials seeking to avoid compliance with the OETA disclosure and recordkeeping requirements.¹ The requirements of the OETA apply to online platforms with at least 100,000 unique monthly U.S. visitors that disseminate “qualified” paid political ads.² The law requires these online platforms to post on their websites and retain in their records information that identifies the sources, costs, and information about the candidate or ballot issue to which the ad relates, and information about the distribution of the ad.³ The online platforms claim that the OETA violates the newspapers’ First Amendment freedoms of the press and speech.⁴

More specifically, a major reason the court ruled in favor of the online platforms was because the OETA compelled third parties (online media platforms) to disclose certain identifying information regarding political speakers implicates protections for anonymous speech.⁵ The court believed that requiring the press itself to disclose the identity or characteristics of political speakers was a problematic step that is still present in the legislation presented by HB 949. Thus, we fear that if passed, this legislation would also be found unconstitutional.

Court case decision aside, we still believe that there needs to be some transparency and accountability. The complete effects of unregulated social media electioneering in the 2016 election is still unknown. What is

¹ <https://campaignlegal.org/update/maryland-citizens-have-right-know-who-trying-influence-their-votes-through-digital-political>

² Id.

³ Id.

⁴ <https://campaignlegal.org/update/maryland-citizens-have-right-know-who-trying-influence-their-votes-through-digital-political>

⁵ <https://campaignlegal.org/update/maryland-citizens-have-right-know-who-trying-influence-their-votes-through-digital-political>

known, however, is that both unethical domestic campaigns and hostile foreign campaigns used social media to spread thousands of news stories designed to dupe Americans and depress participation in our elections.

In Maryland, as in many states, most campaign finance oversight is actually handled by campaign opponents watching each other to keep themselves in line. However, in the age of social media, it can be difficult, if not impossible, to ensure that your opponent is following the rules. Digital ads on social platforms can be micro-targeted to specific user interests and locations. If an opposing candidate's social media profile does not fit that targeting metrics, they and their team may never see the ad in order to provide oversight. That is why we need some form of detailed records of digital communications kept by some entity, even if it is not online media platforms.

While we support the purpose behind HB 949, we are not sure it is the best route to achieve our goals. Thus, we take no position on this legislation

