



July 8, 2014

The Honorable Therese Murray
Massachusetts Senate
State House
Suite 332
Boston, MA 02133

The Honorable Bruce E. Tarr
Massachusetts Senate
State House
Room 308
Boston, MA 02133

Re: Constitutional and Practical Issues with House Bill 4226

Dear President Murray, Minority Leader Tarr, and Members of the Senate:

On behalf of the Center for Competitive Politics,¹ I write to comment on several constitutional and practical concerns included in House Bill 4226. While there is much to commend in the changes proposed by House Bill 4226, the bill contains several significant constitutional and practical issues and fails to correct clearly unconstitutional provisions in existing Massachusetts campaign finance laws. Aside from serious public policy concerns, these weaknesses could subject the state to costly litigation.

On a positive note, the measure raises Massachusetts' contribution limits, which are currently the lowest in the nation (tied with Alaska) for giving to gubernatorial candidates. The state's current limits might be unconstitutionally low under the Supreme Court's 6-3 decision in the *Randall v. Sorrell* case² that invalidated Vermont's contribution limits. This bill's repeal of the state's current aggregate limit law would also help bring Massachusetts law into compliance with the recent Supreme Court decision in *McCutcheon v. Federal Election Commission*.³ Both of these actions are positive steps that recognize and respond to important First Amendment concerns.

However, the measure's proposal to require disclosure of an advertisement's top five donors suffers from many constitutional and practical flaws.

¹ The Center for Competitive Politics is a nonpartisan, nonprofit 501(c)(3) organization that promotes and protects the First Amendment political rights of speech, assembly, and petition. It was founded in 2005 by Bradley A. Smith, a former Chairman of the Federal Election Commission. In addition to scholarly and educational work, the Center is actively involved in targeted litigation against unconstitutional laws at both the state and federal levels. For instance, we presently represent nonprofit, incorporated educational associations in challenges to state campaign finance laws in Colorado, Delaware, and Nevada. We are also involved in litigation against the state of California.

² *Randall v. Sorrell*, 548 U.S. 230 (2006) (opinion of Breyer, J.) (finding that a failure to index contribution limits to inflation, in combination with other factors, may substantially burden First Amendment rights and therefore render a state's contribution regime unconstitutional).

³ 572 U.S. ___, No. 12-536 (Apr. 2, 2014).

The requirement would greatly interfere with radio and many Internet ads. For example, consider a radio ad by a fictional group called American Action for the Environment (AAE) with five hypothetical top donors. If H. 4226 became law, a radio ad by AAE might have to contain a disclaimer like the following:

I am John Smith, the Chief Executive Officer of American Action for the Environment, and American Action for the Environment approves and paid for this message. Top contributors are Ronald Coppersmith, Donald Wasserman Schultz, Kathleen O'Brien, Albert Ruppertsberger, and William Valelly.

Speaking this disclaimer takes nearly 14 seconds – effectively half of a standard 30-second radio ad. Some “top contributors” will inevitably have longer names or titles, and some groups have longer names, such as The American Academy of Otolaryngology – Head and Neck Surgery.

This type of requirement raises serious constitutional concerns about compelled speech. Not only are citizens and organizations forced to engage in government-required speech with many unnecessary words, but the very real possibility exists that donors to organizations will be forced to be listed on an ad implying they “approve” of a particular commercial, when in fact they may have little interest, are unaware of the ad, or may even oppose the particular expenditure. This is because the bill does not limit identification of “major funders” to those who give or were solicited to support a specific ad, but also includes persons or groups that give to an organization’s general treasury or for the creation of another ad altogether.

Worse still, it’s not just radio ads at issue, but such a disclaimer makes Internet communications difficult or impossible. Many Internet ads are simple banner ads with very limited space. Much of these ads now appear on small smartphone screens. Such long disclaimer requirements would make publishing these Internet ads effectively impossible.

The disclosure of the top funders also does not appear to be tailored in any way, other than to discourage people from contributing to an organization. Such a goal infringes upon First Amendment rights. If the top funder were the sole donor to an organization, then such a disclaimer might make sense.

Ultimately, it is hard to understand why the proposed disclaimer is superior to a simple one required by many other states, such as “Paid for by American Action for the Environment.” All donors are already publicly reported.

As it is, we believe Massachusetts’ current disclaimer requirements are already unconstitutionally long and provide meaningless information. The “top contributors” mandate proposed in H. 4226 would only make existing law more constitutionally suspect.

The current absurd disclaimer that requires the top official’s photo or video and audio is also constitutionally suspect. What does this requirement accomplish? Viewers and listeners would learn something about AAE CEO John Smith – perhaps his gender, weight, appearance, race, age, or regional accent. But they would learn nothing additional about Mr. Smith’s group.

How does this disclaimer “disclose” anything relevant to the public or better enable voters to judge an organization’s message? Do we want political speech – whether it concerns issues or candidates – to be judged on that basis?

In addition to the myriad disclaimer issues, this bill’s proposal to adjust Massachusetts’ contribution limits is not without its issues. H. 4226 would double the state’s existing \$500 per candidate per year limit on individual giving to statewide and legislative candidates. These new limits would still rank far below many of the other 49 states, as the enclosed chart demonstrates.

Further, this well-meaning attempt to adjust the state’s arcane contribution limits falls short by failing to index these limits to inflation⁴ or base them on an “election cycle,” rather than a “year.” Massachusetts could help protect its contribution limits from constitutional challenge if a provision were added to this bill to index the state’s new contribution limits to inflation. The amended bill could delegate this authority to an agency of the executive branch, much in the way that federal contribution limits are indexed to inflation and amended by the Federal Election Commission each election cycle.⁵ The Supreme Court has previously found that contribution limits could be *unconstitutionally* low in part due to a lack of indexing. Inflation indexing is a non-controversial way for the state to mitigate the risk of constitutional litigation on this matter.

H. 4226 would continue to impose an annual contribution limit. This is clearly unconstitutional, as it blatantly discriminates against challengers and favors incumbents. California had a similar law, but the United States Court of Appeals of the Ninth Circuit struck it down in 1992, saying that “[w]e recognize that the state has a legitimate interest in preventing corruption and the appearance of corruption, but hold that this interest will not support a discriminatory formula for limiting contributions.”⁶

Of the 38 states that impose limits on individual giving to statewide and legislative candidates, most impose their limits based on either the election cycle or preferably on a primary and general election basis, which at least has the virtue of allowing challengers and incumbents to raise the same total amount of contributions from each individual donor.

It is my sincere hope that you take into account these significant constitutional and practical issues inherent in H. 4226. Should you have any questions regarding this legislation and its impact on the First Amendment or any other campaign finance proposals, please do not hesitate to contact Matt Nese at (703) 894-6835 or by e-mail at mnese@campaignfreedom.org.

Respectfully yours,



David Keating
President

⁴ *Randall v. Sorrell*, at 261-62, (finding that a failure to index contribution limits to inflation, in combination with other factors, may substantially burden First Amendment rights and therefore render a state’s contribution regime unconstitutional).

⁵ *See*, 11 C.F.R. 110.17(e).

⁶ *Service Employees International Union v. Fair Political Practices Commission*, 955 F.2d 1312 (1992).

State Limits on Individual Contributions to Candidates, per Two-Year Election Cycle								
Governor			State Senate			State House		
Rank	State	Limit	Rank	State	Limit	Rank	State	Limit
1	Alabama	Unlimited	1	Alabama	Unlimited	1	Alabama	Unlimited
	Indiana	Unlimited		Indiana	Unlimited		Indiana	Unlimited
	Iowa	Unlimited		Iowa	Unlimited		Iowa	Unlimited
	Mississippi	Unlimited		Mississippi	Unlimited		Mississippi	Unlimited
	Missouri	Unlimited		Missouri	Unlimited		Missouri	Unlimited
	Nebraska	Unlimited		Nebraska	Unlimited		Nebraska	Unlimited
	North Dakota	Unlimited		North Dakota	Unlimited		North Dakota	Unlimited
	Oregon	Unlimited		Oregon	Unlimited		Oregon	Unlimited
	Pennsylvania	Unlimited		Pennsylvania	Unlimited		Pennsylvania	Unlimited
	Texas	Unlimited		Texas	Unlimited		Texas	Unlimited
	Utah	Unlimited		Utah	Unlimited		Utah	Unlimited
	Virginia	Unlimited		Virginia	Unlimited		Virginia	Unlimited
13	California	\$54,400	13	Ohio	\$24,311.04	13	Ohio	\$24,311.04
14	New York	\$50,995.83	14	New York	\$16,800	14	Nevada	\$10,000
15	Ohio	\$24,311.04	15	Nevada	\$10,000		North Carolina	\$10,000
16	Georgia	\$12,600		North Carolina	\$10,000	16	California	\$8,200
17	New Mexico	\$10,400	17	California	\$8,200		New York	\$8,200
18	Idaho	\$10,000	18	Maryland	\$6,000	18	Maryland	\$6,000
	Louisiana	\$10,000	19	Illinois *	\$5,300	19	Illinois *	\$5,300
	Nevada	\$10,000	20	New Jersey	\$5,200	20	New Jersey	\$5,200
	North Carolina	\$10,000	21	Georgia	\$5,000	21	Georgia	\$5,000
	Wisconsin	\$10,000		Louisiana	\$5,000		Louisiana	\$5,000
23	New Jersey	\$7,600		Oklahoma	\$5,000		Oklahoma	\$5,000
	Tennessee	\$7,600	24	New Mexico	\$4,800	24	New Mexico	\$4,800
25	Connecticut	\$7,000	25	Arizona	\$4,000	25	Arizona	\$4,000
	South Carolina	\$7,000		Arkansas	\$4,000		Arkansas	\$4,000
27	Michigan	\$6,800		Hawaii	\$4,000	27	Tennessee	\$3,000
28	Florida	\$6,000	28	Tennessee	\$3,000		Wyoming	\$3,000
	Hawaii	\$6,000		Wyoming	\$3,000	29	Florida	\$2,000
	Maryland	\$6,000	30	Connecticut	\$2,000		Hawaii	\$2,000
31	Illinois *	\$5,300		Florida	\$2,000		Idaho	\$2,000
32	Oklahoma	\$5,000		Idaho	\$2,000		Kentucky	\$2,000
	Wyoming	\$5,000		Kansas	\$2,000		New Hampshire	\$2,000
34	Arizona	\$4,000		Kentucky	\$2,000		South Carolina	\$2,000
	Arkansas	\$4,000		Michigan	\$2,000		West Virginia	\$2,000
	Kansas	\$4,000		New Hampshire	\$2,000	36	Washington	\$1,800
	Minnesota	\$4,000		South Carolina	\$2,000	37	Kansas	\$1,000
	South Dakota	\$4,000		West Virginia	\$2,000		Massachusetts (w/ H. 4226)	\$1,000
	Vermont	\$4,000	39	Washington	\$1,800		Michigan	\$1,000
40	Washington	\$3,600	40	Vermont	\$1,500		Minnesota	\$1,000
41	Maine	\$3,000		Massachusetts (w/ H. 4226)	\$1,000		Rhode Island	\$1,000
42	Kentucky	\$2,000	41	Minnesota	\$1,000		South Dakota	\$1,000
	New Hampshire	\$2,000		Rhode Island	\$1,000		Vermont	\$1,000
	West Virginia	\$2,000		South Dakota	\$1,000	43	Maine	\$750
45	Montana	\$1,300		Wisconsin	\$1,000	44	Delaware	\$600
46	Delaware	\$1,200	45	Maine	\$750	45	Alaska	\$500
47	Colorado	\$1,100	46	Delaware	\$600		Connecticut	\$500
	Massachusetts (w/ H. 4226)	\$1,000	47	Alaska	\$500		Massachusetts (current)	\$500
48	Rhode Island	\$1,000		Massachusetts (current)	\$500		Wisconsin	\$500
49	Alaska	\$500	49	Colorado	\$400	49	Colorado	\$400
	Massachusetts (current)	\$500	50	Montana	\$340	50	Montana	\$340

Chart Compiled by Center for Competitive Politics

Using NCSL's data on campaign contribution limits, we calculated each state's contribution limit on individual giving to candidates for governor, State Senator, and State Representative (or the equivalent) on a two-year election cycle basis. In states that allocate their limits on an election basis, we doubled the limit to account for the maximum an individual could give to a candidate in both a primary and general election. States that regulate contribution limits on a yearly basis were considered to have limits equivalent to an election cycle for the purposes of this chart. Contribution limit data available at: "State Limits on Contributions to Candidates," National Conference of State Legislatures. Retrieved on July 8, 2014. Available at: http://www.ncsl.org/Portals/1/documents/legismgt/Limits_to_Candidates_2012-2014.pdf (October 2013). Arizona, Michigan, Oklahoma, and Vermont recently increased their contribution limits. The limits appearing in this chart for those four states were taken from each state's elections agency, as the limits in the NCSL chart for these states are now dated. As New York has disparate limits on the amount an individual may contribute to a gubernatorial candidate in a primary based on the candidate's party, we averaged the limit for all six recognized political parties in the state to derive an average limit for the gubernatorial primary.

* In Illinois, if spending by Super PACs hits a defined amount in a given race, then existing candidate contribution limits no longer apply.