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April 30, 2008

The Honorable Martin J. O'Malley
Governor of Maryland
State House
Annapolis, Maryland 21401-1991

Re: Senate Bill 755

Dear Governor O'Malley:

We have reviewed and hereby approve the constitutionality and legal sufficiency of Senate Bill 755, which imposes campaign finance reporting requirements relating specifically to the ballot question concerning video lottery terminals ("slot machines") enacted by 2007 Laws of Maryland, ch. 5, Special Session.

The First Amendment states that "Congress shall make no law ...abridging the freedom of speech." U.S. Const. amend. I. "The command of the first amendment...is directed with equal force, by way of the fourteenth amendment, to state and local governments." *Eanes v. State*, 318 Md. 436, 445 (1990). While the Supreme Court has held that the government can regulate campaign expenditures, *Buckley v. Valeo*, 424 U.S. 1 (1976), the Court has made clear that for a statute to pass constitutional muster, it must not be vague or overbroad and it may regulate only "express advocacy" or its "functional equivalent." *McConnell v. FEC*, 540 U.S. 93, 193 (2003). In addition, because the statute at issue relates to core political speech, it must satisfy strict scrutiny. *Buckley*, 424 U.S. at 39 (direct expenditures are core political expression).

To pass the strict scrutiny test, the State must show that (1) it has a compelling interest, (2) the regulation is necessary to advance that interest, and (3) that the provision is narrowly tailored to do so. *Austin v. Michigan State Chamber of Commerce*, 494 U.S. 652, 657 (1990). The State has a compelling interest to provide the electorate with information about the sources of political contributions. *McConnell*, 540 U.S. at 196. Moreover, requiring disclosure of more than $10,000 assists the public and the media in determining who is spending thousands of dollars to influence the outcome of the ballot question whether to allow commercial slot machine gambling in Maryland. *California Pro-Life Council, Inc. v. Randolph*, 507 F.3d 1172, 1180 (9th Cir. 2007)("With all the hyperbole in campaigning, the financial backing of each side gives voters a yardstick to measure the truth of the assertions.")

The proposed legislation is also narrowly tailored to meet the State's interest in that it "targets and eliminates no more than the exact source of the 'evil' it seeks to remedy." *Frisby v. Schultz*, 487 U.S. 474, 485 (1988). Senate Bill 755 does not prohibit campaign expenditures, it merely requires public disclosure when the amount spent reaches a large dollar amount. *See Citizens Against Rent Control/Coalition for Fair Housing v. Berkley*, 454 U.S. 290, 298- 300 (1981)(striking down a contribution limit on ballot questions as unconstitutional but noting that the city could support its interest by requiring disclosure and outlawing anonymous contributions). Therefore, we believe that Senate Bill 755 is narrowly tailored.

Finally, Senate Bill 755 is neither overbroad nor vague. A statute that "seeks to prohibit such a broad range of protected conduct" is overbroad and thus, unconstitutional on its face. *City Council of Los Angeles v. Taxpayers for Vincent*, 466 U.S. 789, 796 (1984). But "[t]here must be a realistic danger that the statute itself will significantly compromise recognized first amendment protections..." *Eanes*, 318 Md. at 464 (quoting *Broderick v. Oklahoma*, 413 U.S. 601 (1973)). Senate Bill 755 reaches only campaign expenditures that "promote or assist in the promotion of the success or defeat of the constitutional amendment," which is the functional equivalent of express advocacy for or against the constitutional amendment. *McConnell*, 540 U.S. at 193. In addition, "persons of common intelligence" have fair notice when they are required to make disclosures under Senate Bill 755, thus the statute is not vague. *See Brown v. State*, 171 Md. App. 489, 519 (2006)(quoting *Galloway v. State*, 365 Md. 599, 615-616 (2001)). Thus, Senate Bill 755 is neither overbroad nor vague. Because it satisfies these three tests, we believe that the limitation on campaign expenditures is constitutional.

Nonetheless, the legislation raises an additional constitutional issue by requiring persons who make more than $10,000 in expenditures and who distribute or publish campaign material to comply with authority line requirements in Election Law Art. § 13-401. That provision requires that "campaign material published or distributed by any other person" to contain "the name and address of the person responsible for the campaign material." EL § 13-401(a)(ii). The Maryland Attorney General previously opined that "individuals who independently produce campaign material" cannot be required to comply with the authority line requirements of EL § 13-401. 80 Op. Att'y Gen. 110 (1995)(relying on *McIntyre v. Ohio Elections Commission*, 514 U.S. 334 (1995), (determining that an Ohio statute that prohibited anonymous campaign material was unconstitutional as applied to an individual distributing leaflets that expressed her opposition to a sales tax ballot question)). In our view, however, Senate Bill 755 avoids this precise problem by exempting individual independent expenditures from the authority line requirements of EL § 13-401. Additionally, this exemption removes any conflict between the new reporting requirements of Senate Bill 755 and the existing requirements in EL § 13-102.

Moreover, Senate Bill 755 does not violate the constitutional rights of those persons who must comply with the authority line requirements. In *Majors v. Abell*, 361 F.3d 349 (7th Cir. 2004), the court upheld as constitutional, an Indiana statute that required campaign material to identify the person responsible for paying for it. In *ACLU v. Heller*, the Ninth Circuit

determined that a Nevada statute requiring entities to reveal financial sponsors of campaign material was unconstitutional because it was overbroad. 378 F.3d 979 (9th Cir. 2004). The court in *Heller* explained, "A properly time-limited statute might cure some of the over-inclusiveness of the Nevada Statute as an aid to enforcement of other campaign finance regulations, by focusing on the campaign-related speech as to which the public's interest in obtaining complete and timely disclosure is the greatest." *Id.* at 1001. The court went on to opine, "An on-publication identification requirement carefully tailored to further a state's campaign finance laws, or to prevent the corruption, could well pass constitutional muster." *Id.* Based on this statement, we believe that the authority line requirement portions of Senate Bill 755 are constitutional because they have a narrow scope relating to only one ballot question as well as an exemption for individuals acting independently.

In accordance with the foregoing, we hereby approve the constitutionality and legal sufficiency of Senate Bill 755.

Very truly yours,

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DF/SB/kk

cc: The Honorable Roy Dyson
The Honorable Dennis C. Schnepfe
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