Senate Committee on Rules
Meeting on 2021-03-09
Public testimony of Kyle Markley
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on Senate Bill 336

Senate Bill 336 would severely and negatively impact the ability of minor political parties and political minorities from effectively advocating for their political positions in Oregon. The bill also has a number of substantial constitutional defects.

Although this bill is positioned as a means to keep "big money" out of politics, its obvious intent is to keep small money out of politics. There is simply no other way to understand a $200 individual contribution limit from individuals to multi-legislative candidate PACs. It is not credible to describe $200 as "big money."

Without explicitly saying so, this bill extinguishes the rights of corporations and unions to contribute to both candidates and political action committees. This cleverly disguised destruction of rights is achieved by using the word "individual" instead of the word "person" throughout the descriptions of limits. For example, is right now, in the middle of a pandemic, a good and reasonable time to strip from the Oregon Nurses Association its ability to fund its own Oregon Nurse Political Action Committee?

1. Limits on accepting contributions to and from multi-legislative PACs

I founded the Statements for Liberty PAC in 2015, which is dedicated to helping Libertarian candidates publish their candidate statements in the Voters' Pamphlet. The limit of $2,000 established in Section 2 subsection (2)(b)(A) will prohibit my PAC from fully funding candidate statements for statewide candidates, which cost $3,000. Minor party candidates seldom have much financial support, and this limit will stifle one of the only sources of funding they actually have. The limit should be raised to at least the level of the cost of the Voters' Pamphlet statement.

The Statements for Liberty PAC would be considered a "multi-legislative candidate political committee" and therefore subject to contribution limits of $200 per election from any individual. As the PAC's founder and primary financial supporter, that limit is ridiculously low. With a $200 per-election limit I could not even pay for the PAC's website expenses myself, much less contribute funds toward the PAC's actual major expense of helping candidates afford their candidate statement filing fees.

Such low contribution limits ensure that only political positions that are *already* popular will be supported by PACs, due to the limits-enforced necessity of finding a large *number* of donors to fund their political activity. This is outrageously unfair to political minorities because it takes away our practical ability to form *effective* political organizations that could increase the popularity of our ideas.

Statements for Liberty has absolutely relied on large donations in order to be effective at its mission. Given that our bylaws prevent the PAC from giving financial assistance to a candidate beyond helping with their candidate statement fees, the prospect of *quid pro quo* corruption – the "compelling government interest" underlying all government authority to regulate campaign contributions – is absent here. *McCutcheon v. FEC*, 572 U.S. 185 (2014) at 19: "Spending large sums of money in connection with elections, but not in connection with an effort to control the exercise of an officeholder's official duties, does not give rise to such *quid pro quo* corruption."

2. <u>Expenditure controls are unconstitutional</u>

Section 3, subsection (3)(b) states that a multi-legislative candidate PAC "may not make independent expenditures." Independent expenditures may not be limited. *Citizens United v. FEC*, 558 U.S. 310 at 42: "… we now conclude that independent expenditures, including those made by corporations, do not give rise to corruption or the appearance of corruption."

Section 3, subsection (3)(c) states that a multi-legislative candidate PAC "may make expenditures for the purpose of influencing the outcome of an election only in the form of contributions." I needn't have worried about how to pay for my PAC's website, because my PAC would not be allowed to have a website at all! A PAC's website itself is political advocacy for the purpose of influencing the outcome of elections, but without being able to make expenditures except in the form of contributions, it would be impossible to pay the website hosting fees. It is flabbergasting how cavalierly this bill disregards the First Amendment.

3. <u>Limits on organizational control are unconstitutional</u>

Section 3, subsection (7)(a) prohibits a person from controlling more than one type of political committee at a time. The First Amendment prohibits the state from limiting the number and type of political organizations a person may participate in, or in what capacity. The right to free association protects private political organizations' decisions about how to select their leadership. *Eu v. San Francisco County Democratic Central Committee*, 489 U.S. 214 (1989).

I am personally a director of the Libertarian Party of Oregon, and of the Libertarian Party of Washington County, and of the Statements for Liberty PAC, and as a candidate for elected office have previously headed principal campaign committees. The State of Oregon may not compel me to abandon even one of my political activities, and certainly not all except one of them. The First Amendment exists precisely to protect my political activity against a State that would so brazenly curtail it.

4. <u>Small Donor Committees</u>

Section 3, subsection (5)(b) is both unimplementable and unconstitutional. How could a small donor committee know what an individual's contributions to *other* small donor committees were in order to enforce the aggregate contribution limit? And aggregate contribution limits are not allowed at all under *McCutcheon v. FEC*.

I confess that I do not understand how small donor committees are intended to function. Could it be that they are supposed to do nothing but accept contributions and forward them to candidates? But what productive function do they serve as middle-man? Why shouldn't an SDC's donors give directly to the candidate, instead? If a candidate has the support of one or more SDCs, they can receive additional money from some donors, beyond what they would be allowed to contribute directly to the candidate, so surely that is the point. But why create a middle-man instead of increasing the contribution limit?

I cynically expect that, like other measures in this bill, SDCs are intended to cement the position of the already-powerful. Major political parties and political interests will surely help to organize the creation and maintenance of SDCs, thereby increasing the amount of money that their preferred candidates are able to receive. Minor political parties and interests will not have the resources to accomplish this, putting them at even further disadvantage, hamstrung by state-imposed limits and administrative burdens that their competitors have the scale to work around. SDCs serve the interests of the well-connected, not of the public.

5. Limits on accepting contributions from multiple political parties

Section 2 subsection (2)(c) is intended to prohibit candidates from accepting contributions from more than one political party committee. This creates a significant problem for “fusion” nominees who receive the nomination of more than one political party, forcing them to choose one single party to receive support from, and alienating the other(s). Especially for candidates who are nominated exclusively by multiple minor parties (e.g. Drew Layda in 2018), their cross-party support may be an important aspect of their campaign. Freedom of association protects political parties and their choice of candidate to support. This provision is surely unconstitutional.

6. An exemption for legal costs is needed

The limits established in Sections 2 and 3 imperil the Article I, Section 10 rights of candidates, political parties, and other political committees to access the courts.

The ballot access of minor parties and their candidates are often challenged by their opponents. For example, in 2020, Republican candidate Jo Rae Perkins unsuccessfully sued to remove Libertarian candidate Gary Dye – and indeed, the entire Libertarian Party slate of nominees – from the ballot.

The Libertarian Party of Oregon had been engaged in litigation over matters of internal governance for the majority of the last decade at an expense of hundreds of thousands of dollars. The legal fees associated with that litigation, and to defend the Party’s candidates in 2020, were paid by a generous individual’s in-kind contributions. Those contributions far exceeded the Party’s budget for ordinary political work.

Under SB 336’s limits, it would have been impossible as a practical matter for the Libertarian Party of Oregon to defend itself in court. Contributions made toward legal costs need a broad exemption from limits, not only to protect access to the courts, but also in recognition of the fact that participating in litigation does not raise the specter of *quid pro quo* corruption and is therefore beyond the reach of the state’s anti-corruption interest.

Conclusion

This bill is a program of protectionism for the major parties and their current power structures and influencers, and creates insurmountable burdens against minor parties, grassroots activism, and private organizations with legitimate political interests in candidates and elections.

Although it cannot keep “big money” out of politics – nothing can, because independent expenditures cannot be limited – it would succeed spectacularly in keeping medium and small money out of politics, while utterly destroying all PACs that are primarily supported by organizations such as corporations or unions. Keeping *organizations* out of politics certainly serves the interests of the powerful: that leaves no space for organized opposition.

Furthermore, this bill is deeply constitutionally flawed and many of its major provisions would be eviscerated by the courts, leaving a difficult-to-predict patchwork of incohesive regulations as a result.

The people of Oregon deserve a *lot* better than SB 336.