CENTER *for* COMPETITIVE POLITICS
Congress shall make no law...

Testimony of Allen Dickerson
before the
MARYLAND COMMISSION TO STUDY CAMPAIGN FINANCE LAW
June 13, 2012

Mr. Chairman and members of the Commission:

I am Allen Dickerson, Legal Director of the Center for Competitive Politics, a 501(c)(3) organization dedicated to promoting and preserving the political speech, press, and petition rights enshrined in the First Amendment to the Constitution.

Thank you for the opportunity to testify today. Opportunities to openly discuss the intricacies of our campaign finance system are rare and valuable. I am grateful for the chance to speak with you.

Much of my testimony will suggest changes and reforms to Maryland's campaign finance laws. However I do want to quickly note two elements of the Bay State's regime that should be praised.

1. Unlike some states, such as Alaska[1], Florida[2], or Massachusetts[3], Maryland has enacted reasonable contribution limits. Far too many states have chosen to read *Buckley v. Valeo* and its progeny as blithely permitting all contribution limits without limit. It is refreshing to see that Maryland recognizes the need for citizens to directly associate with their favored candidates, allowing those candidates to make their pitches to the broader electorate.

2. Unlike 22 other states, Maryland permits both corporations and labor unions to contribute directly to candidate committees. As the Supreme Court properly stated in *Citizens United*, speech cannot be banned solely because of the associational form of the speaker.

However, the Center for Competitive Politics believes that the following changes would help ensure the constitutionality of Maryland's election laws.

1. *Index Contribution Limits to Inflation*

In 2002, the Federal government raised the maximum direct contribution limit from $1,000 to $2,000 and indexed that limit to inflation. The rationale for doing so is obvious, without indexing, the value of the maximum contribution decreases every year.

[1] ALASKA STAT. § 15.13.1070 (2012).
[2] FLA. STAT. § 106.08 (2012)
[3] MASS. GEN. LAWS ch. 55 § 6, 6A, 7, 8 (2012)

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For instance, the $1,000 limit enacted at the Federal level in 1974 was actually the equivalent of over $3,600 when the law was amended in 2002.

The state is permitted to limit monetary contributions in order to deter corruption or the appearance of corruption. But there is a limit to its discretion. In *Randall v. Sorrell*, Justice Steven Breyer listed five factors which, when taken together, may void a contribution limit as impermissibly low. One of those factors was a lack of inflation indexing. The Court pointedly noted that "[a] failure to index limits...means that future legislation will be necessary to stop that almost inevitable decline, and it thereby imposes the burden of preventing the decline upon incumbent legislators who may not diligently police the need for changes in limit levels to ensure the adequate financing of electoral challenges."[4]

Put differently: incumbents may have no incentive to raise contribution limits, as doing so may help fund their opponents. This is precisely the sort of manufactured crisis that lowers public confidence in the government. Again, the Federal example is a good one. Nearly 30 years passed before the Congress chose to raise limits, but still did so in a way that fell over $1,600 shy of the proper inflation adjustment.

It should be noted that *Randall* arose in the context of Vermont, a state where low contribution limits effectively prevented one of the major parties from mounting challenges to incumbent legislators, leading to a substantial imbalance in favor of one party.

2. *$50 Disclosure*

Under present Maryland law, any political contribution of $51 or more must be disclosed to the government. All committees must record the name and address of each contribution they receive in their account book.

At the Federal level, committees are not required to even track contributions until they reach a threshold of $50. Reporting of names and addresses does not kick in until $200 – about one-tenth of the Federal maximum contribution limit.

What is Maryland's rationale for such low disclosure requirements? Surely a contribution as low as $55 will not have any corrupting influence at all. Furthermore, the informational interest of the citizenry in knowing the names and addresses of small donors is also negligible.

In fact, by commingling the names and addresses of small donors with larger, probably more influential donors, Maryland has created an enormous volume of "junk disclosure." The general idea behind disclosure is to know who is funding campaigns, and who may have influence over members of the government. Listing reams of $60 and $70 donors only clutters the list and actually serves to make large donors less apparent.

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[4] *Randall v. Sorrell*, 548 U.S. 230, 261 (2006).

Meanwhile, these disclosure reports are available online and the data can be easily aggregated into software apps. One example is the Sunlight Foundation's Inbox Influence, which will compare the names of companies and people who email you with the Foundation's up-to-date list of all contributions given at the state and Federal level. Another example would be to use public political data to make neighborhood maps.[5]

The chilling effect of low-level dollar disclosure is obvious. It functions as forced disclosure of the membership lists of organizations speaking on unpopular topics. In the 1950's, the City of Little Rock enacted legislation designed to—in the words of the Arkansas attorney general at the time—"break" the NAACP. How? By requiring the local NAACP affiliate to disclose their membership list. The rest would take care of itself.

The whole idea behind the First Amendment is to protect the unpopular. If protections only applied to the popular, there would be no need for a freedom of speech. Everyone would already broadly agree on the acceptable topics of conversation. Even a few decades ago, same-sex marriage would not have qualified, to take one example.

The Supreme Court has pointed out that money is an essential element of speech. Even the act of standing on a corner with a bullhorn requires money to buy the bullhorn. Political campaigns require more: money to print, publish, and disseminate ideas in written, visual, or digital form.

The Center has also taken notice of Maryland's recent passage of a law which requires the name, address, and employer to be revealed of any contributor who gives more than $500. Why is this necessary? Unless there is evidence of widespread coercion of employers forcing employees to contribute to favored candidates, evidence of which I am unaware, adding an employer to a disclosure report serves no actual interest.

When an individual gives to a political campaign or committee, he or she is not doing so as an agent of their employer. They may be donating to a candidate because they approve of the candidate's views on property taxes, or because the candidate is pro-choice. However, by adding employers to disclosure reports, the state of Maryland has made it very easy for employers to search and determine which of their employees is giving to the "right" or "wrong" causes and candidates. If anything, the state has made it *easier* for employers to coerce giving, not less.

Most fundamentally, this linkage of contributor and employer fundamentally devalues the autonomy of individual citizens. If I make certain contributions, why should my civic activities somehow be suspect because of where I make my living? What interest does the state have in viewing me principally through the lens of my occupation, or in encouraging others – my neighbors and coworkers, fundraisers and googlers – to do so? This Commission should consider whether it prefers to help or hinder the national trend of sacrificing personal privacy in the interest of a far-off and unarticulated threat.

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[5] One website, knowthyneighbor.org, provided a searchable database of those who signed petitions to put a gay marriage ban on their state's ballot.

The Center would recommend repealing the employer disclosure provision, and also would recommend pegging the name and address disclosure requirement to the Federal level of 1/10th of the maximum contribution limit: in this case $400. We also suggest that Maryland enact legislation to mirror the Federal requirement that contributions need not be formally tracked until a contributor has given over $50.

3. *Increase Aggregate Limits*

While Maryland does have reasonable contribution limits, Maryland's *aggregate* contribution limit is surprisingly low. Given that the maximum contribution limit is $4,000, it is odd that the maximum *aggregate* for all races is only $10,000. Essentially, this allows contributors to only "max out" to two candidates and give half the maximum to a third candidate. For example: contribute $4,000 to a gubernatorial ticket, $4,000 to a state senate candidate of choice, and contribute $2,000 to a delegate candidate of choice.

The Center believes that placing such a low cap on the number of political candidates that one may associate with on a one-to-one monetary basis is in conflict with the First Amendment's freedom of association. After all, what is a contribution to a candidate or committee if not the equivalent of becoming a dues-paying member of a club or organization? For many, a monetary contribution is simply the equivalent of sticking a yard sign on the lawn or a bumper sticker on the car—another way of associating with a candidate or cause of one's choice and supporting it in the marketplace of ideas.

The Center believes that, just as the state could not put a ceiling on the number of clubs or organizations one may join, there ought not to be a ceiling on the *number* of contributions that contributors may give. However, failing that, at the very least, Maryland ought to peg itself to the Federal standard.

In 2012, under Federal law, an individual contributor can give up to $46,200 to combined candidates. This allows contributing the $2,500 maximum to 18.4 different Federal candidates. A similar standard should be put in place in Maryland. But, at a minimum, individual citizens should be able to contribute in each of the races directly representing him or her: Governor, Attorney General, Comptroller, and Legislators. This would suggest an aggregate limit of $20,000.

4. *Increase the committee filing limit*

Under current Maryland law, groups of like political mind are forced to file regular, onerous campaign finance reports once they have raised or spent $1,000 in pursuit of their cause. It is shockingly easy to spend $1,000 on political speech. A non-tech savvy speaker could easily spend that amount simply hiring a programmer to build her a basic Web site. Printing and passing out flyers, mailing copies of policy papers, or renting a small office can all push rather small, inconsequential groups over the $1,000 limit.

Registration (and the filing process; with its concurrent fear of fines or investigations for errors) is burdensome. And in many cases, it is only really safe to do so under the advice of counsel—a cost that lay activists spending, say, $1,500 on a campaign simply cannot afford. Raising the limit will give grassroots activists more breathing room and more ability to avail themselves of their First Amendment political rights.

Maryland's $1,000 limit is odd. By setting a maximum contribution limit per election cycle at $4,000, the state has stated that contributions up to $4,000 do not have the tendency to cause corruption or the appearance of corruption. Yet, once anyone spends one-fourth of that amount of money to speak independently, Maryland subjects it to be closely monitored and regulated by the state. This is incongruent and illogical. The people hurt are—once again—small-time, grassroots activists.

Conclusion

I recognize that campaign finance restrictions are generally created with good intentions. Unfortunately, regulations are often at cross-purposes with their goals. Out of fear of "big money" come regulations that disproportionately hurt small-dollar contributors and grass-roots organizations.

Because money is essential to speech, the Supreme Court has made it clear that the use of money to associate with causes and campaigns may only be regulated in order to prevent corruption, enforce the law, and provide information to the electorate. These modest changes would recalibrate your to better serve those interests.

Again, I appreciate the opportunity to speak with you. Thank you for your time.