



TO: The Honorable Louis Luchini
The Honorable Chris Caiazzo, Co-Chairs
Members of the Joint Standing Committee on Veterans and Legal Affairs

DATE: March 8, 2021

RE: LD 526 – An Act To Require an Affidavit for Every Independent Expenditure Influencing an Election and To Penalize the Use of Mistruths

Good morning Senator Luchini and Representative Caiazzo.

My name is John Brautigam. I live in Falmouth, and I am here today as legal counsel and policy advisor for Maine Citizens for Clean Elections. I am testifying neither for nor against LD 526 – An Act To Require an Affidavit for Every Independent Expenditure Influencing an Election and To Penalize the Use of Mistruths.

Maine Citizens for Clean Elections has been the leading campaign finance organization in Maine for over twenty years and one of the nation’s most respected state-based organizations advocating for democratically funded elections. We are proud of our national reputation. But we are all Mainers, and our nonpartisan mission has always been with and for the people of this state.

This bill brings to the fore the clash of two principles, each of which is deeply embedded in our democratic traditions. On the one hand, the success of our democracy depends on the ability of voters to access information necessary to make informed choices. On the other hand, the government cannot serve as the referee deciding which campaign messages are beneficial and which are harmful.

For most of our history, we have entrusted the political process to mark the boundaries around what is acceptable speech. We have assumed that opposing forces will point out a candidate’s lies, and that the electorate will punish blatantly dishonest candidates by voting against them. Political campaigns are a “marketplace of ideas” where, at the end of the day, the “consumer” uses their ballot to choose winners and losers. We do not entrust that role to election administrators or judges.

While we share the sponsor’s frustration with recent examples of blatantly false campaign communications, LD 526 raises some significant issues.

First, without the “malice” factor, this would be patently unconstitutional. Judicial decisions in this area suggest that even with the addition of the malice factor, courts may prioritize protecting free political speech above protecting voters from misinformation. *See, e.g., 281 Care Comm. v. Arneson*, 638 F.3d 621, 636 (8th Cir. 2011); *Rickert v. Washington*, 168 P.3d 826, 827 (Wash. 2007).

Second, sanctions such as a \$5,000 penalty have the effect of “chilling” speech. That means that even honest and law abiding people might be afraid that they will incur the cost and risk of a legal case against them, and that this fear alone will effectively cause them to suppress their speech.

Third, recent experience shows that it can be very difficult to reach a public consensus on whether any given campaign advertisement is objectively true or false. By focusing on the presence of “malice,” this bill puts forth an even more challenging test. The determination of “malice” depends on the mental state of the person making the communication. Is the Ethics Commission staff equipped to make that call, and do we want to put them in that position?

Political lies are nothing new. In the 1800 election, Thomas Jefferson’s opponents warned that “[Americans] would see our wives and daughters the victims of legal prostitution” if Jefferson were elected, and that “murder, robbery, rape, adultery and incest [would] openly be taught and practiced.” Similarly scurrilous fabrications occur every cycle up to and including the 2020 campaign. No one should be proud of that record, but we can take comfort knowing that our legacy of fiercely protecting free speech ensures that opponents and any other person can vociferously refute campaign lies, and that voters can and often do reject them.

Thank you for your attention and consideration.