May 23, 2019

Dear Chair Holvey, Vice Chairs Williamson and Wilson, and members of the House Committee on Rules:

We are writing to share our concerns with the -4 amendment to HB 2983- requiring covered organizations, including 501(c)(4) nonprofit organizations, to file unconditional donor identification lists with the state of Oregon.

Our organizations work to advance social justice issues in Oregon by encouraging communities of color to engage directly in our democracy. That involves empowering historically marginalized communities to use their collective voices to speak loudly and confidently on issues that impact their lives. We strongly support efforts to expand transparency in elections because voters deserve to know who is spending money to influence their outcome. However, the US Supreme Court has long recognized that disclosure and reporting obligations are subject to constitutional scrutiny because they burden our free speech rights to hold our government leaders accountable. To survive a constitutional challenge, disclosure laws applied to elections must be right-sized to ensure that voters are given the information they need to make informed choices without violating the First Amendment.[1]

Unfortunately, the -4 amendment to HB 2983 misses the mark.

First, we are unclear why this bill, as written, is necessary since it regulates the same activity as the disclosure regime currently applied to political committees, but with higher thresholds.

"(3) 'Covered organization' means a combination of two or more individuals, or a person other than an individual, political committee, petition committee or a not-for-profit corporation that is tax exempt under section 501(c)(3) of the Internal Revenue Code, that both accepts donations and makes political communications."

"(18) "Political committee" means a combination of two or more individuals, or a person other than an individual, that has: (a) Received a contribution for the purpose of supporting or opposing a candidate, measure or political party; or (b) Made an expenditure for the purpose of supporting or opposing a candidate, measure or political party."

"(10) 'Independent expenditure' means an expenditure by a person for a communication in support of or in opposition to a clearly identified candidate or measure that is not made with the cooperation or with the prior consent of, or in consultation with, or at the request or suggestion of, a candidate or any agent or authorized committee of the candidate, or any political committee or agent of a political committee supporting or opposing a measure.

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[1] See the attached Memo for the relevant constitutional analysis applied by the US Supreme Court and US Court of Appeals for the Ninth Circuit.

The bill regulates political speech without clearly differentiating between existing disclosure regimes applied to political committees and independent expenditures. Disclosure in this context means laws that require people to register with the government and file regular reports disclosing the money they raise and spend in elections. Currently, Oregon law requires disclosure for making independent expenditures if an organization does not also raise funds for political speech. Once an organization also raises funds, it is required to file as a political committee. This bill further complicates the process. It is unclear (and potentially unconstitutionally vague and overbroad) if receiving a contribution and making expenditures that meet the thresholds would require the speaker to report as a "political committee" and/or a "covered organization" because these laws regulate the same activity.

The current "political committee" definition is already susceptible to a constitutional challenge because it places a high burden on political speech when the primary or major purpose of the organization is not to influence the outcome of an election. *See Yamada v. Snipes*, 786 F.3d 1182, 1200 (9th Cir. 2015) (recognizing that political committee burdens may not be imposed on organizations that only incidentally engage in political speech). To resolve this problem, we propose that a primary purpose requirement be added to the definition of "political committee" to distinguish it from a "covered organization," which should be subject to less burdensome disclosure requirements. A similar primary purpose requirement is already applied to business corporations that engage in election activity in ORS 260.049, which means these corporations have greater speech protections in Oregon's election code. Treating speakers differently could also subject the bill to a constitutional challenge.

The confusion created by this new disclosure regime is particularly concerning given the excessive penalties included, which are extremely burdensome for smaller organizations.

The penalties listed Section 4 of this bill are excessive and inconsistent with other sections of Oregon's election code. When excessive penalties are applied to political speech, it can impact the constitutionality of the disclosure scheme. The government's interest in applying excessive penalties are weighed against First Amendment protections. In Oregon, the state applies lower level penalties to violations by political committees and candidates, which weakens its justification for the higher levels included in this bill. For instance, penalties for political committees and candidates are limited at $1,000 per violation unless particularly egregious. 150% of the cost of a political communication in almost all cases would be well over that amount and potentially devastating for a smaller nonprofit. Because the state has not provided sufficient justification for penalizing a covered organization at a higher level than other political actors we believe it may be subject to First Amendment and Equal Protection challenges. We recommend that this law apply the same penalty structure that is applied to political committees and candidates in ORS 260.995.

The definition for "Communication in support or in opposition to a clearly identified candidate" burdens free speech rights beyond the scope of an election.

"(c) 'Communication in support of or in opposition to a clearly identified candidate or measure' means:

...

"(B)(i) The communication ~~[contains]~~ involves aggregate expenditures of more than ~~[$750]~~ $250 by a person; (ii) The communication refers to a clearly identified candidate ~~[who]~~ or measure that will appear on the ballot or to a political party; and (iii) The communication is published and disseminated to the relevant electorate within ~~[30]~~ 60 calendar days before a primary election or ~~[60]~~ 120 calendar days before a general election."

This bill regulates issue advocacy that may not be aimed at influencing the outcome of an election. *See, e.g.*, *Citizens United v. Fed. Election Comm'n*, 558 U.S. 310, 369 (2010) (upholding disclaimer requirements on the basis that "the public has an interest in knowing who is speaking about a candidate *shortly before an election*")(emphasis added); *Wis. Right to Life, Inc. v. Barland*, 751 F.3d 804, 836-37 (7th Cir., 2014) (in finding unconstitutional Wisconsin's 30/60 day regulations, the Court cautioned "it's a mistake to read Citizens United as giving the government a green light to impose political-committee status on every person or group that makes a communication about a political issue that also refers to a candidate"). In the second part of the definition in this bill, if you expand the disclosure period from 30 days to 60 days before a primary to 60 days to 120 days before a general election, then you are severely restricting the period when a person can merely mention an identified candidate outside of the scope of an election without triggering speech regulations. The courts do allow the government to regulate mentioning a candidate right before an election. But, this bill goes further than the periods that we have seen upheld. In fact, proximity to an election is a factor that courts use to decide if the speech infringement is constitutional. These thresholds are a far cry from "proximate." We recommend reinstating the expenditure threshold to $750 and the disclosure windows to 30 days before a primary and 60 days before a general election.

This bill compels nonprofit organizations to disclose donors who do not have any connection to the political activity referenced in this bill.

This bill fails to include a donor intent requirement, which means organizations will be required to disclose donors who do not actually fund any political communications. These donors are general supporters of the mission of the organization, not unlike customers who shop at a corporation like Nike because they agree with the company's politics. The difference is that corporations and labor unions have been carved out of this bill. 501(c)(4) nonprofits exist to promote the social welfare of our communities and are only allowed to engage in a minimal amount of candidate-related electoral activity based on IRS requirements. Therefore, the majority of contributions made to these organizations is used to further their mission not to support or oppose candidates.

The FEC requires an element of donor intent to justify its donor disclosure requirements. Similarly, the 9th Circuit Court of Appeals justified donor disclosure on the basis that "being able to evaluate who is doing the talking is of great importance." *Family Pac v. McKenna*, 685 F.3d 800, 808 (9th Cir. 2012). Oregon misses the mark by requiring disclosing donors who have no intent to fund the political speech--or even worse, did not *actually* fund the communication. While overreaching in this bill, Oregon's definition of "contribution" for political committees does require that something of value be given for the purpose of influencing an election, or that it be made to or on behalf of a candidate, political committee or measure. The bill should only compel disclosure of donors who either (1) earmark a donation to support or oppose a candidate or ballot measure OR (2) give a donation in response to a solicitation for that purpose.

Our organizations are committed to working with this legislative body to pass robust disclosure laws that can withstand constitutional scrutiny because we believe in the importance of transparency in elections. However, we are unwilling to chill important public discourse and forego our right to engage in effective issues advocacy and our mandate to hold our elected leaders accountable. The stakes are too high for the communities we represent--communities who are too often intentionally left out of the political process.

Because this bill is unconstitutional in its current form, we urge you to vote NO on HB 2983.

Sincerely,

Amanda Manjarrez, on behalf of Latino Network and Latino Network Action Fund
Ana Del Rocio, on behalf of Color Pac and Oregon Futures Lab
Gustavo Morales, EUVALCREE ACTIO
Tony DeFalco, Verde
Joy Alise Davis, PAALF Action Fund