

SenZucker_FAV_SB781

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Position: FAV

CRAIG J. ZUCKER
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Montgomery County

Budget and Taxation Committee

Subcommittees

Vice Chair, Capital Budget

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Administration

Chair, Senate Democratic Caucus



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THE SENATE OF MARYLAND
ANNAPOLIS, MARYLAND 21401

Testimony of Senator Craig J. Zucker
Senate Bill- 781 – Election Law – Disclosure of Qualifying Paid Digital
Communications – Revisions
Senate Education, Health, and Environmental Affairs Committee
February 20th, 2020
1:00pm
Position: SUPPORT

Good afternoon Chairman Pinsky, Vice Chairman Kagan and distinguished members of the committee. It is my pleasure to testify today in **support of Senate Bill 781– Election Law – Disclosure of Qualifying Paid Digital Communications - Revisions**. I am very thankful for the committee’s consideration of this important piece of legislation.

In 2018, I passed The Online Electioneering Transparency and Accountability Act. In December of 2019, the Fourth District Court ruled that the Online Electioneering Transparency and Accountability Act granted an injunction against the State Board of Elections from enforcing the law against press and media outlets. However, in the ruling, it was noted that online platforms had to maintain records in a different way than other digital ads. The purpose of this legislation is to revise existing law surrounding digital advertisements.

Maryland has the opportunity to be a leader protecting integrity around our elections. Senate Bill 781 brings transparency to online ads and provides a national road map for other states to follow. This bill does not address enforcement against the press. Nor does the legislation address all of the issues discussed in the 4th Circuit opinion. It addresses one of them.

Senate Bill 781 requires the online platform to maintain a record of advertisements for at least one year after the general election the ad is targeted for. The platform where the ad was displayed must produce the record of the advertisement within 48 hours upon the request of the State Board of Elections. These records will be held to the same standard as all other types of ads placed on a platform.

I urge a favorable report on Senate Bill 781. Thank you for your kind consideration.

MDCD_FWA_SB0781

Uploaded by: Nelson, Tim

Position: FWA



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Lynn Polovoy
iHeartMedia

Associate

Dan Spears
BMI

To: Education, Health and Environmental Affairs Committee
From: Executive Committee, Maryland-DC-Delaware Broadcasters Association
Date: February 20, 2020
Re: Senate Bill 781

The Maryland-DC-Delaware Broadcasters Association ("MDCD") submits this statement regarding Senate Bill 781, "Election Law – Disclosure of Qualifying Paid Digital Communications – Revisions."

The MDCD appreciates legislative efforts to combat foreign interference in the State's elections. The MDCD, however, is concerned that SB 781 retains several of the constitutional infirmities that the federal courts have previously identified in the very law SB 781 seeks to amend.

The MDCD hopes to work with lawmakers should SB 781 progress through the Senate in order to ensure that the Bill (1) accurately and clearly accounts for the realities of the marketplace, and (2) does not impose unnecessary or inappropriate burdens on online platforms.

* * * * *

The MDCD is a voluntary, non-profit trade association that advocates for the interests of its member radio and television stations and, more generally, the interests of broadcasting in Maryland, Delaware, and Washington, D.C.

MDDC Oppose SB781

Uploaded by: snyder, rebecca

Position: UNF



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To: Education, Health & Environmental Affairs Committee

From: Rebecca Snyder, Executive Director, MDDC Press Association

Date: February 20, 2020

Re: **SB 781 - 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 SB 781.

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](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.



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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 SB 781.

CCMD_Tierra Bradford_Fav_SB0781

Uploaded by: Bradford, Tierra

Position: INFO

Testimony on SB 781**Election Law - Disclosure of Qualifying Paid Digital Communications – Revisions
Ways and Means****Position: Informational**

Common Cause Maryland takes no position on SB 781 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 in response to 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 SB 781 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 SB 781. 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 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 SB 781, we are not sure it is the best route to achieve our goals. Thus, we take no position on this legislation

