THE CAMPAIGN LEGAL CENTER

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Ethics & Campaign Review Board
of City of Santa Fe
c/o City of Santa Fe
PO Box 909
Santa Fe, NM 87504-0909

Re: Proposed Changes to Santa Fe City Code

Dear Ethics & Campaign Review Board Members:

The Campaign Legal Center (CLC) respectfully submits these comments regarding proposed changes to the Santa Fe City Code, scheduled to be considered by the Board as agenda item 3(a) at its May 20 meeting. Founded in 2002, CLC is a nonpartisan, nonprofit organization that defends and protects our democracy in the areas of campaign finance, voting rights, political communication and government ethics. CLC represents the public interest in the courts, before regulatory agencies and legislative bodies across the United States.

Much has changed on the campaign finance law and practice landscape since the voters of Santa Fe overwhelmingly voted to create the City's public campaign financing program in 2008. The U.S. Supreme Court's decision in *Citizens United v. Federal Election Commission*, 558 U.S. 310 (2010), deregulated so-called "independent" spending in elections and, via lower court decisions, gave rise to Super PACs. And the Supreme Court's decision in *Arizona Free Enterprise v. Bennett*, 131 S. Ct. 2806 (2011), limited the ability of Santa Fe and other jurisdictions with public financing programs to provide participating candidates with additional public funds specifically to respond to high-spending "independent" spenders and nonparticipating candidates.

In the wake of these court decisions, jurisdictions with public financing programs face several obvious policy challenges: (1) ensuring that so-called "independent" spending is truly and meaningfully independent; (2) ensuring that such independent spending is fully disclosed and transparent; and (3) maintaining the viability and effectiveness of public financing programs without "trigger" provisions and in light of unlimited Super PAC and other independent spending.

The proposed changes to the Santa Fe City Code under consideration by Ethics & Campaign Review Board deftly address these policy challenges. The proposed changes are wholly consistent with Supreme Court and lower court precedent, and are also wholly consistent with

the approaches to these policy issues being taken in other jurisdictions. For these reasons, CLC strongly encourages you to approve the proposed changes. Notwithstanding our endorsement of the proposed changes, we offer some minor amendments for your consideration.

Coordination

In the course of invalidating the federal corporate expenditure ban in *Citizens United*, the Supreme Court endorsed the principle that "independent expenditures, including those made by corporations, do not give rise to corruption or the appearance of corruption." 558 U.S. at 357. This principle has been extended to "independent-expenditure-only" political committees (a.k.a. Super PACs) in a recent series of lower court decisions striking down limits on contributions to groups that made only independent expenditures, reasoning that if their expenditures did not raise a significant risk of corruption, then limits on contributions to such groups could not be justified by the governmental interest in preventing corruption.

Although CLC disagrees with these court holdings, unleashing unlimited fundraising and spending into candidate elections from coast to coast, they are court decisions we must live with for the time being. And these decisions place much importance on the legal line separating ostensibly-non-corrupting "independent" expenditures from potentially-corrupting "coordinated" expenditures. And though the *Citizens United* Court did not elaborate on the concept of independent/coordinated, the Court has in numerous past cases provided a more comprehensive analysis of the standards governing the determination of an expenditure's independence.

Beginning in *Buckley v. Valeo*, 424 U.S. 1 (1976), drawing the line between "independent" and "coordinated" expenditures was recognized by the Court as crucial to averting circumvention of candidate contribution limits. *Buckley* 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, his agents or [his] authorized committee …." *Id*. at 46-47 n.53; *see also id.* at 78.

The Supreme 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 Supreme Court held that a political party ad aired prior to a candidate's nomination 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 (emphasis added).

In *FEC v. Colorado Republican Federal Campaign Committee*, 533 U.S. 431 (2001) ("*Colorado II*"), the Court—again in the context of party spending—underscored "the good sense of recognizing the distinction between independence and coordination." 533 U.S. at 447. Of particular importance, the Court noted that independent expenditures are only those "without any candidate's approval (or wink or nod) …." *Id*. at 442, 447. The Court went on to conclude that "a party's coordinated expenditures, unlike expenditures *truly independent*, may be restricted to minimize circumvention of contribution limits." *Id*. at 465 (emphasis added).

In *McConnell v. FEC*, 540 U.S. 93 (2003), 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." 540 U.S. at 221 (emphasis added). The Court explained: "Independent expenditures are poor sources of leverage for a spender because they might be duplicative or counterproductive from a candidate's point of view. By contrast, *expenditures made after a wink or nod often will be as useful to the candidate as cash*." *Id*. at 221-22 (emphasis added) (internal citations and quotation marks omitted).

Throughout its campaign finance precedents, the Supreme Court has thus maintained a broad "wink or nod" view of what constitutes coordination between a candidate and an outside spender. It has spoken in expansive terms about the degree of independence that is necessary to prevent outside spending from "undermin[ing] contribution limits"—opining that only those expenditures that are "totally independent," "wholly independent," and "truly independent" should be treated as legally "independent."

The proposed changes to Santa Fe City Code regarding "coordination" are entirely consistent with Supreme Court jurisprudence emphasizing the importance of total, whole and true independence of expenditures treated as "independent" under the law.

CLC urges the Board to go further in its proposed regulation of "coordination" by including within the definition of "contribution" a provision making clear that spending money to republish a candidate's campaign materials, in whole or in part, constitutes an in-kind contribution to that candidate. Such a provision could be modeled on the federal regulation at 11 C.F.R. § 109.23, though we would recommend *not* including the "brief quote" exception found at 11 C.F.R. § 109.23(b)(4), because it has proven susceptible to abuse.

CLC also recommends that the Board consider modifying subsection (3)(a) within the proposed definition of "coordinated expenditure" to make clear that the provision covers only substantial discussion of information material to the expenditure at issue—and not discussion of wholly unrelated matters (e.g., the weather).

CLC further recommends that language be added to subsection (3)(c) within the proposed definition of "coordinated expenditure" to state that fundraising activities "include, but are not limited to, being a featured guest or speaker at a fundraising event, exchanging names of potential donors," etc.

Transparency of Independent Expenditures

The lynchpin of the independent expenditure transparency provisions under consideration by the Board is the addition of an "electioneering communication" type standard to the City's disclosure requirements—*i.e.*, requiring disclosure not only of "express advocacy" communications, but also of any public communication that "refers to a clearly identifiable candidate or ballot proposition within 60 days before an election at which the candidate or proposition is on the ballot."

The U.S. Supreme Court has twice considered—and twice upheld by an 8-to-1 majority—comparable federal electioneering communication disclosure provisions that had been enacted by Congress in 2002.

In *McConnell*, rejected an argument that "*Buckley* drew a constitutionally mandated line between express advocacy and so-called issue advocacy." 540 U.S. at 190. The plaintiffs argued that disclosure requirements could not constitutionally extend to electioneering communication "without making an exception for those 'communications' that do not meet *Buckley*'s definition of express advocacy." *Id.* The Supreme Court flatly rejected this argument, finding that neither its prior precedents nor the First Amendment "requires Congress to treat so-called issue advocacy differently from express advocacy" in the disclosure context. *Id.* at 194.

In *Citizens United*, the Court again considered a challenge to the federal law electioneering communication disclosure provisions as applied to Citizens United's film, *Hillary: The Movie* and three promotional ads for the movie. And again the Court by an 8-to-1 majority "reject[ed] this contention" that disclosure must be limited to "express advocacy" or its functional equivalent. 558 U.S. at 369. The *Citizens United* Court explained:

> [D]isclosure is a less restrictive alternative to more comprehensive regulations of speech. In *Buckley*, the Court upheld a disclosure requirement for independent expenditures even though it invalidated a provision that imposed a ceiling on those expenditures. In *McConnell*, three Justices who would have found [BCRA's ban on corporate funding of ECs] to be unconstitutional nonetheless voted to uphold BCRA's disclosure and disclaimer requirements. And the Court has upheld registration and disclosure requirements on lobbyists, even though Congress has no power to ban lobbying itself. For these reasons, *we reject Citizens United's contention that the disclosure requirements must be limited to speech that is the functional equivalent of express advocacy*.

Id. (emphasis added) (internal citations omitted). The Court could not have made its conclusion any clearer: disclosure requirements may extend beyond express advocacy and its functional equivalent.

The proposed changes to Santa Fe City Code regarding transparency of independent expenditures are entirely consistent with Supreme Court jurisprudence upholding nearly identical provisions of federal law. CLC respectfully urges the Board to approve these proposed changes to City law and offers only one very minor suggestion for consideration. Given the potential broad scope of the "member organization" communication exception found near the end of proposed section 9-2.6(A), the Board should consider defining the term "member organization" and "member" so as to require that a "member" pay annual dues or meet some other specified criteria. In the absence of such a definition, the Board may later need to deal with an organization claiming exemption from the disclosure law for paid political advertising targeting a large segment of the population with which the organization has no formal connection (*e.g.*, all parents in Santa Fe).

Public Financing

Finally, CLC wholeheartedly endorses the proposed changes to the Santa Fe City Code regarding public financing that are currently under consideration. The proposed changes appropriately respond to the rise of unlimited fundraising and spending by Super PACs and others, while steering clear of any constitutional law issues arising out of the Supreme Court's decision in *Arizona Free Enterprise*.

Under the proposed changes, the City would maintain its requirement that a participating candidate raise a specified number of small contributions in order to become eligible to receive an initial lump sum grant of public funds, but would then allow participating candidates to continue raising "qualified small contributions" and would match such small contributions 4-to-1 with public funds, with total public funds received by a candidate not to exceed 200% of the initial disbursement.

This matching funds approach incentivizes candidates to engage all voters as donors and enables candidates to run competitive campaigns regardless of personal wealth and/or access to wealthy donors. This approach also accommodates the needs of candidates facing large independent expenditures and/or high-spending nonparticipating opponents to continue raising and spending non-corrupting small contributions free of any hard-dollar spending limit.

The variables in such a matching funds system—the limit on "qualified small contributions" and the ratio at which such contributions are matched with public funds—vary significantly in the other jurisdictions that have such systems. The proposed changes to the Santa Fe City Code include a $100 limit on "qualified small contributions" and a 4-to-1 match. A number of jurisdictions permit larger contributions to publicly financed candidates, while only matching a portion of those contributions. No particular limit or matching ratio are mandated by constitutional law. These amounts can and should be adjusted in a particular jurisdiction to reflect the policy preferences of stakeholders within the community. CLC expresses no opinion on the specific amounts included in the proposal currently under consideration.

Conclusion

For all of the above-stated reasons, CLC strongly encourages the Board to approve the proposed changes to the Santa Fe City Code and to consider the minor amendments detailed above. CLC would be honored to serve as a legal resource to the City moving forward on these important campaign finance reforms, in whatever capacity might be useful. Please do not hesitate to contact me with any comments, concerns or questions.

Sincerely,

/s/ Paul Seamus Ryan
Paul Seamus Ryan
Senior Counsel