Senate Committee on Rules
Meeting on 2022-02-10
Public testimony of Kyle Markley
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on Senate Bill 1526

1. Favoritism to certain kinds of organizations

This bill allows "membership organizations" (unions) to make contributions to small donor committees while forbidding any other kind of non-political organization from doing so (section 4 subsection (6)(a)(B)). This is rank favoritism to enhance the influence of one kind of organization over others, to the obvious benefit of the political party currently holding the majority in the legislature.

2. Unconstitutional preemption of local provisions

Section 3 subsection (1)(c) allows candidates for local offices to receive unlimited contributions from small donor committees "notwithstanding any local provision". That is not constitutional. Measure 107 added language to the Oregon Constitution granting independent legislative authority to local governments to limit contributions. State law may not remove that authority.

3. Limits must not limit participation

The Supreme Court has allowed contribution limits only to counter *quid pro quo* corruption of elected officials. "When *Buckley* identified a sufficiently important governmental interest in preventing corruption or the appearance of corruption, that interest was limited to *quid pro quo* corruption." *Citizens United v. FEC,* 558 U.S. 310 at 43. With this context, you should seek to identify what level of contribution is likely to create undue influence – not to set the limits as low as you can get away with. I'll suggest that no amount less than about 5% of a political candidate's campaign budget would lead them to, if elected, treat that donor with favoritism. So, for an example with nice round numbers, if you think campaigns are going to cost around $100,000, then the contribution limit should be no less than $5,000. If you limit contributions that don't risk undue influence, you limit political speech – which is a harm to the public – for no anticorruption benefit.

Contribution limits to groups other than principal campaign committees are farther removed from the potential for *quid pro quo* corruption and should consequently be higher than limits for donations to candidates.

I founded the Statements for Liberty PAC in 2015, which is dedicated to helping Libertarian candidates publish their candidate statements in the Voters' Pamphlet. My PAC would become a "multicandidate political committee" under this bill. Minor party candidates seldom have much financial support, and my PAC is one of the only sources of funding they actually have. It is also important to note that the PAC's bylaws prevent it from giving financial assistance to a candidate beyond helping with their candidate statement fees. To fulfill its mission, my PAC needs to be able to contribute the Voters' Pamphlet fees, which are $3,000 for a statewide office or $750 for the legislature. But even more importantly, we need to be able to raise enough money to pay for those fees.

Low contribution limits to multicandidate committees will 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.

As the PAC's founder, most of its financial support has come from me, personally. I have contributed a few thousand dollars in each election cycle, and need to be able to keep doing that. We have absolutely relied on receiving donations from a small number of people. Frankly, we want to support a larger number of candidates than we actually have in donors. If a large donation is going to get split up to support many candidates, the rationale for limiting that donation evaporates. Multicandidate committees need higher limits in order to support multiple candidates.

I am a grassroots activist with no connections to either major political party, or to any power centers in business or in labor. If you truly value grassroots activism, you will take my input to heart, and not make limits so low that they suffocate my PAC.

4. Limits on organizational control are unconstitutional

This bill would forbid any person from controlling more than one political committee of each type (section 4 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.
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> "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.

This bill's attempt to control the leadership of ballot measure and recall committees (section 4 subsections (7)(a)(C) and (F)) is particularly noxious. These kinds of political committees pose absolutely no risk of *quid pro quo* corruption of elected officials and the government therefore has no legal foundation whatsoever to attempt to control their leadership. This is a brazen overreach that would immediately fail when tested in court.

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

Section 3 subsections (6)(a)(B) and section 4 subsection (7)(b)(B) both 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.

6. Cannot limit speech about ballot measures

Section 6 subsection (1)(g) would forbid political committees other than measure committees from making expenditures supporting or opposing ballot measures. This is an unconstitutional infringement on committees' speech. Speech about ballot measures poses absolutely no risk of *quid pro quo* corruption of elected officials and is therefore beyond the government's power to limit. This provision, too, would immediately fail when tested in court.

Moreover, it would prohibit speech that is completely ordinary and even expected. To wit, this bill would prevent political parties and candidates from using their Voters' Pamphlet statements from supporting or opposing ballot measures. The First Amendment does not permit such limits.

7. Exemptions for legal costs are needed

The limits established in Sections 3 and 4 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.

8. 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 12 provides that the Small Donor Election Fund may be funded by the legislature using taxpayer dollars. 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 (but not by 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 1526.