CENTER *for* COMPETITIVE POLITICS

Congress shall make no law...

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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: Constitutional and Practical Issues with Legislative Document 189

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,[1] I am writing you today to respectfully submit the following comments regarding the constitutional and practical impact of the provisions contained in Legislative Document 189, which proposes to amend Maine's campaign finance laws by requiring Section 501(c)(4) advocacy nonprofits, Section 501(c)(5) labor unions, and Section 501(c)(6) trade associations to report the names, home addresses, occupations, and employers of *all of their donors* – regardless of how paltry the contribution – over the past two calendar years to the government, simply as a result of such an entity's choice to make a contribution over $50 to a political party or political committee operating in the State of Maine.

Before I review the serious constitutional defects in the proposal, I urge you to consider how its practical impact would produce many absurd results:

- A small donation from a nonprofit to a political party or committee would result in the group handing over its entire membership list to the party or committee. This makes no sense. For example, a $100 donation might trigger disclosure of donors who have made hundreds of thousands of dollars of contributions to the nonprofit over the last two years.
- The party or committee would then have a very valuable asset – the entire mailing list of the donating nonprofit. The value of this list would, in this example, vastly exceed the cost of the contribution, perhaps triggering additional reporting requirements to the Internal Revenue Service by the nonprofit organization.

[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 and Delaware. We are also involved in litigation against the state of California.

- The donors to the nonprofit, who had no idea the organization might donate to a party or committee, might find themselves the target of solicitations from dozens of other committees, resulting in phone calls at home or huge volumes of mail.

The proposed reporting requirements in L.D. 189 would only serve to discourage donors from supporting nonprofit organizations, and associate them with contributions they had no knowledge of or might even oppose.

When we speak of political parties and political committees, 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.[2] 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 the 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.[3] Second, even if an organization qualifies as a PAC because its political contributions or expenditures exceed $1,500 during a calendar year, if 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."[4]

L.D. 189 significantly departs from current Maine law and court precedent by associating particular donors with particular contributions, regardless of whether such donors gave for the purpose of influencing any elections, and even in cases where donors oppose the particular contribution. 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.[5] Absent any similar narrow tailoring and clear rationale for donor disclosure in L.D. 189, we believe that the bill's disclosure requirement is unconstitutionally overbroad.

Consequently, if Legislative Document 189 becomes law as written, there is a high likelihood that the law will be found unconstitutional if challenged in court. Any potential legal action will cost the state a great deal of money defending the case, and will distract the Attorney General's office from meritorious legal work. Additionally, it is probable that the state will be

[2] *See* 21-A Me. Rev. Stat. §§ 1017(5), 1017-A(1), 1060(6).
[3] 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).
[4] 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).
[5] *See* note 4, *supra*.

forced by the courts to award legal fees to successful plaintiffs. Legal fee awards are often expensive, and can cost governments hundreds of thousands of dollars.

I. The proposed government reporting requirements for nonprofit organizations contributing any sum over $50 to political parties or political committees would often uncouple the disclosed "donor" from the actual speech funded, resulting in "junk disclosure" that associates a donor with a contribution they have no knowledge of and may not even support.

The proposed reporting regime in L.D. 189 will mislead rather than enlighten voters. When we speak of political parties and political committees, we can be reasonably assured that all donors to such organizations intend for their contributions to be used for political purposes. The same is not true of donors to 501(c)(4) advocacy nonprofits, 501(c)(5) labor unions, and 501(c)(6) trade associations. Under L.D. 189, if one of these groups decides to contribute just $51 to a political party or political committee, it must reveal the names, home addresses, occupations, and employers of all of its donors who gave even one dollar to the group in the previous two years. In effect, this amounts to "junk disclosure" – disclosure that is primarily used by other parties to look for potential donors and by prying neighbors to search their fellow citizens' political activity and affiliations, many of which may not even be accurate given the issues described previously.

The "junk disclosure" problem is exacerbated by the requirement in L.D. 189 that disclosure occurs for "all donors to that tax-exempt entity during the previous 2 calendar years." It is dangerous to assume that all contributions to nonprofits represent complete endorsement of every $51 spent by that nonprofit, but it is even more dangerous to assume that an individual who gave $25 to his union in January 2015, supports the October 2016 contribution of that union to a political action committee *that did not exist* in January 2015. In cannot possibly be in the interest of the state to link contributors to causes that did not exist when the supposedly supportive contribution was made.

It is difficult to argue that the second-order public reporting on relatively small dollar contributions of donors to nonprofits who, in turn, donated in small amounts to political parties or political committees advances the legitimate purposes of informing the public or preventing corruption.

II. Disclosure information can result in the harassment of individuals by their political opponents and should be carefully balanced with the public's "right to know."

In considering this bill, it's worth noting that disclosure laws implicate both citizen privacy rights and touch on Supreme Court precedent. Indeed, the desire to preserve privacy stems from a growing awareness by individuals and the Supreme Court that threats and intimidation of individuals because of their political views is a very serious issue. Much of the Supreme Court's concern over compulsory disclosure lies in its consideration of the potential for harassment. This is seen particularly in the Court's decision in *NAACP v. Alabama*, in which the Court recognized that the government may not compel disclosure of a private organization's

general membership or donor list.[6] This is precisely what would occur if L.D. 189 were signed into law.

In recognizing the sanctity of anonymous free speech and association, the Court asserted that "it is hardly a novel perception that compelled disclosure of affiliation with groups engaged in advocacy may constitute as effective a restraint on freedom of association as [other] forms of governmental action."[7] This is why even anonymous political activity has been protected in certain contexts.[8]

Much as the Supreme Court sought to protect African Americans in the Jim Crow South and those citizens who financially supported the cause of civil rights from retribution, donors and members of groups supporting unpopular causes still need protection today. It is hardly impossible to imagine a scenario in 2016 in which donors to nonprofits that support controversial causes – for or against same-sex marriage; for or against abortion rights; or even groups associated with others who have been publicly vilified, such as the Koch family or George Soros, might be subjected to similar threats. This is of particular concern in this bill, since an individual who makes a nominal donation to a nonprofit, that, in turn, makes a $51 donation to a controversial cause, will have her name, home address, occupation, and place of business disclosed to the government and made publicly available – even if she does not personally support the controversial cause. The donor, therefore, faces the risk of harassment even without contributing direct support.

This may seem unrealistic, but it illustrates the fundamental problem with the approach taken. The assumption seems to be that citizens are dangerous to government, and the government must be protected from them. Little thought is given to protecting the citizens from government, as is required by the First Amendment. Worse still is that little can be done once individual contributor information – a donor's full name, street address, occupation, and employer – is made public under government compulsion. It can then immediately be used by non-governmental entities and individuals to harass, threaten, or financially harm a speaker or contributor to an unpopular cause. We believe, therefore, that the problem of harassment is best addressed by limiting the opportunities for harassment, and that this is best done by crafting reporting thresholds that capture just those donors who are truly contributing large sums to *political candidates* – and not to organizations engaging primarily in issue advocacy about a particular topic relevant to the voters of Maine.

Ultimately, the Court has made clear that this concern over harassment exists, whether the threats or intimidation come from the government or from private citizens, who receive their information because of the forced disclosure. In short, mandatory disclosure of political activity requires a strong justification and must be carefully tailored to address issues of public corruption and the provision of only such information as is particularly important to voters. It is highly doubtful that requiring government reporting of the private information of any individual giving any amount in a two-year period to a nonprofit that then gives as little as $51 to a political party or political committee is sufficient to meet this justification.

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[6] *NAACP v. Alabama ex rel. Patterson*, 357 U.S. 449 (1958).
[7] *NAACP*, 357 U.S. at 462.
[8] *See McIntyre v. Ohio Elections Commission*, 514 U.S. 334, 337-338 (1995).

III. Due to its inefficiency, spending by organizations that are not required to disclose their donors is not likely to become a significant percentage of overall political spending.

Lastly, it bears noting that any perceived need to require disclosure from nonprofit groups in Maine (and elsewhere) is overblown. Because 501(c) organizations may not have political activity as their primary purpose, they must conduct their activities to stay within IRS guidelines to maintain their exempt status. In effect, then, a donor whose main objective is political activity faces the effective equivalent of an over 50 percent tax on his or her political donations by giving to a 501(c) organization rather than to a political party or political committee directly. This is because the nonprofit group must primarily spend its funds on programs other than political activity, as defined in Section 527 of the tax code. As a result of this inefficiency, it is doubtful that spending by 501(c) organizations will increase substantially as a percentage of either independent or total spending.

* * *

As written, L.D. 189's likely unconstitutionally overbroad disclosure requirements would make disclosure information less meaningful to the public by broadly associating contributors with political causes they have not supported directly. Such a violation of privacy may lead to significant harm to individuals both from harassment and from wrongful association with causes they do not support – and may not even be aware of. Given the inefficiencies inherent in political spending by 501(c) organizations, the perceived need for the reporting requirements imposed on these entities by L.D. 189 is significantly misguided.

Thank you for allowing me to submit comments on Legislative Document 189. Should you have any further questions regarding these issues or any other campaign finance proposals, please do not hesitate to contact me at (703) 894-6835 or by e-mail at mnese@campaignfreedom.org.

Respectfully yours,

Matt Nese
Director of External Relations
Center for Competitive Politics