

OFFICE OF POLICY AND LEGAL ANALYSIS

Date: April 2, 2021

To: Veterans and Legal Affairs Committee

From: Janet Stocco, Legislative Analyst

LD 53 An Act To Limit Political Advertising (Rep. O'Connell)

SUMMARY

This concept draft “proposes to limit excessive political advertising in a manner that does not infringe on First Amendment rights.”

ISSUES RAISED / AMENDMENTS PROPOSED AT PUBLIC HEARING

At the public hearing, the sponsor suggested that the committee consider striking and replacing the concept draft with legislation enacting “parameters around when campaign mail is sent” perhaps by limiting campaign mail to the 3 months preceding an election.

ADDITIONAL INFORMATION

First Amendment analysis.

The U.S. Supreme Court has repeatedly explained:

Discussions of public issues and debate on the qualifications of candidates are integral to the operation of the system of government established by our Constitution. The First Amendment affords the broadest protection to such political expression in order to assure the unfettered interchange of ideas for the bringing about of political and social changes desired by the people.

McIntyre v. Ohio Elections Commission, 514 U.S. 334, 346-47 (1995). Because the sponsor’s proposal for amending LD 53 “burdens core political speech” regarding a campaign for political office, if challenged it will be held unconstitutional unless a court concludes that the bill is both “necessary to serve a compelling state interest and . . . narrowly drawn to achieve that end.” *Mowles v. Comm’n on Gov’t Ethics and Election Practices*, 2008 ME 160, ¶20.

In addition, under a separate line of U.S. Supreme Court cases, content-based governmental regulations of speech—laws that regulate speech based on either the content of the message or the topic discussed—are “presumptively unconstitutional” under the First Amendment. When challenged, content-based laws are subjected to strict scrutiny and will be declared unconstitutional by a court unless “the government proves that they are narrowly tailored to serve compelling state interests.” *Reed v. Town of Gilbert*, 575 U.S. 155, 163 (1995).

In *Reed*, for example, the U.S. Supreme Court concluded that a town’s sign code, which imposed different size and time restrictions on the placement of temporary roadside signs based on the subject matter of the message—*i.e.*, signs with political messages were only authorized during a particular time period surrounding an election but an ideological sign could be placed for a longer period of time—was

unconstitutional. The Court declined to decide whether the town's asserted interests in preserving the town's aesthetic appeal and in traffic safety were "compelling" under the First Amendment because, even if those interests were compelling, the law was "hopelessly underinclusive." *Id.* at 171-72. The Court observed that the town could not demonstrate that it was necessary to restrict certain categories of signs to preserve the town's beauty "while at the same time allowing unlimited numbers of other types of signs" that were "no greater an eyesore." Nor had the town shown that the categories of signs disfavored in the sign code posed any greater threat to traffic safety than favorably treated ideological signs, which the Court believed might be "more likely to distract a driver." *Id.* at 172.

In light of these decisions, the committee should carefully consider the compelling governmental interest or interests justifying a restriction specifically applied to political speech through an amendment to LD 53, including an amendment limiting the time period in which political mailings may be sent, and whether that restriction is both necessary and narrowly tailored to serve that compelling government interest or interests. The committee may also wish to consider whether a legislative findings provision should be added to the bill outlining the facts giving rise to the State's compelling government interest.

FISCAL IMPACT

Not yet determined.