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To: Ways & Means Committee

From: Rebecca Snyder, Executive Director, MDDC Press Association

Date: February 18, 2020

**Re: HB 949 - Oppose**

The Maryland-Delaware-District of Columbia Press Association represents a diverse membership of media organizations, from large metro dailies such as the Washington Post and the Baltimore Sun, to publications such as The Daily Record and online only outlets such as Maryland Matters and Baltimore Brew.

We believe in free and fair elections and imposing various requirements on the press is neither necessary nor constitutional. As such, the Press Association opposes HB 949.

This bill represents a slightly tweaked version of HB 981, which was passed in 2018. In January 2019, Judge Paul Grimm of the United States District Court for the District of Maryland declared that law unconstitutional and enjoined its enforcement. The United States Court of Appeals for the Fourth Circuit unanimously affirmed that ruling in December 2019. *See Washington Post v. McManus*, 355 F. Supp. 3d 252 (D. Md.), *aff'd*, 944 F.3d 506 (4th Cir. 2019). Judge Grimm's opinion may be found at https://www2.mdd.uscourts.gov/opinions/opinions/WaPo%20mem%20op%20PWG-18-2527%20(signed).pdf. The decision of the Fourth Circuit is available at http://www.ca4.uscourts.gov/opinions/191132.P.pdf.

This proposed legislation continues to include a slightly-modified retention and disclosure requirement and otherwise leaves intact the rest of the law, including the compelled publication requirement as well as an injunction provision backed by fines and criminal penalties -- all of which were already ruled unconstitutional. More generally, the underlying premise of both courts' opinions was that, if the State wishes to regulate in this area, it should do so without dragging the press into that effort. The proposed legislation continues to contravene that principle in core respects.

Specifically,

1. The proposed legislation continues to include a publication requirement, found in Section 405(b), in violation of the First Amendment's prohibition on compelled speech and the Court's rulings in both the district court and the Fourth Circuit.
2. The proposed legislation includes a disclosure requirement, found in Section 405(c), albeit in a different form than the one that was ruled unconstitutional. This new version would also appear to violate the First Amendment and both Court's rulings, especially the Fourth Circuit's concern about intermingling the state and the press and imposing various burdens, including the 48-hour production requirement. Moreover, although neither the district court nor the Fourth Circuit found it necessary to reach this issue, such a disclosure requirement separately violates the Fourth Amendment, including its specific protection for "papers." Specifically, under a 2015 Supreme Court case called *City of Los Angeles v. Patel*, 135 S. Ct. 2443 (2015), requiring a platform turn over records "on request," without the opportunity for pre-compliance review (as would be the case with a subpoena and which the proposed legislation separately authorizes), violates the Fourth Amendment. This argument was explained in detail in our district court briefing.
3. The proposed legislation is still unconstitutionally vague. This includes (a) who is responsible for doing what as between an advertiser and a platform, (b) the use of terms like "good faith," "reasonable efforts" and the like, and (c) application to prospective candidates and prospective ballot questions, under the existing definition of "campaign material," when it is impossible to predict who will be a candidate or what issues may end up as the subject of ballot questions.
4. In Section 405.1, the proposed legislation permits the Board to secure an injunction requiring a platform to remove an ad, without requiring notice to the platform and solely upon a finding that the ad purchaser violated the statute, without requiring a finding that the ad is sufficiently unprotected speech that it can be enjoined. Compliance with such an injunction is backed by the threat of fines and/or criminal penalties. This regime also violates the First Amendment, and was a particular focus of the Court's opinions, especially in the Fourth Circuit.

The Press Association requests an unfavorable report on HB 949.