May 15, 2023

VIA ELECTRONIC AND FIRST-CLASS MAIL

Senator Bryan Hughes
Chairman, Senate State Affairs Committee
P.O. Box 12068
Capitol Station
Austin, TX 78711

Re: HB 1585's Unconstitutional Violation of First Amendment Rights

Dear Senator,

It has come to our attention that the Texas Senate is considering HB 1585, which would flagrantly violate the constitutional rights of those who dare to speak to the public and associate with each other regarding their state's pressing political challenges. We urge the Senate to reject this bill, which defies Supreme Court precedent rejecting unnecessary, invasive, vague, overbroad, and burdensome political disclosure requirements that unlawfully chill First Amendment freedoms of speech and association.

Specifically, HB 1585 is a multi-pronged assault on Texans' constitutional rights and must be rejected. The proposed measures are unnecessarily invasive, vague, and overbroad, making an incomprehensible hash of well-established and important constitutional distinctions governing laws regulating political activity—while adding little to the extensive disclosures already required. Further, the cost of compliance with HB 1585's invasive, vague, overbroad, and confusing rules, or fear of punishment for violating them, will discourage vital and protected political speech and association.

This burden will fall most heavily on Texans who don't have the means to hire qualified lawyers, or even know to hire a lawyer, for having the audacity to address or join their fellow citizens for a common cause. Finally, HB 1585 would provide a pretext for partisan or bureaucratically meaningless investigations and punishment of Texans' political activity. And it would needlessly expose members of the public to politically motivated personal attacks for their perceived beliefs.

Should the state enact such an ordinance, we are prepared to litigate to protect the First Amendment rights of the citizens of Texas.

The Essential Constitutional Rights of Free Speech and Association

The rights to free speech and association are at the core of American freedoms—essential rights to maintain and defend every other right we enjoy. "The First Amendment prohibits government from 'abridging the freedom of speech, or of the press; or the right of the

people peaceably to assemble, and to petition the Government for a redress of grievances.'" *Americans for Prosperity v. Bonta*, 141 S. Ct. 2373, 2382 (2021) (holding a state requirement for nonprofits operating in California to disclose donors of more than $5,000 unconstitutionally infringed on the freedom of association); U.S. Const. amen. I. "[I]mplicit in the right to engage in activities protected by the First Amendment [is] a corresponding right to associate with others." *Id.* (citing Roberts v. United States Jaycees, 468 U. S. 609, 622 (1984)).

The freedom of association "furthers a wide variety of political, social, economic, educational, religious, and cultural ends, and is especially important in preserving political and cultural diversity and in shielding dissident expression from suppression by the majority. Id. (quotations omitted). "[I]t is hardly a novel perception that compelled disclosure of affiliation with groups engaged in advocacy may constitute as effective a restraint on freedom of association as [other] forms of governmental action." *Id*. (quoting *NAACP v. Alabama ex rel. Patterson*, 357 U. S. 449, 462 (1958). As the Supreme Court explained, "[e]ffective advocacy of both public and private points of view, particularly controversial ones, is undeniably enhanced by group association," and we noted "the vital relationship between freedom to associate and privacy in one's associations," *Id*. (internal citations omitted).

These rights are as critical as ever in today's starkly divided and toxic political culture, where ordinary Americans as well as professional politicians across the political spectrum are being assaulted, canceled, fired, harassed, and ostracized for any perceived deviation from the puritanical political orthodoxies of one hostile group or another.

The Bill Is Unnecessary, Vague, Overbroad, and Confusing

The assessment of the constitutionality of a disclosure requirement's burden on the First Amendment "should begin with an understanding of the extent to which the burdens are unnecessary, and that requires narrow tailoring." *Bonta* at 2385. HB 1585's disclosure regime imposes unnecessary burdens on citizens and groups that engage in a broad range of public political advocacy that is unrelated to elections and therefore fails this test. The new statue will not prevent corruption, inform voters, or serve the citizens of Texas by expansively regulating, as it proposes, any communication that mentions an elected official—but it will suppress legitimate political speech and dissent.

HB 1585 defines an "legislative advertising" to include, in addition to a communication actually intended to influence an election, four forms of communication that "supports, opposes, or proposes legislation." Those forms of communication include not only an ad broadcast over radio, television, cable, or satellite, but also internet ads, newspaper ads, ads in a periodical, or a billboard, in addition to "a mass e-mail or text message that involves an expenditure of funds beyond the basic cost of hardware messaging software and bandwidth." The reach of HB 1585 thus would go far beyond the broadcast ads that have been deemed to warrant government regulation as "electioneering communications" under federal election law.

More importantly, the "support, oppose, or propose" standard is so vague and subjective as to be useless. On the federal level, the whole point of Congress enacting a statute regulating electioneering communications was to enable the government to avoid the subjective task of

having to parse the meaning of a political ad. It did this by only requiring, as far as an ad's content is concerned, that the ad identify a candidate—so long as it was also broadcast on TV, radio, or satellite shortly before an election and targeted to the electorate voting on that candidate.

The "support, oppose, or propose" standard necessarily will be applied to mean that any communication criticizing an elected official on the issues or their conduct in office is subject to regulation, and its sponsor required to register and disclose their finances. This dissent suppressing scheme is an outrageous intrusion into Texans' First Amendment rights.

HB 1585 thus unconstitutionally obliterates the key legal distinctions between independent expenditures and legislative advertising, and between independent speech that can permissibly be deemed to influence elections (because it contains express advocacy) from other speech which may be more ambiguous or focus on non-election issues and therefore cannot be regulated like an election-influencing expenditure.

We note that Texas already regulates, as independent expenditures, any "contribution to a candidate or political committee that is offered or given with the intent that it be used in connection with a campaign for elective office or on a measure [,]" a definition that is further limited by Texas Supreme Court precedent, on vagueness concerns, to communications that "'expressly advocate' the election or defeat of an identified candidate[,]" as well as communications that "when taken as a whole and in context, . . .[are made] to influence the outcome of an elective office or ballot measure[.]" *King St. Patriots v. Tex. Democratic Party*, 521 S.W.3d 729, 736 (Tex. 2017); *Fed. Election Comm'n v. Mass. Citizens for Life, Inc.*, 107 S. Ct. 616, 93 (1986); *Buckley v. Valeo*, 96 S. Ct. 612.

In sum, HB 1585 is not only unconstitutionally vague and burdensome; it adds nothing significant to Texas's effort to provide voters with ample disclosure about communications that are clearly intended to influence elections.

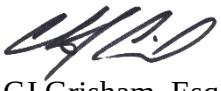
The Burden of Compliance with HB 1585 And Fear of Investigation or Punishment Will Chill Political Speech

The cost of compliance with HB 1585's invasive, vague, and overbroad rules, or fear of punishment for violating them, will discourage vital and protected political speech and association. Compelled donor disclosure for plain speech criticizing elected politicians on the issues will strangle civic engagement, cutting off the resources needed for effective public advocacy. With expert counsel costing hundreds of dollars an hour, political treasurers costing at least hundreds of dollars per month, and the defense of government investigations or litigation costing tens of thousands of dollars, the crushing burden of this futile, complex, and unnecessary new law would illegally smother Texans' political speech and association.

Enactment of HB 1585 would trample Texans' right to political speech and association free from government intrusion, discouraging political discourse and dissent with the threat of investigation and punishment, and costly bureaucratic requirements. The proposed disclosure scheme would threaten to expose ordinary citizens to attacks for their perceived political beliefs

on sensitive issues. If HB 1585 is enacted, we have been authorized to file a lawsuit pursuant to 42 U.S.C. §1983 for the deprivation of constitutional rights. Once we prevail in protecting those rights, we will seek our reasonable attorney fees under 42 U.S.C. §1988(b). We thereby strongly encourage you to reconsider moving forward with the proposed legislation.

Sincerely,



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CC:
Lt. Gov. Dan Patrick
Senator Angela Paxton
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Senator Brian Birdwell
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