House Committee on Rules
Meeting on 2021-03-30
Public testimony of Kyle Markley
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on House Bill 3343

HB 3343 would set contribution limits so low that it would harm grassroots political activism rather than help it. Its effect on local political party groups is very unclear. It would violate the rights of politically active minors while putting them at risk. And it lacks an exemption for political committee legal costs, which is sorely needed due to its dog's breakfast of constitutional deficiencies, which range from unconstitutional limits, age discrimination, a separation of powers violation, and concerns around the Takings and Excessive Fines clauses.

1. Limits on accepting contributions to and from multicandidate committees are too low

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 limits established in Section 3 subsection (2)(b) are so low – $1,000 for statewide candidates, $500 for others – that they would prohibit my PAC from fully funding candidate statements. 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 "multicandidate committee" and therefore subject to the contribution limit in Section 3 subsection (3) of $500 per calendar year from any individual. As the PAC's founder and primary financial supporter, that limit is ridiculously low. With that limit I could cover the cost of the PAC's website myself, but could contribute little 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 medium-size donations of a few thousand dollars 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."

The proponents of campaign finance limits are always talking about how they want to empower grassroots activists. Well I am a grassroots activist, with no connections to either major political party, or to any power centers in business or in labor, and I'm telling you that this bill will kill my PAC and further disadvantage our genuine grassroots candidates.

2. Limits on candidate self-funding are unconstitutional

Section 4 subsections (1) and (2) would limit the amount of money a candidate could contribute to their own campaign or expend on behalf of their own campaign. Limits on candidate self-funding have been unconstitutional since *Buckley v. Valeo*, 424 U.S. 1 (1976) at 53:

> The primary governmental interest served by the Act – the prevention of actual and apparent corruption of the political process – does not support the limitation on the candidate's expenditure of his own personal funds. As the Court of Appeals concluded: "Manifestly, the core problem of avoiding undisclosed and undue influence on candidates from outside interests has lesser application when the monies involved come from the candidate himself or from his immediate family." 171 U.S.App.D.C. at 206, 519 F.2d at 855. Indeed, the use of personal funds reduces the candidate's dependence on outside contributions, and thereby counteracts the coercive pressures and attendant risks of abuse to which the Act's contribution limitations are directed.

I understand that you are trying to "level the playing field" by taking away the advantage this bill would create for wealthy self-funding candidates. But self-funding isn't the problem you think it is – just ask Michael Bloomberg, who spent *sixteen times*[1] as much as Joe Biden in the 2020 Democratic Presidential primary, yet easily lost. Even ignoring the evidence that what you're trying to do is unnecessary, you need to know that trying to "level the playing field" is also unconstitutional. *Buckley v. Valeo*, 424 U.S. 1 (1976) at 48 (emphasis added):

> It is argued, however, that the ancillary governmental interest in equalizing the relative ability of individuals and groups to influence the outcome of elections serves to justify the limitation on express advocacy of the election or defeat of candidates imposed by 608 (e) (1)'s expenditure ceiling. But **the concept that government may restrict the speech of some elements of our society in order to enhance the relative voice of others is wholly foreign to the First Amendment**, which was designed "to secure `the widest possible dissemination of information from diverse and antagonistic sources,'" and "`to assure unfettered interchange of ideas for the bringing about of political and social changes desired by the people.'" *New York Times Co. v. Sullivan*, supra, at 266, 269, quoting *Associated Press v. United States*, 326 U.S. 1, 20 (1945), and *Roth v. United States*, 354 U.S., at 484.

It doesn't matter whether the drafters of this bill were unaware of these constitutional problems, or whether legislative counsel was asleep when reviewing the bill, but now that I have pointed out these unambiguously unconstitutional provisions, I trust that they will be removed.

Similarly, subsection (3) will also have to go. Loans from the candidate to their campaign have no nexus with *quid pro quo* corruption.

I must mention that I have personally contributed more than $10,000 to my own campaigns for State Representative in the past, so the actual effect of that limit in my case would have been to stifle a grassroots candidate's campaign, protecting the major party candidates from my competition. Again, the rhetoric is always that you're trying to empower the little people, but the actual effect is to build a moat of protection to benefit the major parties and their candidates.

1 https://tinyurl.com/no107-bi

3. Political party finance committees are unclear

HB 3343 defines a "political party finance committee" but it is worryingly unclear what effect this will have on local (e.g. county) political parties. The definition in Section 2 subsection (12) talks about "a subdivision of a political party" but current and future local groups of Libertarians in Oregon are fully independent organizations, not subdivisions of the Libertarian Party of Oregon, and not necessarily even affiliated with the state party.

Section 3 subsections (2)(c) and (4) prescribe aggregate limits related to "all of a political party's finance committees." As a director of the Libertarian Party of Oregon, and of the as-yet-unaffiliated Libertarian Party of Washington County, I do not know what this bill would mean for two of the organizations I am involved with.

To make things even more interesting, if you check ORESTAR, you will see that there are two committees named Libertarian Party of Oregon and two committees named Libertarian Party of Washington County. They are all independent, and not all on friendly terms with each other. I do not see how, as a practical matter, separate organizations could coordinate their contributions and expenditures to avoid violating this bill's aggregate limits.

4. An exemption for legal costs is needed

The limits established in Section 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 HB 3343'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.

5. Discriminating against children while putting them at risk

Section 3 subsection (5) limits people younger than 16 years to contribution limits of $200. Why? When did children become a major source of *quid pro quo* corruption? When did their political opinions become less equal than those of adults? When did the First Amendment start allowing age discrimination?

You must be aware that enforcing this provision will require political committees to gather and report the ages of their contributors, and that since campaign finance transactions are published on ORESTAR, you will be creating a public database with the names, ages, and addresses of minors. I don't think that's a good idea.

6. Violation of the separation of powers

Section 6 subsection (6) provides that courts should raise any limits that are unconstitutional, rather than strike them down. This raises grave separation of powers concerns. According to the Oregon Constitution, Article III, Section 1:

> The powers of the Government shall be divided into three separate branches, the Legislative, the Executive, including the administrative, and the Judicial; and no person charged with official duties under one of these branches, shall exercise any of the functions of another, except as in this Constitution expressly provided.

This bill would require a judge to determine a specific amount for a limit which would be constitutional, which in addition to being a greatly increased burden for the court, actually modifies the limit itself – literally giving the judge dictatorial legislative authority to set the amount of the limits, which the Oregon Constitution forbids.

7. Confiscation of political donations is obscene

Section 6 subsection (5) would confiscate all money remaining in candidate committees after the election. These are funds donated by people who specifically intended to support that candidate. Those donors did not consent to their money instead being taken to help pay for the Voters' Pamphlet.

If you have a strong argument for why this confiscation would not be a facial violation of the Fifth Amendment's takings clause, I would like to see it. (*Horne v. Department of Agriculture*, 576 U.S. 350 (2015) held that the takings clause applies to personal property, not just to real property.)

At minimum, the bill should be amended to explicitly allow for refunds of unspent donations.

8. Excessive fines

Section 7 subsection (2) requires that fines for violations of HB 3343 be "not less than five times, nor more than 20 times, the amount of the unlawful contribution or expenditure." That is an enormous minimum fine, and a staggeringly large maximum fine, and these invite a challenge under the Eighth Amendment's excessive fines clause. (Since *Timbs v. Indiana*, 586 U.S. ___ (2019), the excessive fines clause is incorporated under the Fourteenth Amendment and applies against state governments.)

9. Emergency clause

Section 13 is yet another abuse of an emergency clause to block a potential referendum. By HB 3343's own terms in section 12, the limits would not become operative until the first day after the next general election (in 2022), so what exactly is the emergency? The bill says it will preserve "the public peace, health and safety" but none of its provisions are related to peace, health, or safety.