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February 3, 2016

By Electronic Mail (mabdul@house.mi.gov)

Chairwoman Lisa Posthumus Lyons
House Elections Standing Committee
House Office Building
Room 308
Lansing, MI 48909-7514

Re: Testimony of the Campaign Legal Center on Senate Bill 638, House Elections Standing Committee

Dear Chairwoman Posthumus Lyons and Members of the Committee:

On behalf of the Campaign Legal Center, we submit this testimony to the House Elections Standing Committee regarding S.B. 638, as passed by the Senate on December 9, 2015. The bill amends the Michigan Campaign Finance Act's (MCFA) definition of "independent expenditure." Although we see the new definition as an improvement over current law, the numerous carve outs and exceptions to this definition are so extensive that they render any improvements made by the new definition meaningless.

The bill has been described as codifying the U.S. Supreme Court's decision in *Citizens United v. FEC*, 558 U.S. 310 (2010), and the bill's Senate sponsor, Sen. David Robertson, has stated that "it makes sense to codify the high court's decision in state statute."[1] These statements, however, do not accurately represent Supreme Court precedent. The bill would allow candidates to coordinate with their supporters on ostensibly independent expenditures in a way that does not comport with the Supreme Court's description of independent expenditures in *Citizens United* and other decisions. In fact, rather than codifying the Supreme Court's decision in *Citizens United*, S.B. 638 would codify the corrupting soft money fundraising practices that are *prohibited* at the federal level. The extensive coordinated activity that the bill allows will have a significant impact on other provisions of the Michigan Campaign Finance Act, including fundamentally undermining the state's contribution limits by allowing candidates to work closely with supporters making unlimited expenditures to their benefit.

[1] Emily Lawler, *Senate votes to write super PACs into state campaign finance law*, MLive, Dec. 9, 2015, *available at* http://www mlive.com/lansing-news/index.ssf/2015/12/senate_votes_to_write_super_pa html.

I. The definition of "independent expenditure" in S.B. 638 would be one important step forward for Michigan campaign finance law—completely undone by many steps back.

The Campaign Legal Center is keenly aware that the vast amount of money spent on independent expenditures has affected campaigns at all levels of government. The U.S. Supreme Court's decision in *Citizens United* and subsequent court decisions allowed corporations and labor unions to make unlimited expenditures to influence elections so long as the expenditures are actually independent of candidates. As the amount of unlimited outside spending has increased, the legal lines separating "independent" and "coordinated" spending have become critically important. Candidates, their supporters and their lawyers have pushed the boundary of what constitutes an "independent" expenditure to absurdity. Without effective regulation of coordinated spending between candidates and their supporters, candidate contribution limits are meaningless. If a Michigan gubernatorial candidate can solicit a $50,000 contribution from a supporter to a so-called "independent" expenditure committee supporting that candidate, then the State's $6,800 limit on contributions directly to state-wide candidates is completely undermined. Such candidate involvement in political fundraising and spending is precisely the type of corrupting scenario that contribution limits are intended to prevent.

Senator Robertson's statements about S.B. 638 make clear that the bill is a response to the drastic changes to the legal landscape since *Citizens United*. Although we view the amended definition of "independent expenditure" to be an improvement over the current definition, the activity that a candidate and outside spender could engage in together will swallow the otherwise good definition. The bill amends the definition of "independent expenditure" to read:

> [A]n expenditure by a person if the expenditure is not made in concert or cooperation with, or at the request or suggestion of, a ballot committee or a candidate, a candidate committee or its agents, or a political party committee or its agents, and is not a contribution made directly to a candidate committee or a political party committee.

S.B. 638, § 9(2). The operative language "in concert or cooperation with, or at the request or suggestion of" in the bill is an improvement over the current statutory language, which describes coordinated expenditures as those made "at the direction of, or under the control of" a candidate. The current definition is too narrow, as it suggests direct control of the expenditure by the candidate is required for the expenditure to be deemed coordinated. This narrow conception of coordinated activity does not capture situations in which there is a transfer of knowledge from the campaign to the outside spender—either directly or indirectly—an important element of a provision that will actually cover the ways in which candidates and outside spenders coordinate.

The proposed "in concert or cooperation with" language is similar to language at the federal level describing what will be considered a contribution to a candidate: "[E]xpenditures made by any person in cooperation, consultation, or concert, with, or at the request or suggestion of, a candidate, his authorized political committee, or their agents, shall be considered to be a contribution to such candidate." 52 U.S.C. § 30116(a)(7)(B)(i). Expenditures made "in

cooperation, consultation or concert" with a candidate are considered coordinated with a candidate. Accordingly they are treated as contributions to the candidate and must comply with the attendant source prohibitions and amount limitations.

Other states, such as Minnesota have adopted a similar "in concert or cooperation with" definition.[2] As explained by the Minnesota Campaign Finance and Public Disclosure Board (Minnesota Board), this language provides the flexibility to capture current practices that have dissolved any sense that there is true independence between candidates and groups making unlimited "independent" expenditures. Moreover, the Minnesota Board's interpretation of the "in concert or cooperation with" definition makes clear that the expenditure is the result of a much larger process:

> [A]n independent expenditure is not merely a spending decision of a payment transaction, but includes all of the activities needed to make the communication. Creating a communication requires fundraising, budgeting decisions, media design, acquisition or development of graphics and text, production, distribution of the final product, and other associated processes.

Minn. Bd. Ad. Op. 437, at 3 (Feb. 11, 2014), *available at* http://www.cfboard.state.mn.us/ao/AO437.pdf. In short: you cannot separate the communication from the process required to create the communication. The communication does not materialize out of thin air. Rather, it is the result of the work and processes around which campaigns are built. The Minnesota Board's reasonable and realistic approach reflects how campaigns actually work. Consistent with this practical understanding of the process involved in creating independent expenditures, the Minnesota Board has interpreted the statute to require independence at every step along the way. The Board has stated in no uncertain terms, "To be an independent expenditure, a communication *and all of the processes or activities leading up to its eventual publication* must meet the requirements of the independent expenditure definition." *Id*. (emphasis added).

The proposed "in concert or cooperation with" definition of independent expenditure in S.B. 638 is an improvement over the current definition. This definition provides a realistic understanding that there are many steps in the process of creating an independent expenditure, and that it is beneficial to the candidate to coordinate with the outside spender at any step in the process. This definition reflects good public policy and would help Michigan ensure that its contribution limits are not rendered meaningless by contributors channeling money through ostensibly independent groups.

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[2] Minnesota's definition of independent expenditure reads:

> [A]n expenditure expressly advocating the election or defeat of a clearly identified candidate, if the expenditure is made without the express or implied consent, authorization, *or cooperation of, and not in concert* with or at the request or suggestion of, any candidate or any candidate's principal campaign committee.

Minn. Stat. § 10A.01, subd. 18 (emphasis added).

a. S.B. 638 allows candidates to solicit funds on behalf of independent spenders, seriously undermining Michigan's contribution limits.

Although the definition of "independent expenditure" in S.B. 638 is an improvement to the MCFA, the numerous exceptions and carve outs in the rest of the bill effectively gut the definition. First and foremost, the bill allows candidates to solicit unlimited contributions on behalf of a supposedly independent expenditure committee supporting his or her candidacy. The solicitation provision reads:

> An independent expenditure is not precluded under any of the following:
>
> Where a candidate or his or her agent, a candidate committee or its agent, or a political party committee or its agent solicits contributions on behalf of a person that may finance independent expenditures on behalf of candidates and political parties, including the candidate or political party soliciting contributions on behalf of that person.

§ 24B(6)(A).

A candidate appearing at a fundraiser or soliciting funds for a committee making expenditures to benefit the candidate is clear indicia of coordination. At the federal level, the FEC has perpetuated the legal fiction that a candidate can raise money (up to the federal $5,000 contribution limit) for an "independent expenditure-only political committee"—a.k.a. Super PAC—while that Super PAC's expenditures supporting that candidate are deemed *legally* independent of the candidate. In reality the message that is sent to contributors when a candidate raises money for an independent expenditure group is: "This is my Super PAC. Please give generously so that it can support my candidacy." This practice allows for blatant violation of the contribution limits.

Similar to what is allowed at the federal level, the solicitation provision in S.B. 638 allows candidates to raise money for groups making independent expenditures. It goes much further than what is allowed at the federal level, however, by allowing candidates to solicit *unlimited* contributions for these groups. Federal candidates may only solicit contributions up to $5,000. *See* FEC Ad. Op. 2011-12, at 3-5 (explaining that Federal candidates and officeholders may solicit funds for groups accepting unlimited contributions to make independent expenditures, so long as the contributions solicited by the candidate or office holder comply with Federal amount limitations and source prohibitions). In contrast, candidates in Michigan could solicit six or seven figure contributions that could then be used to directly support their candidacy. As explained in greater detail below, Congress passed the so called soft money provisions of the Bipartisan Campaign Reform Act of 2002 (BCRA) to curtail precisely this type of activity. *See* 52 U.S.C. § 30125(e). Despite claims that S.B. 638 codifies *Citizen United*, in reality it goes well beyond the decision and what is allowed at the federal level by allowing candidates to solicit unlimited amounts for groups making independent expenditures on their behalf. The bill codifies the soft money fundraising practices specifically prohibited by BCRA. Accordingly, the solicitation provision of S.B. 638 would be seriously detrimental to the bill's amended definition of independent expenditure and to the MCFA on the whole.

b. S.B. 638 allows agents of candidates (e.g., the candidate's staff) and common vendors to coordinate with outside spenders on nearly every aspect of an "independent" expenditure, damaging any sense of actual independence.

Additional carve outs to the definition of independent expenditure relate to the use of common vendors, agents of a candidate and services related to preparing independent expenditures. The problem with these exceptions is that they allow people with extensive knowledge of the candidate's campaign—even people working for the candidate—to simultaneously work for the outside spender. According to the statute, however, the resulting expenditure could still be considered independent. These exceptions are problematic for many reasons and allow a degree of coordination that makes independent expenditures merely an extension of the candidate's campaign.

To begin, Section 24B(5) allows outside spenders to use the same attorney or other common vendor as a candidate committee. The provision reads:

> An independent expenditure committee may use an attorney or other vendor that is also used by a . . . candidate, [or] candidate committee . . . that is the subject or beneficiary of the independent expenditure, without defeating the independent nature of the independent expenditure, *if the attorney or vendor does not convey material information* to the independent expenditure committee about the campaign plans, projects, activities or needs of the . . . candidate, candidate committee, or political committee."

§ 24B(5) (emphasis added). We are sympathetic to the fact that there may be a limited number of vendors in a given area that can provide the services that both candidates and outside spenders need. An outright common vendor prohibition is likely unfeasible in some communities. However, the law should reflect that when candidates and outside spenders use common vendors, a valuable transfer of knowledge can take place. Section 24B(5) prohibits a common vendor from conveying material information from candidate to the outside spender. This is an important measure but leaves much room for the common vendor's own *use* of information obtained from a candidate. For example, a media buyer used by a candidate could tell a Super PAC supporting the candidate to buy advertising time on a Tuesday, knowing that the campaign has bought ad time on Wednesday, to ensure maximum coverage of ads supporting the candidate. The ad buyer would not have "conveyed" material information to the Super PAC but would have used such information in the advice he or she provided to the Super PAC, resulting in an expenditure that will be more complimentary to the candidate's efforts.

In contrast, the Federal Election Commission's (FEC) coordination regulations prohibit common vendors from conveying *or* using information "about the campaign plans, projects, activities, or needs" of a candidate or party committee, 11 C.F.R. § 109.21(d)(4)(iii). The FEC's regulation accurately reflects how common vendors can transfer or use information about a candidate's plans to the mutual benefit of the candidate and the outside spender by tailoring the Super PAC's activities to the candidate's strategy and needs.

Again, we understand that an outright ban on the use of common vendors may not be realistic. One possible solution would be to allow common vendors to use internal firewalls to prevent the transfer or use of information about a candidate's campaign when advising or consulting an outside spender. If the vendor assigned different staff to the candidate and to the outside spender, it is much less likely that the common vendor would convey and/or use information about the candidate's campaign when advising the outside spender.

Section 24B(6)(B) also relates to the use of common vendors but this provision undermines other key components to regulating independent expenditures, mainly what activities will be considered related to preparing an independent expenditure and the involvement of a candidate's agents (e.g., staff, family members). The provision reads:

> An independent expenditure is not precluded under any of the following:
>
> Where an independent expenditure committee or a person engages agents or vendors of candidates, candidate committee, or political party committees to assist that independent expenditure committee or person in areas unrelated to preparing an independent expenditure subject to the act, including, but not limited to, agents or vendors providing fund-raising, legal, accounting, studio rental, and other services unrelated to preparing an independent expenditure subject to this act.

§ 24B(6)(B). By enumerating activities that are "unrelated" to preparing an independent expenditure, this provision artificially isolates the independent expenditure from the fundraising, planning and production necessary to create the expenditure. The proposed language states "and other services unrelated to preparing an independent expenditure." The problem with this provision is that all of the services described in this list are, in reality, directly related to preparing independent expenditures. Again, we think the Minnesota Board appropriately recognized independent expenditures as the end result of a longer process when it said:

> [A]n independent expenditure is not merely a spending decision of a payment transaction, but includes all of the activities needed to make the communication. Creating a communication requires fundraising, budgeting decisions, media design, acquisition or development of graphics and text, production, distribution of the final product, and other associated processes.

Minn. Bd. Ad. Op. 437 at 3. Ironically, the very services that S.B. 638 identifies as unrelated to preparing an independent expenditure, the Minnesota Board has said *are* related to preparing an independent expenditure. The list of activities unrelated to preparing an independent expenditure would allow candidates to coordinate with outside spenders on all but deciding when to run the ad, and the common vendor provision, Section 24B(5), provides an easy workaround for that.

Additionally, in contrast with federal law, Section 24B(6)(B) would allow agents of a candidate (e.g., high level staff or immediate family members) to work simultaneously for the candidate and a Super PAC supporting the candidate. If the candidate's staff can coordinate with the outside spender on "fund-raising, legal, accounting, studio rental, and other services" there is

functionally little difference between the "independent" expenditure committee and the candidate's own campaign.

Federal law restricts the type of involvement "agents" of a candidate or officeholder may have with outside spenders. *See* FEC Ad. Op. 2015-09, at 7-8 (describing the limited circumstances in which an "agent" of a federal candidate may solicit funds for certain Super PACs). Additionally, FEC regulations require a 120-day "cooling off" period before a candidate's former employee may work with an independent spender in support of the candidate. *See* 11 C.F.R § 109.21(d)(5). Indeed, this is precisely because of the former staff person's valuable knowledge about the candidate's campaign. A candidate's *current* staff engaged with the work of an outside spender is even more problematic. Such a scenario sends a clear message to contributors: "This is the candidate's Super PAC and we know what expenditures are going to be the most helpful to the candidate."

In effect, the provisions in Sections 24B(5) and (6)(B) would allow a candidate's staff or family members to coordinate with outside spenders on virtually every aspect of an "independent" expenditure. These provisions would allow unfettered collaboration, destroying any distinction between an independent expenditure and a candidate's own expenditures.

II. The proposed definition of "independent expenditure" is constitutional but the solicitation allowed by S.B. 638 poses a serious threat of corruption.

a. The Supreme Court has made explicit that only expenditures that are "totally," "wholly," or "truly" independent from candidates are non-corruptive.

There are no constitutional barriers to adopting S.B. 638's definition of "independent expenditure." Notwithstanding the Supreme Court's pronouncement in *Citizens United* that independent expenditures cannot be constitutionally limited because they "do not give rise to corruption or the appearance of corruption," 558 U.S. 310, 357 (2010), *non*-independent—i.e., coordinated—expenditures are not so immunized. The Supreme Court has maintained a broad view of coordination in general, and has spoken expansively about the degree of independence that is necessary to prevent outside spending from "undermin[ing] contribution limits." *FEC v. Colorado Republican Federal Campaign Committee*, 533 U.S. 431, 464 (2001) ("*Colorado II*"). Only "totally independent," "wholly independent," and "truly independent" expenditures qualify.

Since the Supreme Court's decision in *Buckley v. Valeo*, 424 U.S. 1 (1976), the Court has distinguished for constitutional purposes between limitations on "contributions" to a candidate's campaign, and limitations on "expenditures" to influence an election made independently of candidates. The *Buckley* Court upheld as constitutionally permissible candidate contribution limits, *id.* at 29, but struck down limits on individual independent expenditures, *id.* at 51. The Court recognized, however, that to be effective any limitations on campaign contributions must apply to expenditures made in coordination with a candidate, so as to "prevent attempts to circumvent the [campaign finance laws] through prearranged or coordinated expenditures amounting to disguised contributions." *Id.* at 47. The *Buckley* Court further explained that there was a difference between expenditures "made *totally* independently of the candidate and his

campaign," *id*. at 47 (emphasis added), and "coordinated expenditures," and construed the contribution limits to include not only contributions made directly to a candidate, but also "all expenditures placed in cooperation with or with the consent of a candidate" or his campaign committee. *Id*. at 46–47 n.53; *see also id.* at 78.

Unlike contributions, the *Buckley* Court explained, *totally* independent expenditures "may well provide little assistance to the candidate's campaign and indeed may prove counterproductive." *Id*. at 47. The Court explained further that the absence of coordination "undermines the value of the expenditure to the candidate" and "alleviates the danger that expenditures will be given as a quid pro quo for improper commitments from the candidate." *Id*.

The Court echoed *Buckley*'s broad language regarding coordination in later decisions on the same topic. In *Colorado Republican Federal Campaign Committee v. FEC*, 518 U.S. 604 (1996) ("*Colorado I*"), the Court held that a radio advertisement aired by the Republican Party attacking the Democratic Party's presumptive nominee to the U.S. Senate would not be treated as coordinated because the ad was developed "*independently* and not pursuant to any general or particular understanding with a candidate . . . ." *Id*. at 614. Then, in *Colorado II*, the Court—again in the context of party spending—noted that independent expenditures are only those "without any candidate's approval (or *wink or nod*) . . . ." 533 U.S. at 442, 447 (emphasis added). Shortly thereafter, the Court again noted that the relevant "dividing line" was "between expenditures that are coordinated—and therefore may be regulated as indirect contributions—and expenditures that *truly* are independent." *McConnell v. FEC*, 540 U.S. 93, 221 (2003) (emphasis added).

The definition of "independent expenditure" in S.B. 638 allows for a realistic understanding of how candidates may coordinate with the outside groups supporting them. The numerous, damaging exceptions to this definition, however, allow for legally "independent" expenditures that are far from the Supreme Court's description of "totally," "wholly," and "truly" independent expenditures.

b. The Supreme Court has confirmed that solicitation by candidates poses a serious threat of corruption and circumvention—even when the funds are solicited for and spent by another entity.

The detrimental impact of the fundraising provision in Section 24B(6)(A) cannot be overstated. The Supreme Court has specifically recognized a serious threat of corruption or its appearance inherent in the act of candidate solicitation itself, in the context of upholding federal law restrictions on candidate solicitation of "soft money" (i.e., money raised outside of contribution amount limits and corporate/union source prohibitions) in connection with any election.[3] The federal solicitation restrictions, which were enacted as part of BCRA, were challenged and

[3] The federal law prohibition on "soft money" fundraising provides: "A candidate … shall not … solicit, receive, direct, transfer, or spend funds in connection" with any election unless the funds are subject to the contribution limitations and prohibitions of the Federal Election Campaign Act. *See* 52 U.S.C. § 30125(e)(1)(A) (prohibiting such activity in connection with federal elections) and (B) (prohibiting such activity in connection with nonfederal elections).

upheld in *McConnell*, 540 U.S. at 142-54, 181-84, including with the vote of Justice Kennedy, who otherwise dissented in the case. *See id.* at 308 (Kennedy, J. dissenting in part and concurring in part). In so holding, the Court emphasized "the substantial threat of corruption or its appearance posed by donations to or at the behest of federal candidates and officeholders," noting that "the value of the donation to the candidate or officeholder is evident from the fact of the solicitation itself." *Id.* at 182-84. Even Justice Kennedy concluded that "[t]he making of a solicited gift is a *quid* both to the recipient of the money and to the one who solicits the payment (by granting his request)." *Id.* at 308 (Kennedy, J.). Consistent with this reasoning, the Court upheld the solicitation restriction as "clearly constitutional." *Id.* at 184.[4]

The Supreme Court has repeatedly emphasized that measures preventing the circumvention of valid contribution limits serve the same compelling anti-corruption interests as do the contribution limits themselves. *See, e.g.*, *McConnell*, 540 U.S. at 144 (upholding restrictions on "soft money" and stating that anti-corruption interests "have been sufficient to justify not only contribution limits themselves, but laws preventing the circumvention of such limits"); *Colorado II*, 533 U.S. at 455 (upholding coordinated party spending limits in order to prevent the "exploitation [of parties] as channels for circumventing contribution and coordinated spending limits binding on other political players"); *Cal. Med. Ass'n v. FEC*, 453 U.S. 182, 197-98 (1981) (upholding limits on contributions to political committees in order "to prevent circumvention of the very limitations on contributions that this Court upheld in *Buckley*"); *FEC v. Beaumont*, 539 U.S. 146, 155 (2003) (upholding restriction on corporate contributions on grounds that it "hedges against" the use of corporations "as conduits for circumvention of valid contribution limits") (internal quotation marks omitted).

When a candidate is specifically sought out by a spender for fundraising assistance, in fact assists with fundraising, and does so by soliciting unlimited contributions and/or appearing as a speaker at a fundraiser, the spender's later expenditure for the candidate's benefit is not "independent" in any meaningful sense. Under such circumstances, it can be reasonably inferred that the solicitation is undertaken with an expectation or understanding that the spender receiving those funds will use them to pay for communications benefiting the soliciting candidate—and indeed, the risk of a more explicit arrangement, going beyond a "wink or nod" or "general agreement," cannot be realistically denied.

III. Conclusion

For all of the above-stated reasons, the Campaign Legal Center concludes that S.B. 638 as passed by the Senate would seriously undermine the MCFA by effectively destroying any separation between candidates and Super PACs supporting them. Despite claims to the contrary, the proposed legislation goes well beyond what is constitutionally required in *Citizens United* by

[4] The Federal Election Commission has made clear that the federal law prohibition on candidates soliciting unlimited funds remains in effect with respect to independent expenditure-only political committees. The Commission has explained: "It is clear that under *Citizens United*, the [independent expenditure-only committees] may accept unlimited contributions from individuals, corporations, and labor organizations; however, the Act's solicitation restrictions remain applicable to contributions solicited by Federal candidates, officeholders, and national party committees and their agents." FEC, Ad. Op. 2011-12 at 4. The Commission explained further that the federal law restriction on candidate fundraising "was upheld by the Supreme Court in *McConnell v. FEC* … and remains valid since it was not disturbed by either *Citizens United* or *SpeechNow*. *Id.* (citation omitted).

allowing candidates to coordinate nearly every aspect of their supporters' "independent" expenditures. We appreciate the opportunity to submit these comments and would be happy to address any questions you may have.

Sincerely,

/s/ Paul S. Ryan

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