Senate Committee on Rules
Meeting on 2022-02-10
Public testimony of Kyle Markley
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on Senate Bill 1561

Senate Bill 1561 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.

1. <u>Extreme ban on contributions from organizations</u>

This bill permits candidates and political committees to receive contributions *only from* individuals and designated types of political committees. It completely extinguishes the ability for other types of associations, such as corporations, unions, and fraternal organizations to contribute to candidates and committees that support their views and values. Such organizations could not even fund a political committee as an alternative to supporting a candidate directly. This would stifle the support from all organizations other than designated political committees. This is extreme and unwarranted – it is important for candidates to hear the approval (and disapproval) of organizations, which after all stand for groups of individuals with common interests. Cynically, this appears designed to concentrate political power in the hands of explicitly political groups, rather than the more diffuse structure we have today.

2. <u>Discriminates against minor party candidates</u>

This bill sets the contribution limits to be independent for each election (section 2 subsection (3)(a)). The State conducts a primary election for the benefit of only the major parties, and not for the minor parties. Major party candidates (who face even nominal competition) will receive double the contribution limit compared to minor party candidates because they stand for two elections. Whatever they don't spend in the primary election – and most primaries are not competitive – they get to keep for the general election.

Although some minor parties conduct their own private primary elections, it is not clear from the text of this bill whether that would entitle their candidates to independent contribution limits for the privately-conducted primary election, or not. I would guess that it does not. And minor parties that *don't* conduct their own private primary elections would surely have only the limits for the general election.

This is just another way that that the major parties use their power to build a moat of protection around themselves. You will enjoy separate contribution limits for the primary and the general elections, will rarely spend much in your primary, and then compete against minor party challengers who by law will be limited to raising half as much money as you.

I call foul. Stop legislating disadvantages for minor parties and their candidates.

3. <u>Contribution limits from political committees are too low</u>

I founded the Statements for Liberty PAC in 2015, which is dedicated to helping Libertarian candidates publish their candidate statements in the Voters' Pamphlet. It would be considered a "multilegislative candidate political committee" under this bill.

The limit of $2000 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.

4. Contribution limits to political committees are too low

The Statements for Liberty PAC would be limited to contributions of $200 per election from any individual (section 3 subsection (3)(a)). Speaking 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."

I have also been a significant financial supporter of the Libertarian Party of Oregon, often contributing thousands of dollars toward the party's privately-funded primary election. The party is funded by a fairly small number of people and has has a long track record of relying on large donations – greater than the maximum of $2000 set in section 3 subsection (4) – in order to pay for expenses related to its primary election. Such a low contribution limit would definitely imperil the ability of the LPO to continue conducting primary elections, and therefore to nominate a large number of candidates at the general election.

5. Unconstitutional restriction on expenditures

Section 3 subsections (3)(b)-(c) provide that multilegislative committees "may not make independent expenditures" and may make expenditures to influence an election "only in the form of contributions". That is, they may only exist as pass-through entities that forward money to candidates and may not engage in other forms of candidate support.

This is an extreme limitation, and would for example prohibit a committee from placing favorable statements about the candidates it supports on its own website. (Its website hosting expenses are an expenditure, but the statements on the website could be interpreted as intended to influence the outcome of an election, a purpose forbidden by this bill.)

Yet, political organizations possess free speech rights that cannot be extinguished in this manner. The United States Supreme Court has consistently struck down as unconstitutional any limits on independent expenditures. *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." The First Amendment certainly protects these organizations' right to engage directly in political speech.

Section 3 subsection (5)(c) would similarly limit small donor committees to make expenditures "only in the form of contributions". It is unconstitutional in the same manner as the restrictions on multilegislative committees.

This bill's attempt to control expenditures calls into question what real purpose of multilegislative and small donor committees would serve. If they can do nothing but forward contributions to candidates, they are merely middle-men. Their existence increases the total amount of money a candidate could receive from an individual by allowing contributions to be indirect. But wouldn't it be simpler to increase the candidate's contribution limit rather than proliferate otherwise-useless pass-through committees?

6. Limits on organizational control are unconstitutional

This bill would forbid any person from controlling more than one political committee of each type (section 3 subsection 7). This is unconstitutional. The First Amendment 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):

> "Freedom of association also encompasses a political party's decisions about the identity of, and the process for electing, its leaders." at 229.
>
> "Because the challenged laws burden the associational rights of political parties and their members, the question is whether they serve a compelling state interest." at 231.
>
> "In the instant case, the State has not shown that its regulation of internal party governance is necessary to the integrity of the electoral process." at 232.
>
> "In sum, a State cannot justify regulating a party's internal affairs without showing that such regulation is necessary to ensure an election that is orderly and fair." at 233.

Moreover, this restriction creates an unfair advantage for major parties and their candidates. Major parties have the scale and funding to easily ensure that every political committee is headed by separate people. They could, for example, simply hire people to fill leadership roles. Minor parties do not have the capacity to do this, with their parties and committees staffed by volunteers, and a shortage of volunteers naturally resulting in multiple roles for each talented volunteer.

7. What is "substantially the same group of persons"?

Section 3 subsections (7)(b)(B) uses 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.

8. Impossible rules for small donor committees

Section 3 subsection (5)(b) makes small donor committees responsible for knowing how much money a contributor has given to *other* small donor committees, in order to enforce an aggregate contribution limit of

$1000 across all small donor committees. That is impossible to implement – they do not have the necessary information. It's also unconstitutional; aggregate contribution limits are not allowed under *McCutcheon v. FEC*.

9. Fusion candidates

Section 3 subsection (2)(c) prohibits legislative caucus committees from contributing to a candidate not registered with that party. Section 2 subsection (2)(c) prohibits candidates from receiving contributions from more than one legislative caucus committee or more than one political party committee.

These provisions create significant problems 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. The freedoms of speech and association surely protect a political party's right to support the candidate it has nominated. These provisions of the bill are surely unconstitutional.

10. Exemptions for legal costs are 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 this bill's limits, it would have been impossible as a practical matter for the Libertarian Party of Oregon to defend itself in court from either of these challenges. 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.

11. Public financing of political speech is wrong

This bill would create a system of public financing for political candidates. 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.

Section 16 subsection (2) provides that the Grasssroots Donor Election Fund will be automatically funded each biennium from the state General Fund. This is extraordinarily 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 taxpayers 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!

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 1561.