
1411 K Street, NW, Suite 1400
Washington, DC 20005
tel: 202-736-2200 fax: 202-736-2222

July 24, 2017

By Electronic Mail (judiciary@dccouncil.us)

Council of the District of Columbia
Committee on the Judiciary & Public Safety
1350 Pennsylvania Avenue, NW
Washington, DC 20004

Re: Testimony in Support of B22-0008 the "Campaign Finance Transparency and Accountability Amendment Act of 2017" and B22-0051 the "Comprehensive Campaign Finance Reform Act"

Dear Chairman Allen and Members of the Committee:

Thank you for the opportunity to submit this written testimony, and to testify at the Committee's hearing on July 10, in support of the campaign finance reform bills the Committee is considering. The Campaign Legal Center supports the Campaign Finance Transparency and Accountability Amendment Act of 2017, B22-0008 (Attorney General Racine's bill); and the Comprehensive Campaign Finance Reform Amendment Act of 2017, B22-0051 (Councilmembers White's and Gray's bill).[1]

The Campaign Legal Center has reviewed the bills very closely, and we believe that they would make important improvements to D.C.'s campaign finance laws. If enacted, these bills would meaningfully inhibit the types of pay-to-play scandals that have cast a shadow over the District's government in recent years. Further, the anti-coordination provisions in the Attorney General's bill would help prevent circumvention of candidate contribution limits through "independent" expenditures that are not truly independent of candidates. In this testimony, the Campaign Legal Center offers a few suggestions regarding what we see as provisions necessary for effective pay-to-play legislation, and provides analysis regarding the constitutionality of pay-to-play and anti-coordination reforms.

[1] The Campaign Legal Center also supports the portions of the Clean Elections Amendment Act of 2017, B22-0032, that address coordination. The Campaign Legal Center takes no position on B22-0107, the Campaign Finance Reform Amendment Act of 2017.

## I. The bills before the Committee include important provisions that would begin to address the pay-to-play scandals that have plagued D.C. politics.

The Campaign Legal Center (CLC) urges the Committee to act expeditiously in the passage of a robust pay-to-play law. Enacting pay-to-play reforms would be an important step toward addressing the pay-to-play scandals that have plagued D.C. politics in recent years.[2] The D.C. Council's significant role in oversight of the contracting process — approving contracts worth more than $1 million — creates the appearance of, if not the opportunity for, favoritism of political supporters.[3] We, therefore, agree with the recommendation in Councilmember Mary Cheh's recent report that the Council should consider amending campaign finance law to limit contractors' campaign contributions. As stated in her report, "Where impressions of favoritism cause contractors to refrain from bidding on particular contracts, that lack of competition means that the District loses out—on price, work quality, and engagement of local workers or businesses."[4]

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[2] *See D.C. corruption scandals: A primer*, WASH. POST (last updated June 10, 2013), http://www.washingtonpost.com/wp-srv/special/local/dc-corruption-scandals; Patrick Madden, *The Cost of D.C. Council's Power Over Contracts*, WAMU, http://wamu.org/projects/paytoplay (last visited July 24, 2017); Aaron C. Davis, *D.C. Council report: Bowser administration favored top donor in contracting*, WASH. POST (June 14, 2017), https://www.washingtonpost.com/local/dc-politics/dc-council-report-bowser-administration-favored-top-donor-in-contracting/2017/06/14/5799a712-5134-11e7-b064-828ba60fbb98_story.html; Aaron C. Davis, *Watchdog calls for review of D.C. mayor's campaign contributions*, WASH. POST (Mar. 9, 2017), https://www.washingtonpost.com/local/dc-politics/watchdog-calls-for-review-of-dc-mayors-campaign-contributions/2017/03/09/3a054804-0504-11e7-b1e9-a05d3c21f7cf_story.html; Aaron C. Davis and Peter Jamison, *Fired D.C. employee claims Bowser administration tried to steer contracts to donor*, WASH. POST (Dec. 1, 2016), https://www.washingtonpost.com/local/dc-politics/fired-dc-employee-claims-bowser-administration-tried-to-steer-contracts-to-donor/2016/12/01/c04f887a-b7de-11e6-959c-172c82123976_story.html; Mike DeBonis & Ann E. Marimow. *Jeffrey Thompson is said to have secretly pumped $100,000 into 2008 Brown campaign*, WASH. POST (Feb. 7, 2014), https://www.washingtonpost.com/local/dc-politics/jeffrey-thompson-is-said-to-have-secretly-pumped-100000-into-2008-brown-campaign/2014/02/07/95b2e16c-903a-11e3-b227-12a45d109e03_story.html; Aaron C. Davis & Mike DeBonis, *D.C. Council censures Marion Barry for taking cash payments from city contractors*, WASH. POST (Sept. 17, 2013), https://www.washingtonpost.com/local/dc-politics/dc-council-censures-marion-barry-for-taking-cash-payments-from-city-contractors/2013/09/17/02f22d06-1fba-11e3-b7d1-7153ad47b549_story.html; Mike DeBonis, *Michael A. Brown is charged with bribery, will plead guilty*, WASH. POST (June 7, 2013), https://www.washingtonpost.com/local/dc-politics/michael-a-brown-is-charged-with-bribery/2013/06/07/20684876-cf7d-11e2-8845-d970ccb04497story.html; Mike DeBonis & Nikita Stewart, *Vast 'shadow campaign' said to have aided Gray in 2010*, WASH. POST (July 10, 2012), https://www.washingtonpost.com/local/dc-politics/gray-donor-admits-to-scheme-to-funnel-illegal-campaign-contributions/2012/07/10/gJQA0b5DbW_story.html.

[3] D.C. Code § 2-352.02; *see* Madden, *supra* note 2 (stating that no other state-level legislature has similar authority over contracts).

[4] Findings & Recommendations of Mary M. Cheh on the Department of General Services Contracting and Personnel Management, at 41-42 (June 14, 2017), http://marycheh.com/wp-content/uploads/2017/06/2017-06-14-DGS-Contracting-and-Personnel-Report-by-Mary-Cheh-no-attachments.pdf.

**a. CLC supports the Committee's plan to move forward with a bill that includes provisions from both the Attorney General's bill and Councilmembers White's and Gray's bill.**

The two pay-to-play bills before the Committee include important provisions that are critical to an effective pay-to-play law. The bills are complementary, and both are thoughtfully designed to address the potentially corrupting influence of campaign contributions from those seeking to do business with the District. CLC supports Chairman Allen's approach of incorporating provisions of Attorney General Racine's bill and Councilmembers White's and Gray's bill into one bill for the Council's consideration.[5] As the Committee considers what it will include in the legislation it submits to the Council, we recommend that the Committee include the following provisions:

- A broader conception of "business dealings": In addition to contracts, the Attorney General's bill would cover grants, tax abatements, and the sale or lease of buildings or land.[6] Covering tax abatements and the sale and use of land and real estate is a more comprehensive approach that reflects the numerous ways the District can engage in business dealings and, accordingly, the individuals and entities on the other side of the business dealing that should be covered by a pay-to-play law.

- Prohibit contributions from high-level employees: In addition to prohibiting contributions from entities contracting with the District, it is important to cover high-level employees of those entities as well. Councilmembers White's and Gray's bill covers officers, directors, and principals with a controlling interest.[7] Including high-level employees in the contribution ban, and establishing a lower contribution limit for their immediate family members, prevents entities doing business with the city from funneling money through their employees and employees' family members. Without this additional coverage, an entity could still curry favor with District officials through contributions from individuals closely associated with the entity.

- Establish a "doing business" database: When New York City enacted its comprehensive pay-to-play law in 2007, the city also established a "doing business" online database to help contributors and campaigns comply with the law.[8] The database lists all individuals and entities subject to New York City's lower contribution limit for individuals and entities that are doing business with the city. The database allows candidates to determine whether contributors are subject to pay-to-play restrictions and provides the New York City Campaign Finance Board with the tools it needs to properly administer and enforce

[5] Peter Jamison, *D.C. Council bills take aim at pay-to-play*, WASH. POST (July 8, 2017), https://www.washingtonpost.com/local/dc-politics/dc-council-bills-take-aim-at-pay-to-play/2017/07/08/e323a950-633a-11e7-a4f7-af34fc1d9d39_story.html.

[6] D.C. Council Bill No. 22-0008 § 201(7).

[7] D.C. Council Bill No. 22-0051 § 2(f).

[8] The City of New York, Doing Business Search, https://www1.nyc.gov/dbnyc/ (last visited July 23, 2017).

the law.[9] Establishing a doing business database would also help address the concern raised by Councilmember Silverman about how candidates would know who is prohibited from giving to them and, thus, how candidates could ensure they are accepting contributions in compliance with pay-to-play provisions. If there is a publicly available database of entities and individuals prohibited from contributing to D.C. candidates, candidates will have the tools they need to comply with the law.

**b. Courts have recognized that contractors' campaign contributions present a heightened risk of corruption.**

In the context of government contracting, courts have long recognized that a contractor's campaign contributions, or other forms of personal or campaign support, to officials with authority over contracts raise heightened corruption concerns. Indeed, Congress has prohibited federal contractors and prospective contractors from making political contributions to federal candidates for more than seventy-five years.[10] A growing number of states and localities similarly have taken steps to restrict political contributions from government contractors. At least seventeen states have limits or prohibitions on campaign contributions from current and/or prospective government contractors or licensees.[11] Various municipalities, including New York City and Los Angeles, also have pay-to-play restrictions on the books.[12]

Courts have approved reasonable restrictions on the campaign-related spending of entities doing business with the government. In fact, the constitutionality of the federal contractor contribution ban — which bars contractors from contributing "directly or indirectly" to federal candidates, political parties or PACs — was recently upheld by the en banc D.C. Circuit.[13] The court recognized two governmental interests sufficient to justify the ban: preventing the actuality and appearance of corruption,[14] and preventing "interference with merit-based public administration"

[9] It is worth noting the thorough explanatory materials produced by the New York City Campaign Finance Board (NYCCFB) to help candidates comply with the law. If a candidate accepts a contribution in violation of New York City's doing business restriction, the NYCCFB provides guidance regarding how the candidate will be informed of the violation and how to address the violation. *See Doing Business FAQs*, N.Y.C. Campaign Fin. Bd., http://www.nyccfb.info/candidate-services/doing-business-faqs/ (last visited July 24, 2017).

[10] *See Wagner v. FEC*, 793 F.3d 1, 3 (D.C. Cir. 2015).

[11] Cal. Gov't Code § 84308(d); Conn. Gen. Stat. § 9-612(f)(1)-(2); Haw. Rev. Stat. § 11-355; 30 Ill. Comp. Stat. 500/50-37; Ind. Code §§ 4-30-3-19.5 to -19.7; Ky. Rev. Stat. Ann. § 121.330; La. Rev. Stat. Ann. §§ 18:1505.2(L), 27:261(D); Mich. Comp. Laws § 432.207b; Neb. Rev. Stat. §§ 9-803, 49-1476.01; N.J. Stat. Ann. § 19:44A-20.13 to -20.14; N.M. Stat. Ann. § 13-1-191.1(E)-(F); Ohio Rev. Code § 3517.13(I) to (Z); 53 Pa. Cons. Stat. § 895.704-A(a); S.C. Code Ann. § 8-13-1342; Vt. Stat. Ann. tit. 32, § 109(B); Va. Code Ann. § 2.2-3104.01 (amended by Va. Acts 2013, Ch. 583 (eff. July 1, 2014)); W. Va. Code § 3-8-12(d).

[12] N.Y.C. Admin. Code §§ 3-702(18), 3-703(1-a)-(1-b); L.A., Cal., City Charter § 470(c)(12).

[13] *See Wagner*, 793 F.3d at 34.

[14] *Id.* at 3.

to ensure that contracting "depend[s] upon meritorious performance rather than political service."[15]

The Second Circuit has upheld similar laws, including New York City's regulation of contributions from entities "doing business" with the city.[16] That upheld law is expansive, covering persons who have received or are seeking contracts, franchises, concessions, grants, pension fund investment contracts, economic development agreements, or land use actions with the city.[17]

## II. The anti-coordination bills before the Committee would help ensure that independent expenditures are "totally," "wholly," and "truly" independent of candidates.

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.[18] 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. For example, if a D.C. mayoral candidate can solicit a $50,000 contribution from a supporter to a so-called "independent" expenditure committee supporting that candidate, then the District's $2,000 limit on contributions to mayoral candidates is severely undermined. Such candidate involvement in political fundraising and spending is precisely the type of corrupting scenario that contribution limits are intended to prevent.

Consistent with 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,"[19] *non*-independent — i.e., coordinated — expenditures may permissibly be limited. The Supreme Court has repeatedly emphasized the degree of independence that is necessary to prevent outside spending from "undermin[ing] contribution

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[15] *Id*. at 8-9.

[16] *Ognibene v. Parkes*, 671 F.3d 174 (2d Cir. 2011); *see also Green Party of Conn. v. Garfield*, 616 F. 3d 189 (2d Cir. 2010) (upholding Connecticut's ban on contributions by contractors and their principals).

[17] *Ognibene*, 671 F.3d at 179.

[18] *See Citizens United v. FEC*, 558 U.S. 310, 360 (2010) ("By definition, an independent expenditure is political speech presented to the electorate that is not coordinated with a candidate.").

[19] *Id*. at 357.

limits".[20] Only "totally independent,"[21] "wholly independent,"[22] and "truly independent"[23] expenditures qualify.

Since *Buckley v. Valeo*, the Court has recognized 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."[24] To this end, the Court upheld that contribution limits may 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.

But the *Buckley* Court's analysis relied on the assumption that "independent expenditures" would be "made *totally* independently of the candidate and his campaign."[25] It explained that, unlike contributions, *totally* independent expenditures "may well provide little assistance to the candidate's campaign and indeed may prove counterproductive."[26] The Court opined 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."[27]

The Court echoed *Buckley*'s broad language regarding coordination in later decisions on the topic. In *Colorado Republican Federal Campaign Committee v. FEC*, the Court held that a radio advertisement aired by the Republican Party attacking a Democratic senatorial candidate would not be treated as coordinated because the ad was developed "*independently* and not pursuant to any general or particular understanding with a candidate."[28] 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*)."[29] Shortly thereafter, the Court again highlighted 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."[30]

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[20] *FEC v. Colo. Republican Fed. Campaign Comm.*, 533 U.S. 431, 464 (2001) ("*Colorado II*").

[21] *Buckley v. Valeo*, 424 U.S. 1, 47 (1976).

[22] *McConnell v. FEC*, 540 U.S. 93, 221 (2003).

[23] *Colorado II*, 533 U.S. at 465.

[24] *Buckley*, 424 U.S. at 47.

[25] *Id*. (emphasis added).

[26] *Id*. (emphasis added).

[27] *Id*.

[28] 518 U.S. 604, 614 (1996) ("*Colorado I*").

[29] 533 U.S. at 442, 447 (emphasis added).

[30] *McConnell*, 540 U.S. at 221 (emphasis added).

The anti-coordination provisions in the Attorney General's bill would help maintain a meaningful line between groups making independent expenditures and candidates. The bill establishes several scenarios that, if satisfied, would create a rebuttable presumption that a campaign expenditure was coordinated with a candidate, including:

- If the campaign provides information about its needs or plans to the person making the expenditure;[31]

- If the campaign and the person making the expenditure share a common vendor providing campaign or fundraising strategy;[32] or

- If the group making the expenditure is run by a candidate's immediate family member or former high-level staff.[33]

These presumptions are reasonable, targeted responses to the kinds of coordination we have seen between candidates and so-called independent spenders. Connecticut and California have adopted rebuttable presumptions as a means maintaining a meaningful line between independent and coordinated expenditures.[34]

[31] Robert Maguire & Will Tucker, *How Carly Fiorina's Super PAC Mirrors Her Campaign*, TIME (Nov. 19, 2015) http://time.com/4120431/carly-fiorina-super-pac/.

[32] Ashley Balcerzak, *Candidates and their Super PACs sharing vendors more than ever*, OPENSECRETS.ORG (Dec. 21, 2016), https://www.opensecrets.org/news/2016/12/candidates-super-pacs-share-vendors/.

[33] A super PAC supporting Mayor Muriel Bowser was established by her former campaign treasurer Ben Soto. Aaron C. Davis, *Divided D.C. Council takes aim at Mayor Bowser's super PAC*, WASH. POST (Oct. 20, 2015), https://www.washingtonpost.com/local/dc-politics/divided-dc-council-takes-aim-at-mayor-bowsers-super-pac/2015/10/20/0a24289a-7765-11e5-a958-d889faf561dc_story.html. Although the super PAC was shuttered shortly after its formation, Mr. Soto's statement that the super PAC's funds would be used to "help reelect allies or unseat council members who do not see eye-to-eye with Bowser" is a prime example of the type of sway that large "independent" expenditures, and the threat of such expenditures, are intended to have on elected officials. *Id.*

[34] *See* Conn. Gen. Stat. § 9-601c(b); Cal. Code Regs. tit. 2, § 18225.7(d). Similarly, New York City's Campaign Finance Board uses a "non-exhaustive" list of factors to assess whether an expenditure is "independent" of a candidate's campaign. N.Y.C. Campaign Fin. Bd. Rule 1-08(f)(1). If the Board finds any of the listed factors are present, the burden of production shifts to candidates or independent spenders to provide evidence demonstrating that coordination did not occur. *Id.* 1-08(f)(2).

## III. Conclusion

For these reasons, the Campaign Legal Center supports the Campaign Finance Transparency and Accountability Act of 2017 and the Comprehensive Campaign Finance Reform Amendment Act of 2017, and we urge the Committee to take favorable action on these important pieces of legislation. We appreciate the opportunity to submit these comments.

Sincerely,

/s/
Adav Noti
Senior Director of Trial Litigation & Strategy

/s/
Catherine Hinckley Kelley
Director of Policy & State Programs