May 6, 2015

The Honorable Scott Cyrway
Maine State Senate
3 State House Station
Augusta, ME 04333-0003

The Honorable Louis Luchini
Maine House of Representatives
2 State House Station
Augusta, ME 04333-0002

The Honorable Jonathan Kinney
Maine House of Representatives
2 State House Station
Augusta, ME 04333-0002

Re: Significant Constitutional and Practical Issues with Legislative Document 1192 (S.P. 419)

Dear Chairs Cyrway and Luchini, Ranking Minority Member Kinney, and members of the Joint Committee on Veterans and Legal Affairs:

On behalf of The Center for Competitive Politics (CCP),[1] Senior Fellow Eric Wang[2] has analyzed L.D. 1192, as referred to the Joint Committee on Veterans and Legal Affairs, and finds that the bill severely threatens core First Amendment rights.

L.D. 1192 imposes disclosure requirements that single out by name political contributors whose aggregate contributions exceed a certain threshold, but the disclosure appears to serve no meaningful purpose other than to unconstitutionally stigmatize and invite public antipathy and hostility toward the contributors. Additionally, the legislation imposes requirements to identify in disclaimers certain large donors to sponsors of independent expenditures. These disclaimer requirements are a radical departure from current Maine law and court precedent, and would tend to mislead rather than inform the public. Lastly, L.D. 1192 would reduce the ability of political action committees (PACs) to speak and to associate with other PACs by imposing an unprecedented 25 percent tax on PAC-to-PAC contributions. The tax does not appear to further any legitimate governmental interest, and the purported justification for this measure can be addressed in a far more narrowly tailored and more speech-protective manner.

These concerns are discussed in more detail below.

[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, it presently represents nonprofit, incorporated educational associations in challenges to state campaign finance laws in Colorado and Delaware. It is also involved in litigation against the state of California.

[2] Eric Wang is also Special Counsel in the Election Law practice group at the Washington, D.C. law firm of Wiley Rein, LLP. Any opinions expressed herein are those of the Center for Competitive Politics and Mr. Wang, and not necessarily those of his firm or its other clients.

I. The publication requirement appears to be motivated by a desire to stigmatize donors, rather than by any legitimate governmental interest to inform voters.

The first provision in L.D. 1192 would require the Maine Commission on Governmental Ethics and Election Practices to purchase newspaper ads publicizing the names of contributors who make political contributions in connection with Maine elections whenever a donor's contributions total more than $250,000 during any biennial election cycle.

In *McCutcheon v. FEC*, the Supreme Court invalidated limits on the aggregate amount that any individual could give to all candidates, party committees, and PACs during any biennial election cycle. In doing so, the Court noted that "the Government may not penalize an individual for 'robustly exercis[ing] his First Amendment rights.'"[3]

While disclaimer and disclosure requirements, unlike contribution limits, do not impose a "ceiling on campaign-related activities," they nonetheless "may burden the ability to speak," and thus are subject to "exacting scrutiny" under judicial review, "which requires a 'substantial relation' between the disclosure requirement and a 'sufficiently important' governmental interest," such as helping voters "make informed choices in the political marketplace."[4]

Specifically, disclosure of a candidate's contributors allows "voters to place each candidate in the political spectrum more precisely than is often possible solely on the basis of party labels and campaign speeches."[5] In other words, under this heuristic theory of disclosure, voters derive information about a candidate based on who is contributing to the candidate.[6]

Here, the special publication requirement in proposed Me. Rev. Stat. § 1006 does not appear to serve any legitimate governmental interest in helping voters "make informed choices" by providing heuristic cues about who is contributing to which candidates or political causes. Instead, the requirement appears to be motivated solely by a desire to stigmatize, "penalize," and otherwise "burden" those contributors who exercise their First Amendment rights "robustly," which the Supreme Court has warned against doing. The publication requirement does not give voters any information about which specific candidates, PACs, party committees, or ballot question committees the individuals whose names are published have given to, or how much they have given to those particular recipients. Instead, it requires publication of the mere fact that certain individuals have made aggregate political contributions in connection with Maine elections exceeding $250,000 in a biennial election cycle.

A voter weighing the choice of whether to vote for Candidate Doe or Candidate Roe, or whether to vote for or against Ballot Question X, derives no useful information with respect to these decisions from the knowledge that Mr. Smith has made more than $250,000 in political contributions during the election cycle. Absent any rational explanation for how this information

[3] *McCutcheon v. FEC*, No. 12-536 (Apr. 2, 2014), slip op. at 16 (quoting *Davis v. FEC*, 554 U.S. 724, 739 (2008)).
[4] *Citizens United v. FEC*, 558 U.S. 310, 366 (2010) (internal citations omitted).
[5] *Buckley v. Valeo*, 424 U.S. 1, 67 (1976).
[6] *See* David M. Primo, "Information at the Margin: Campaign Finance Disclosure Laws, Ballot Issues, and Voter Knowledge." Retrieved on May 6, 2015. Available at: http://users.polisci.wisc.edu/kmayer/466/Primo%20Info%20at%20the%20Margin.pdf (October 2011), p. 3.

assists the voters, the intent of the publication requirement appears to be to shame and harm such contributors by engendering public antipathy and hostility toward them.

This apparent intent to discourage political participation is reinforced by the requirement under proposed Me. Rev. Stat. § 1006 that the publication of the names of businesses that make political contributions also must identify "the name of the individual who is the principal of the business." Under existing Maine law, campaign finance reports are required to disclose not only the names of individual contributors, but also their employers.[7] Presumably, the requirement to identify contributors' employers serves the function of providing the public with information about a contributor's potential economic interests. L.D. 1192 flips this general reporting rule on its head. Where a contribution is made directly by a business, its economic interests are already clear on their face, and thus any additional requirement to also identify the principal of the business is gratuitous and appears to be motivated by an attempt not only to stigmatize the business for exercising its First Amendment rights "robustly," but also to stigmatize an individual associated with the business. The term "principal" also is not defined, and may include someone who has only a minority stake (or no stake at all) in the business, and who might have opposed making the contribution.

II. The identification of contributors in disclaimers would result in "junk disclosure."

The second provision in L.D. 1192 would require, among other things, independent expenditures expressly advocating the election or defeat of a candidate to bear a disclaimer that identifies the two largest donors who have given at least $10,000 within the last year to the sponsor of the independent expenditure. In addition, independent expenditures made by direct mail must bear a disclaimer identifying all donors who have given at least $200,000 within the last year to the sponsor of the communication.

These disclaimers may well confuse or mislead rather than enlighten voters. When we speak of candidate committees, PACs, and political parties, we can be reasonably assured that all donors to such organizations intend for their contributions to be used for political purposes, and current Maine law appropriately requires disclosure of contributor information for those entities.[8] The same is not true of donors to 501(c) membership organizations, trade associations, and other forms of advocacy groups. People give to such entities not because they agree with everything an organization does, or particular political positions it takes, but because on balance they think it provides a valuable service.

Current Maine law recognizes this important distinction in two ways. First, organizations that receive political contributions or make political expenditures totaling $1,500 or less during a calendar year, and whose major purpose is not to influence elections, are not required to report their donors on independent expenditure reports.[9] Second, even if an organization qualifies as a PAC because its political contributions or expenditures exceed $1,500 during a calendar year, if

[7] *See* 21-A Me. Rev. Stat. §§ 1017(5), 1017-A(1), 1060(6).
[8] *See* note 7, *supra*.
[9] 21-A Me. Rev. Stat. §§ 1052(5)(A), 1019-B(4); *see also* "Reporting Requirements for Independent Expenditures: General Election—November 4, 2014," Maine Commission on Governmental Ethics and Election Practices. Retrieved on May 6, 2015. Available at: http://www.maine.gov/ethics/pdf/2014_ie_report_general.pdf (June 6, 2014).

its major purpose is not to influence elections, then it is required to report "*only* those contributions made to the organization *for the purpose of influencing* a ballot question or the nomination or election of a candidate to political office."[10]

L.D. 1192 significantly departs from current Maine law and court precedent by associating particular donors with particular independent expenditures, regardless of whether such donors gave for the purpose of influencing any elections, and even in cases where donors oppose the particular independent expenditure. In *National Organization for Marriage v. McKee*, the U.S. Court of Appeals for the First Circuit upheld Maine's donor disclosure requirement for sponsors of independent expenditures whose major purpose was not to influence elections because the law was still narrowly tailored to cover only donors who gave specifically for a political purpose.[11] Absent any similar narrow tailoring and clear rationale for donor disclosure in L.D. 1192, we believe that the bill's disclaimer requirement is unconstitutionally overbroad.

III. The 25 percent tax on PAC-to-PAC contributions unconstitutionally burdens freedom of speech and association and is not narrowly tailored.

Section 5 of L.D. 1192 would impose a 25 percent tax on any PAC that makes contributions totaling more than $25,000 during a biennial election cycle to another PAC.

As a general principle of First Amendment law, a state may not impose a special tax on particular forms of speech "unless the State asserts a counterbalancing interest of compelling importance that it cannot achieve without differential taxation."[12] Even if the tax here is viewed as a campaign finance regulation rather than as a tax, the Supreme Court has held that contribution limits may not pose a "'significant interference' with protected rights of political association," unless the state demonstrates a "sufficiently important interest and employs means closely drawn to avoid unnecessary abridgement of associational freedoms."[13] Although the 25 percent tax on PAC-to-PAC transfers here does not act as an explicit contribution limit, it still functions as a mechanism that reduces the amount of any contribution that a PAC may give to another PAC by 25 percent.

According to Senator Thibodeau, the justification for this tax is to enhance "transparency" by preventing money from being "shuffled around" and one PAC giving money to another "'cover' PAC" to fund a "negative assault" on politicians without the message being attributed to the original PAC.[14]

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[10] 21-A Me. Rev. Stat. §§ 1052(5)(A), 1060(6) (emphasis added); *see also Nat'l Org. for Marriage v. McKee*, 649 F.3d 34, 58 (1st Cir. 2011) (describing the Maine law as requiring disclosure under such circumstances of "any contributors who have given more than $50 to the PAC *to support or oppose a candidate or campaign*.") (emphasis added).

[11] *See* note 10, *supra*.

[12] *Minneapolis Star v. Minnesota Comm'r of Rev*., 460 U.S. 575, 585 (1983).

[13] *McCutcheon* slip op. at 8 (quoting *Buckley*, 424 U.S. at 25).

[14] Senate President Michael Thibodeau, "Testimony of Senate President Michael Thibodeau on LD 1192, "An Act Regarding Campaign Finance Reform." Office of Senator Michael D. Thibodeau, President of the Senate. Retrieved on May 6, 2015. Available at: http://www.mainelegislature.org/legis/bills/getTestimonyDoc.asp?id=27100 (April 13, 2015), p. 1.

If this is, indeed, the rationale for this provision,[15] there are several responsive objections. First, PACs are already required to itemize all contributions they receive from a particular source totaling more than $50 during a reporting period, and to itemize all contributions (of any amount) that they make to other entities.[16] Thus, the original PAC in Senator Thibodeau's scenario is already required to disclose its "transfer" to the "'cover' PAC," and the "'cover' PAC" is already required to disclose the "transfer" it receives from the original PAC. It is not clear where the gap in "transparency" lies.

Absent any legitimate problem to be solved by discouraging PAC-to-PAC contributions, the 25 percent tax on such transactions fails to serve any "compelling" or "sufficiently important" governmental interest and is an unconstitutional burden on PACs' freedom to speak and to associate with other PACs.

Even if Senator Thibodeau's concerns about transparency are legitimate, the 25 percent tax is still unconstitutional because there is a far more narrowly tailored way of addressing the purported problem. Rather than reduce a PAC's ability to speak by 25 percent, if one PAC transfers funds to another PAC for the purpose of sponsoring an ad, the bill could simply require the ad to bear a disclaimer identifying both of the PACs as sponsors. As discussed above, the drafters of L.D. 1192 are apparently familiar with how to craft a disclaimer provision – although, in this case, the disclaimer we propose for earmarked PAC transfers would be more narrowly tailored than the indiscriminate disclaimer requirement contained in this bill's second provision.

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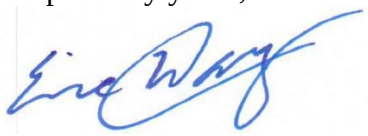
Thank you for considering this analysis of L.D. 1192. Should you have any further questions regarding these issues or any other campaign finance proposals, please do not hesitate to contact the Center at (703) 894-6800 or by e-mail to Matt Nese, the Center's Director of External Relations, at mnese@campaignfreedom.org.

Respectfully yours,



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[15] There do not appear to be any other plausible justifications for this provision. Under existing Maine law, there are no limits on how much any contributor may give to a PAC, nor are there any limits on how much one PAC may give to another. *See generally* 21-A Me. Rev. Stat. § 1015. Thus, the attempt to discourage PAC-to-PAC transfers cannot be to prevent circumvention of any limits on contributions to PACs. *See, e.g., McCutcheon*, slip op. at 6 (discussing a hypothetical in which "[a] single donor might contribute the maximum amount under the base limits to nearly 50 separate committees, each of which might then transfer the money to the same single committee. That committee, in turn, might use all the transferred money for coordinated expenditures on behalf of a particular candidate . . . .") (internal citations omitted).

[16] 21-A Me. Rev. Stat. § 1060.