House Committee on Rules
Meeting on 2021-05-13
Public testimony of Kyle Markley
kyle@kylemarkley.org
on House Bill 2680-1

Rep. Rayfield's nonpublic workgroup has published a whopping 45-page amendment to an originally 9-page bill a mere two days before the public hearing on that amendment. It is impossible for members of the public (cf. members of the nonpublic workgroup) to digest and fully comment on such a long amendment in such a short period of time.

I would have more to say about this amendment if I had adequate time to review it and compose my thoughts, but the process has not afforded the necessary time. I hope that members of this Committee will be responsibly skeptical of accepting such large changes proposed with such little time for people to consider those changes and provide their input.

1. Definition of "person" is unclear and underinclusive

Section 2, subsection (4) defines a "Person" (who will be allowed to make contributions) to be only an individual, labor union, or corporation. The word "individual" is undefined, which is a startling defect. So, are estates of deceased humans included or excluded? It needs to be obvious whether political bequests may or may not be made in a will or estate plan – and the right answer is that of course they should be allowed. Are conjoined twins (who are not biologically individuals) allowed to make political contributions? What about pregnant women, who are – temporarily – not biological individuals, either?

This definition encompasses labor unions and corporations but excludes all manner of other entities without any known justification. Why are partnerships excluded? Why are trusts excluded? Why are nonincorporated associations like the Oregon State Grange and its subordinate units excluded? There is no reason to anoint labor unions and corporations as "more special" than any other entity or form of association.

There is some allowance in Section 4 for a "membership organization" to contribute to a small donor political committee, but not to any other kind of political committee, an exception that deserves close scrutiny and demands a justification.

2. Contribution limits favor certain committees over others

Section 3's contribution limits allow candidates to receive highly different amounts depending on the contributor. For example, a candidate for State Representative can receive $1,000 from a person, multicandidate committee, or principal campaign committee – but $10,000 from a political party multicandidate committee, or $40,000 from a caucus committee.

There is no clear reason why these differences should exist. Why are caucus committees super-powered compared to political party committees or other kinds of committees? Why are political party committees super-powered compared to non-party multicandidate committees?

The Libertarian Party of Oregon's bylaws have been interpreted to prohibit it from directly funding candidate campaigns. Against that backdrop, I founded the Statements for Liberty PAC in 2015, dedicated to helping Libertarian candidates publish their candidate statements in the Voters' Pamphlet. Under the limits imposed for multicandidate committees, my PAC would be unable to fund Voters' Pamphlet statements for statewide candidates (which cost $3,000).

If my PAC were folded into the LPO, it would enjoy much higher limits. But no public interest is served by incentivizing political parties – rather than independent PACs – as political power centers. The rational responses to this legislation would be for the LPO to change its bylaws and for my PAC to reorganize as an organ of the political party. But these responses would be a reaction to what is, frankly, unnecessary and unjustified government meddling into the affairs of these organizations. The independence of multicandidate committees is a feature, not a bug, and they should not be legislatively disadvantaged.

3. <u>What is "substantially the same group of persons"?</u>

Section 3, subsections (7)(a)(B) and (8), and Section 4 subsections (6)(c)(B) and (7) use the undefined phrase "substantially the same group of persons" to describe control over organizations. This needs a clear definition.

For example, if one political committee run by a group of 5 directors makes a contribution to another political committee run by group of 9 directors, and 3 of those directors are in common – a majority of one committee but a minority in the other – is that control by "substantially the same group of persons," or not? A specific threshold is needed rather than the vague word "substantially," as well as clarification about whether that threshold needs to be met simultaneously across all relevant organizations simultaneously.

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

Section 4, subsection (6)(a) provides that a person may not control more than one of each 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).

It is particularly troublesome that this provision would limit control of measure and recall committees. There is absolutely nothing wrong with a single individual wishing to promote or oppose more than one ballot measure, or more than one recall. This provision would limit valuable civic participation for no reason at all.

5. <u>Controls on expenditures related to ballot measures are unconstitutional</u>

Section 6, subsection (1)(g) would add a restriction that "Only a political committee that operates as a measure political committee may use amounts received as contributions to support or oppose one or more measures." Because there is absolutely no risk of *quid pro quo* corruption relating to ballot measures, this restriction would not survive strict scrutiny and therefore is unconstitutional.

Political parties regularly support or oppose ballot measures. You may not stop them, or any other political groups, from doing so.

6. Loyalty in political organizations

Section 20, subsection (1)(b) provides that entities may not "provide or promise any benefit or impose or threaten any detriment due to a decision by an employee or contractor on whether to make a contribution or independent expenditure to support or oppose a candidate."

The goal of this section – to protect individuals from undue influence over their decisions about campaign contributions – is laudable. However, political organizations have a specific interest in loyalty. As written, this provision forbids a candidate's principal campaign committee from firing an employee who makes a contribution to an opponent of the candidate they work for, when such plain disloyalty would be a very reasonable basis for dismissal. A similar interest exists for other types of political organizations.

This provision appears to violate the right to free association of political organizations as guaranteed by the First Amendment. This defect needs to be corrected.

7. No taxpayer funding of politicians

Sections 10-15 create a system of matching funds. As expected, it sets the thresholds to qualify for those funds high enough to exclude minor party and grassroots candidates, effectively creating a protectionist subsidy for the groups who currently hold power, designed to further cement that power. It should not need to be said that this is obviously and thoroughly wrong.

Although Section 16 allows funding this system through a voluntary income tax check-off, which would be proper, Section 14 subsection (2) also allows for "moneys appropriated to the fund by the Legislative Assembly," which is very much improper. As Thomas Jefferson explained in the Virginia Statute for Religious Freedom in 1786, a forerunner of the First Amendment:

> … to compel a man to furnish contributions of money for the propagation of opinions which he disbelieves and abhors, is sinful and tyrannical; that even the forcing him to support this or that teacher of his own religious persuasion, is depriving him of the comfortable liberty of giving his contributions to the particular pastor whose morals he would make his pattern …

As an ethical matter, it is plainly wrong to force people to subsidize political speech that they disagree with. People who do not contribute to political candidates have already revealed – by not making such contributions voluntarily – that they do not want to do so! Spending general taxpayer revenue for this purpose *means* disregarding individual judgment about what candidates are worthy of support, and disregarding the very clear revealed preference of the overwhelming majority of taxpayers that *none of them are*.

As a perennial minor party political candidate, I am acutely aware that a matching funds system would result in me being compelled to subsidize the campaigns of my political opponents while simultaneously being excluded from receiving a subsidy due to the out-of-reach qualification thresholds. And even if I could qualify, using matching funds would be an ethical issue, because it is just as wrong to compel people to fund my political speech as it is to force me to fund anyone else's.

No welfare for politicians!

8. An exemption for legal costs is needed

Contribution limits will imperil the Article I, Section 10 rights of candidates and political committees other than political parties to access the courts. Although this amendment allows political parties – uniquely – to have an administrative committee capable of receiving unlimited funds and using them for legal defense, it does not afford the same opportunity to principal campaign committees or multicandidate committees. These types of committees may also need legal defense. For example, to contest a fine issued by the Elections Division.

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.

There is a very real danger that contribution limits will make it impossible as a practical matter for political committees other than political parties to defend themselves 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.

9. Why are public records addressed in this amendment?

Section 4, subsection (5)(b)(B) creates an exception to public records law. This sticks out as unusual for a bill which is otherwise about campaign finance. Why is this here? It surely rubs against the anti-privacy, pro-disclosure thrust that is typical of campaign finance law. Is this bill trying to turn membership organizations into dark money centers, or something?