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STATE OF MAINE
DEPARTMENT OF THE ATTORNEY GENERAL
STATE HOUSE STATION 6
AUGUSTA, MAINE 04333

April 19, 1983

The Honorable Michael D. Pearson
The Honorable Gregory G. Nadeau
Chairmen, Joint Standing Committee on Election Laws
Maine Legislature
Augusta, Maine 04333

Dear Senator Pearson and Representative Nadeau:

This will respond to your inquiry as to the constitutionality of Legislative Document No. 7 of the 111th Legislature, "AN ACT Relating to Referendum Campaign Reports and Finances" ("bill"). Specifically, you asked whether the bill would violate the First Amendment of the United States Constitution in light of the United States Supreme Court's decision in Citizens Against Rent Control v. City of Berkeley, 454 U.S. 290 (1981) ("Berkeley"). For the reasons set out below, it is the Opinion of this Department that the bill is unconstitutional.

I

The bill would prohibit any individual from contributing more than $1,000 to any referendum campaign.[1/] The bill would also prohibit any political committee, other committee,

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1/ L.D. 7, § 2, (111th Legis. 1983), which would enact 21 M.R.S.A. § 1412-A(1) ("No individual may make contributions in any aggregate amount greater than $1,000 to any campaign.")

corporation, or association from contributing more than $5,000 to any referendum campaign.[2] The Statement of Fact appended to the bill states that "[t]he purpose of this bill is to prevent undue influence of referendum campaigns through excessive contributions from a single source. This bill essentially provides the same limitations that are established for contributions to candidates."[3] L.D. 7, Statement of Fact (111th Legis. 1983).

The bill is virtually identical to a bill introduced in the 110th Legislature. L.D. 1150 (110th Legis. 1981). In response to an opinion request about the constitutionality of that proposed legislation, this Department concluded that:

> [B]ased on the rationale of Buckley v. Valeo, [424 U.S. 1 (1976) (per curiam)], we believe that the contribution limitations contained in L.D. 1150 would be legally defensible by the Legislature. . . .To summarize, the law on this subject is unsettled, and thus, we cannot give an unqualified answer to your inquiry. However, in light of the existing precedent and the presumption of constitutionality accorded to legislative enactments, we believe that reasonable arguments can be made to defend L.D. 1150 should it be enacted.

Op.Me.Att'y Gen. 81-42 at 2, a copy of which is attached. That Opinion noted, however, that the United States Supreme Court had granted review of the decision of the California Supreme Court in Berkeley, upholding similar contribution limits, and that, therefore, the decision in that case could affect the conclusion of the Opinion. Id. at 2 n.2. Despite the Opinion of the Attorney General as to the constitutionality of the bill, however, the Maine Legislature did not enact the proposed contribution limits for referendum campaigns because of the Maine Senate's "overwhelming concern about the constitutionality of this issue." Legis. Rec. 1169 (May 18, 1981) (statement of Rep. Diamond). The issue presented, then, is whether the Supreme Court's decision in Berkeley altered the conclusion of this Department's earlier Opinion.

2/ L.D. 7, § 2, (111th Legis. 1983), which would enact 21 M.R.S.A. § 1412-A(2) ("No political committee, other committee, corporation, or association may make contributions in any aggregate amount greater than $5,000 to any campaign.")

3/ See 21 M.R.S.A. § 1395 (Supp. 1982).

II

In Berkeley, the United States Supreme Court for the first time directly addressed the question of whether the government could limit contributions to referendum campaigns.4/ The voters of Berkeley, California adopted an ordinance to place limits on expenditures and contributions in campaigns involving both candidates and ballot measures. 454 U.S. at 292. The ordinance prohibited any person from contributing more than $250 to a referendum campaign. Id. The California Supreme Court upheld the ordinance because it found that it furthered the compelling governmental interest of protecting the political process against corruption, and that this interest outweighed the First Amendment interest infringed upon. See Citizens Against Rent Control v. City of Berkeley, 27 Cal. 3d 819, 614 P.2d 742, 167 Cal.Rptr. 84 (1980), reversed 454 U.S. 290 (1981). The United States Supreme Court, by a vote of 8-1, reversed. Id.

After distinguishing referenda campaigns from candidate elections,5/ 454 U.S. at 295-97, the Court found that the Berkeley ordinance did not "advance a legitimate governmental interest significant enough to justify its infringement on First Amendment rights." Id. at 299 (footnote omitted). The Court noted, with respect to the contribution limits of the ordinance, that

> Whatever may be the state interest or degree of that interest in regulating and limiting contributions to or expenditures of a candidate or candidate's committees there is no significant state or public interest in curtailing debate or in discussion of a

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4/ In First National Bank of Boston v. Bellotti, 435 U.S. 765 (1978), the Court invalidated on First Amendment grounds a Massachusetts law which prohibited corporations from spending any money for the purpose of influencing the public concerning certain referendum questions. Because the focus of the Court's opinion was on the complete prohibition of corporate expenditures and expression, it did not address the issue of whether a limitation on referendum campaign contributions in general would be unconstitutonal.

5/ In Buckley v. Valeo, 424 U.S. at 26-29, the Court upheld limits on contributions to candidates and their committees because of the need to avoid even the appearance of improper influence, and therefore, to preserve the integrity of the system of representative democracy.

> ballot measure. Placing limits on contributions which in turn limit expenditures plainly impairs freedom of expression. The integrity of the political system will be adequately protected if contributors are identified in a public filing revealing the amounts contributed; if it is thought wise, legislation can outlaw anonymous contributions.

Id. at 299-300. In the referendum context, the Court held that disclosure requirements,[6] rather than contribution limits, are sufficient to serve the government's interest of protecting against the appearance of corruption.[7]

III

Before Berkeley, this Department was unable to give an unqualified answer to the question of whether the limitations on contributions to referendum campaigns were constitutional. See Op.Me.Att'y Gen. 81-42 at 2. Following the United States Supreme Court's decision in Citizens Against Rent Control v. City of Berkeley, 454 U.S. 290 (1981), this Department concludes that it is unconstitutional for the government to limit the contributions to referendum campaign committees

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6/ Maine law currently requires referenda committees to appoint a treasurer, keep records of contributions, and report all contributions for expenditures in excess of $50 to the Commission on Governmental Ethics and Election Practice. See generally 21 M.R.S.A. §§ 1411-1420 (Supp. 1982). Accordingly, Maine law currently provides much of the protection thought sufficient by the United States Supreme Court in this area.

7/ It is worth noting that three of the Justices concurring in the result in Berkeley would have decided the case on the narrower ground that the city had simply not proved how the integrity of its government processes would be compromised without a contribution limitation. See 454 U.S. at 301-02 (Marshall, J. concurring in the judgment); id. at 302-03 (Blackmun and O'Connor, JJ. concurring in the judgment). However, because a majority of the Court supported the general proposition that contribution limitations in referendum campaigns are per se unconstitutional, this Department cannot advise that if a better factual record were created in support of the bill, the constitutional result would be any different.

formed to support or oppose referenda measures.8/

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I hope that you find this information helpful. Please feel free to contact this Office if we can be of any further assistance.

Very truly yours,

JAMES E. TIERNEY
Attorney General

JET/dab

cc: The Honorable John N. Diamond
The Honorable Michael E. Carpenter
The Honorable Steven E. Crouse

8/ It should also be recognized that if this bill were enacted, the State could be sued pursuant to Section 1983 of the Federal Civil Rights Act. 42 U.S.C. § 1981, et seq. (Supp. V 1981). Furthermore, if the plaintiff in that case were to prevail, then the State could also be held liable for the plaintiff's costs of the litigation, including attorneys fees. 42 U.S.C. § 1988 (Supp. V 1981). Cf. Maine v. Thiboutot, 448 U.S. 1 (1980) (Maine held liable for attorneys fees when plaintiff prevails in civil rights action under federal statute).