



April 21, 2015

The Honorable Diane Rosenbaum  
Oregon State Senate  
900 Court Street, NE  
Room S-223  
Salem, Oregon 97301

The Honorable Ted Ferrioli  
Oregon State Senate  
900 Court Street, NE  
Room S-323  
Salem, Oregon 97301

Re: Constitutional and Practical Issues with Senate Joint Resolution 5 and Senate Bill 75

Dear Chair Rosenbaum, Vice-Chair Ferrioli, and members of the Senate Rules Committee:

On behalf of the Center for Competitive Politics, I am writing you today to respectfully submit the following comments regarding the impact of Senate Joint Resolution 5, which would alter Oregon's Constitution to allow legislators to impose campaign contribution limits, and Senate Bill 75, which would impose those contribution limits.

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.

This legislation runs contrary to Oregon Supreme Court precedent, as well as prevailing academic research, which shows that contribution limits will neither decrease corruption, nor produce "good" government, nor improve public confidence in government, and will actually have the perverse effect of increasing the power of independent groups at the expense of candidates and political committees. Worse still, imposing limits in Oregon will lead to new complexity in enforcing state campaign finance law while creating the potential for abusive investigations.

**I. The Oregon Supreme Court has appropriately found that contribution limits are a violation of Oregonians free speech rights under the State's Constitution.**

Oregon has a well-established and admirable legal history of protecting free speech. In the landmark 1997 case, *Vannatta v. Keisling*, the Oregon Supreme Court found that campaign contributions are acts of political expression, and, therefore any limitations on such contributions are a limitation on Oregonians free speech rights.<sup>1</sup>

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<sup>1</sup> *Vannatta v. Keisling*, 931 P.2d 770 (Or. 1997).

As the Oregon Supreme Court noted in that case, “[i]n our view, a contribution is protected as an expression by the contributor, not because the contribution eventually may be used by a candidate to express a particular message. The money may never be used to promote a form of expression by the candidate; instead, it may (for example) be used to pay campaign staff or to meet other needs not tied to a particular message. However, the contribution, in and of itself, is the contributor’s expression of support for the candidate or cause – an act of expression that is completed by the act of giving and that depends in no way on the ultimate use to which the contribution is put.”<sup>2</sup>

Since that decision, an attempt was made via ballot initiative in 2006 to exempt campaign contributions from the free speech language in Oregon’s Constitution. While Oregon voters narrowly passed the initiative that would have imposed specific contribution limits (in the vein of S.B. 75),<sup>3</sup> they overwhelmingly rejected the initiative that would have amended the State Constitution in order to implement those limits (in the vein of S.J.R. 5).<sup>4</sup>

Consequently, S.J.R. 5 would tread on nearly two decades of legal precedent establishing that contribution limits are a violation of free speech rights guaranteed in the Oregon Constitution. It would further submit a constitutional amendment to the voters that they have already rejected. Enacting this measure, therefore, would likely waste time and money unnecessarily retrying well-established law in order to enact changes that the voters of Oregon have already proclaimed they do not want.

## **II. Enacting contribution limits would increase the influence of independent groups and limit the ability of candidates and political committees to speak during election campaigns.**

Enacting limits on giving to candidates and political committees (PACs) in Oregon would likely result in a massive shift of campaign speech away from candidates and PACs and toward independent expenditure groups. Importantly, the Supreme Court and federal courts have said that donations to independent groups<sup>5</sup> and independent speech by labor unions and corporations about candidates<sup>6</sup> cannot be limited under the First Amendment.

In race after race, the imposition of contribution limits would leave candidates and PACs struggling to compete on messaging with independent expenditure groups, to which donations cannot be limited. Such limits will have the unintended consequence of increasing donations to independent groups, like Super PACs, at the expense of the newly limited candidates and PACs. These contribution limits would, therefore, place candidates and PACs at a permanent disadvantage.

Imagine a small business owner in Portland who wants to express her opinion about the importance of raising the minimum wage. As the law currently exists in Oregon, she will find a candidate that agrees with her on this issue, and contribute to their campaign whatever amount she likes – her political giving is dictated only by her desire to voice her political preferences. Now imagine S.J.R. 5 and S.B. 75 become law. This small business owner’s desire to express her political

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<sup>2</sup> *Id.* at 522 (emphasis removed).

<sup>3</sup> “Oregon Ballot Measure 47, Revision of Campaign Finance Laws (2006),” Ballotpedia. Retrieved on April 21, 2015. Available at: [http://ballotpedia.org/Oregon\\_Ballot\\_Measure\\_47,\\_Revision\\_of\\_Campaign\\_Finance\\_Laws\\_%282006%29](http://ballotpedia.org/Oregon_Ballot_Measure_47,_Revision_of_Campaign_Finance_Laws_%282006%29) (2015).

<sup>4</sup> “Oregon Ballot Measure 46, Regulation of Campaign Contributions (2006),” Ballotpedia. Retrieved on April 21, 2015. Available at: [http://ballotpedia.org/Oregon\\_Ballot\\_Measure\\_46,\\_Regulation\\_of\\_Campaign\\_Contributions\\_%282006%29](http://ballotpedia.org/Oregon_Ballot_Measure_46,_Regulation_of_Campaign_Contributions_%282006%29) (2015).

<sup>5</sup> *SpeechNow.org v. Federal Election Commission*, 599 F.3d 686 (D.C. Cir. 2010).

<sup>6</sup> *Citizens United v. Federal Election Commission*, 558 U.S. 310 (2010).

opinion has not changed. But because her giving to the candidate that supports a higher minimum wage is now capped at \$2,600, she chooses instead to contribute beyond that amount to an independent group that supports her position. The same contribution has entered the political arena and the same amount of political speech has occurred, but the candidate has lost out on the opportunity to specifically define and express their message.

Thus, even if one accepts the inaccurate argument that Oregon has a problem with “money in politics,” contribution limits on giving to candidates and PACs will not alter the overall level of funding for political speech. Like pressing down on one side of a water-filled balloon, contributions will inevitably flow to a different legal source. The net effect will be the diminished ability of candidates and PACs to control their message – and be accountable for it – during campaigns.

### **III. Contribution limits will lead to new complexity in Oregon campaign finance law, creating the potential for abusive investigations.**

Enforcing new contribution limits will lead to new complexity in the law and new complexity in enforcing the law. Existing definitions of “independent expenditure” and “in-kind contribution” in Oregon statutes will become critically important.<sup>7</sup>

With the creation of contribution limits, investigations of alleged coordination will often be demanded by political opponents. By their very nature, investigations concerning illegal coordination will target the most sensitive information: internal communications, membership lists, and conversations with political allies, all with great potential to harm First Amendment rights.

An illegal coordination claim alleges that someone spoke to someone else concerning a prohibited topic. Naturally, any contact between two individuals can raise suspicions that such a conversation occurred. And, once initiated, a coordination investigation will focus on who spoke with whom. This will require an invasive investigation that, by its nature, is directed precisely at private communications. Moreover, since information may be passed through intermediaries, the investigation will often expand to encompass the target’s entire professional and personal network.

For example, in 1997, a complaint by the Democratic National Committee triggered an investigation of over 60 conservative organizations, plus numerous individuals, that lasted over four years.<sup>8</sup> The various respondents were ultimately exonerated. Another investigation of the Christian Coalition led to over 80 depositions and years of legal fees before the Coalition was ultimately found not to have illegally coordinated its activities.<sup>9</sup> These examples are not outliers, but rather paradigmatic examples of the intrusive and speech-inhibiting nature of coordination investigations based on flimsy allegations and generalized suspicion. Imposing contribution limits in Oregon law will open the opportunity for illegal coordination complaints to great impact on First Amendment rights.

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<sup>7</sup> To wit, a review of the Oregon Revised Statutes indicates that the state lacks a definition for “in-kind contribution.”

<sup>8</sup> See Federal Election Commission, MUR 4624.

<sup>9</sup> *FEC v. Christian Coalition*, 52 F. Supp. 2d 45 (D.D.C. 1999). See also Mark Hemingway, “IRS’s Lerner Had History of Harassment, Inappropriate Religious Inquiries at FEC,” *The Weekly Standard*. Retrieved on April 21, 2015. Available at: [http://www.weeklystandard.com/blogs/irss-lerner-had-history-harassment-inappropriate-religious-inquiries-fec\\_725004.html](http://www.weeklystandard.com/blogs/irss-lerner-had-history-harassment-inappropriate-religious-inquiries-fec_725004.html) (May 20, 2013).

**IV. Taken together, S.J.R. 5 and S.B. 75 impose campaign contribution limits in Oregon elections, at a time when states around the country are raising their contribution limits or eliminating them altogether, all while research demonstrates that these limits will neither reduce corruption, nor produce “good” government, nor improve public confidence in government.**

In the last two years, twelve states – Alabama, Arizona, Connecticut, Florida, Maryland, Massachusetts, Michigan, Minnesota, North Carolina, Oklahoma, Vermont, and Wyoming – raised or eliminated portions of their campaign contribution limits. Alabama is notable for becoming the sixth state with no limits on the size or source of campaign contributions, joining Oregon, as well as Missouri, Nebraska, Utah, and Virginia.<sup>10</sup> Since 2010, over one-third of the 38 states that impose contribution limits on individual giving to candidates (fifteen states), have increased or repealed portions of their contribution limits in some manner.<sup>11</sup> Thus, the trend around the country is one of state legislators liberalizing existing limits and enhancing the First Amendment freedoms of their constituents. These efforts, generally, have been bipartisan, as both Republicans and Democrats across the country see the folly of strict contribution limits. Any attempts to do otherwise with these proposed measures would mark a backwards step for Oregonians’ First Amendment rights.

The reason behind this trend is clear. As academic research and studies by the Center for Competitive Politics have shown, contribution limits have no impact on reducing corruption,<sup>12</sup> promoting “good” government,<sup>13</sup> or improving trust in government,<sup>14</sup> but do have an impact in terms of reducing the amount of political speech. Academic research also demonstrates that campaign cash and legislative votes are not linked.<sup>15</sup>

Understanding how contribution limits distort election campaigns helps explain why states without limits have fared as well or better than states with low limits in state rankings on corruption and good governance measurements. Many people wrongly assume that in the absence of financial

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<sup>10</sup> Luke Wachob, “2013 State Legislative Trends: Campaign Contributions Limits Increase in Nine States,” Center for Competitive Politics’ Legislative Review. Retrieved on April 21, 2015. Available at: [http://www.campaignfreedom.org/wp-content/uploads/2014/05/2014-04-25\\_Legislative-Review\\_Wachob\\_2013-State-Legislative-Trends-Increasing-Contribution-Limits2.pdf](http://www.campaignfreedom.org/wp-content/uploads/2014/05/2014-04-25_Legislative-Review_Wachob_2013-State-Legislative-Trends-Increasing-Contribution-Limits2.pdf) (May 9, 2014).

<sup>11</sup> These fifteen states are Alabama, Arizona, Connecticut, Florida, Illinois, Maryland, Massachusetts, Michigan, Minnesota, Nebraska, North Carolina, Oklahoma, Tennessee, Vermont, and Wyoming.

<sup>12</sup> Adriana Cordis and Jeff Milyo, “Working Paper No. 13-09: Do State Campaign Finance Reforms Reduce Public Corruption?” Mercatus Center at George Mason University. Retrieved on April 21, 2015. Available at: [http://mercatus.org/sites/default/files/Milyo\\_CampaignFinanceReforms\\_v2.pdf](http://mercatus.org/sites/default/files/Milyo_CampaignFinanceReforms_v2.pdf) (April 2013); Matt Nese and Luke Wachob, “Do Lower Contribution Limits Decrease Public Corruption?” Center for Competitive Politics’ Issue Analysis No. 5. Retrieved on April 21, 2015. Available at: [http://www.campaignfreedom.org/wp-content/uploads/2013/08/2013-08-01\\_Issue-Analysis-5\\_Do-Lower-Contribution-Limits-Decrease-Public-Corruption1.pdf](http://www.campaignfreedom.org/wp-content/uploads/2013/08/2013-08-01_Issue-Analysis-5_Do-Lower-Contribution-Limits-Decrease-Public-Corruption1.pdf) (August 2013).

<sup>13</sup> Matt Nese and Luke Wachob, “Do Lower Contribution Limits Produce ‘Good’ Government?,” Center for Competitive Politics’ Issue Analysis No. 6. Retrieved on April 21, 2015. Available at: [http://www.campaignfreedom.org/wp-content/uploads/2013/10/2013-10-08\\_Issue-Analysis-6\\_Do-Lower-Contribution-Limits-Produce-Good-Government1.pdf](http://www.campaignfreedom.org/wp-content/uploads/2013/10/2013-10-08_Issue-Analysis-6_Do-Lower-Contribution-Limits-Produce-Good-Government1.pdf) (October 2013); Matt Nese, “Do Limits on Corporate and Union Giving to Candidates Lead to ‘Good’ Government?,” Center for Competitive Politics’ Issue Analysis 7. Retrieved on April 21, 2015. Available at: [http://www.campaignfreedom.org/wp-content/uploads/2013/11/2013-11-20\\_Issue-Analysis-7\\_Do-Limits-On-Corporate-And-Union-Giving-To-Candidates-Lead-To-Good-Government.pdf](http://www.campaignfreedom.org/wp-content/uploads/2013/11/2013-11-20_Issue-Analysis-7_Do-Limits-On-Corporate-And-Union-Giving-To-Candidates-Lead-To-Good-Government.pdf) (November 2013).

<sup>14</sup> Jeff Milyo, “Do State Campaign Finance Reforms Increase Trust and Confidence in State Government?,” Paper Presented at the 2012 Annual Meetings of the Midwest Political Science Association. Retrieved on April 21, 2015. Available at: [http://web.missouri.edu/~milyoj/files/CFR%20and%20trust%20in%20state%20government\\_v3.pdf](http://web.missouri.edu/~milyoj/files/CFR%20and%20trust%20in%20state%20government_v3.pdf) (April 2012).

<sup>15</sup> See e.g. Steven Levitt, “How Do Senators Vote? Disentangling the Role of Party Affiliation, Voter Preferences and Senator Ideology,” *American Economic Review*, Vol. 86 (1996): 425–441; Gregory Wawro, “Legislative Entrepreneurship in the United States House of Representatives.” (Ann Arbor: University of Michigan Press, 2000); Stephen Ansolobehere, John M. de Figuerido, and James M. Snyder Jr., “Why Is There So Little Money in U.S. Politics?,” *Journal of Economic Perspectives*, Vol. 17:1 (Winter 2003): 105–130.

contributions, all citizens would have equal access to candidates. In reality, established interests (including trade associations, labor unions, the media, well-organized public interest groups, celebrities, and established political players) already have an overwhelming advantage in access to elected officials. Thus, contribution limits serve to stifle the voice of the average citizen while doing little to hinder the influence of those who already hold political sway.

Ultimately, this is because the Oregon Supreme Court is correct – contribution limits infringe upon the free speech rights guaranteed under the First Amendment. While other courts have upheld certain limits on contributions as constitutional due to a governmental interest in combating corruption or the appearance of corruption, this reasoning has been rejected in Oregon. There is, further, broad agreement that limits on campaign contributions harm the right to free speech guaranteed by the First Amendment. Now that evidence proves that contribution limits do not reduce corruption, produce “good” government, or increase trust in government, citizens and policymakers alike have recognized that the logic underlying contribution limits elsewhere in the country is weak at best. Many state legislators now realize that raising or eliminating limits entirely better conforms to the First Amendment, and therefore better fulfills every lawmaker’s commitment to upholding the Constitution. For Oregon legislators to impose contribution limits on the citizens of Oregon in the face of the above research and national trends would be antithetical to both common sense and the First Amendment.

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Ultimately, Senate Joint Resolution 5 and Senate Bill 75 unnecessarily impose campaign contribution limits, in opposition to both current legislative trends and prevailing academic research. Such limits would contradict current court precedent, and fail to address any perceived corruption issues or improve confidence in government. This move would further perversely increase the influence of independent groups at the expense of candidates and political committees and complicate enforcement of state campaign finance law. For a detailed analysis of the many harms involved with the implementation of contribution limits, I strongly encourage you to consult the Center for Competitive Politics’ Policy Primer, “Campaign Contribution Limits: A Cap on Free Speech.”<sup>16</sup>

Thank you for allowing me to submit comments on Senate Joint Resolution 5 and Senate Bill 75. Should you have any further questions regarding this legislation 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](mailto:mnese@campaignfreedom.org).

Respectfully yours,



Matt Nese  
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Center for Competitive Politics

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<sup>16</sup> “Campaign Contribution Limits: A Cap on Free Speech,” Center for Competitive Politics’ Policy Primer. Retrieved on April 21, 2015. Available at: [http://www.campaignfreedom.org/wp-content/uploads/2014/07/2014-10-22\\_Policy-Primer\\_Contribution-Limits.pdf](http://www.campaignfreedom.org/wp-content/uploads/2014/07/2014-10-22_Policy-Primer_Contribution-Limits.pdf) (July 18, 2014).