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By Electronic Mail (gary.goldsmith@state.mn.us)

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Re: Comments on Advisory Opinion 437: Candidate fundraising for independent expenditure political committee or fund

Dear Mr. Goldsmith, Ms. Wiener, and Members of the Board:

These comments are filed on behalf of the Campaign Legal Center in regard to Advisory Opinion (“AO”) 437: Candidate fundraising for independent expenditure political committee or fund. The Campaign Legal Center respectfully urges the Campaign Finance & Public Disclosure Board to adopt the draft second version of AO 437 at its February 11, 2014 meeting.

This AO request asks the Board to consider whether an independent expenditure political committee (“IEPC”) is “independent” of a candidate when the IEPC enlists a specified candidate’s help with its fundraising efforts, and thereafter makes express advocacy expenditures supporting that candidate’s election. According to the stated facts, an incipient IEPC approaches a particular candidate for fundraising assistance. The Committee intends to make expenditures for ads expressly advocating the election or defeat of candidates, and to accept unlimited individual and corporate contributions; the candidate’s fundraising assistance is to include both direct solicitations for contributions to the IEPC, and appearances as a speaker at fundraising events.

Under Minnesota law, an independent expenditure is an expenditure that “expressly advocat[es] 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 or agent.” Minn. Stat. § 10A.01, subd. 18. Given this definition’s “comprehensive list of prohibited communications and relationships,” we agree with the Board’s determination in both drafts that the legislature “intended to require the highest degree of separation between

candidates and independent spenders that is constitutionally permitted.” We likewise agree with the second draft’s conclusion that, in light of the broad statutory language and clear legislative intent, the expenditures contemplated here are not “independent” within the meaning of section 10A.01, subdivision 18.

As we explain below, there is no constitutional barrier to determining that this activity is “coordinated” (i.e., not “independent”) under Minnesota law. Placing reasonable limits on the degree of cooperation that may occur between a candidate and a purportedly “independent” group represents a practical and perfectly legal approach to the question at hand.

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

In *Citizens United v. FEC*, 558 U.S. 310 (2010), 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.” *Id.* at 357. While the Court did not elaborate on what it meant by an “independent” expenditure in *Citizens United*, it has spoken in more detail about the standards governing an expenditure’s “independence” in other campaign finance decisions. And it is worth noting that, unlike the facts in this advisory opinion proceeding, neither the “independent” expenditures at issue in *Citizens United*, nor the “independent” expenditures at issue in other cases in which the Supreme Court concluded that the expenditures posed no threat of corruption, involved fundraising by candidates to pay for such expenditures.

Beginning in *Buckley v. Valeo*, 424 U.S. 1 (1976), the Court distinguished for constitutional purposes between limitations on “contributions” to a candidate’s campaign, and limitations on “expenditures” by an independent spender to influence an election. *Buckley* also 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 Act through prearranged or coordinated expenditures amounting to disguised contributions.” 424 U.S. at 47. Drawing the line between “independent” and “coordinated” expenditures was thus crucial to averting circumvention of the contribution limits. *Buckley* 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, his agents or [his] authorized committee” *Id.* at 46-47 n.53; *see also id.* at 78.

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 an ad aired by the Republican Party attacking the Democratic Party’s presumptive nominee to the U.S. Senate, before the Republican Party had even nominated its 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” *Id.* at 614 (emphasis added). Then, in *FEC v. Colorado Republican Federal Campaign Committee*, 533 U.S. 431 (2001) (“*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) . . .” *Id.* at 442, 447. 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 Court explained in *McConnell*: “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, a position it articulated in both *Colorado I* (“general or particular understanding”) and *Colorado II* (“wink or nod”). It has spoken in expansive terms about the degree of independence that is necessary to prevent outside spending from “undermin[ing] contribution limits.” Only “totally independent,” “wholly independent,” and “truly independent” expenditures qualify.

However, in comments already filed with the Board, the Institute for Justice contends that the second draft of AO 437 would be unconstitutional under prevailing Supreme Court precedent. Specifically, the Institute for Justice suggests that the Court’s decision in *Colorado I* is dispositive of whether there is constitutionally sufficient “coordination” under the given set of facts to destroy any claimed independence. But the Court’s decision in *Colorado I* was based on the absence of any “general or particular understanding” between candidates and parties as a matter of fact—as well as the not-insignificant fact that the Republican Party had spent funds attacking a Democratic Party candidate before the Republican Party had even nominated its candidate. The Institute for Justice does not explain how the circumstances at issue in *Colorado I* are at all applicable to this request, which presupposes that the IEPC has directly and specifically enlisted the candidate for fundraising support. It strains credulity to argue that the possibility of candidate and committee reaching some “general” or “wink or nod” agreement is so remote that the IEPC’s subsequent expenditures must be “independent” as a matter of constitutional law.

Simply put, the Supreme Court has never suggested that independence in the context of campaign finance law is anything other than a question of fact—and here, the facts do not suggest any meaningful degree of independence. Furthermore, the Supreme Court has never held that the expenditure of funds raised by a candidate to directly benefit that candidate cannot be regulated as coordinated expenditures. The draft second version of AO 437, which reasonably interprets and applies the “implied consent” and “cooperation” prongs of the state’s definition of “independent expenditure” and concludes that expenditures made with funds raised by candidates are not “independent” of such candidates, is not foreclosed by Supreme Court precedent. On the contrary, the draft second version of AO 437 is good public policy and is on solid constitutional footing.

II. 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 Institute for Justice also argues that the second draft of AO 437 will unconstitutionally prohibit conduct that the Supreme Court “has already determined ... does not corrupt candidates for office.” Institute for Justice Comments, at 2. At odds with this assertion is the fact that 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.¹ The federal solicitation restrictions, which were enacted as part of the Bipartisan Campaign Reform Act of 2002 (BCRA), were challenged and 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 184.²

The Court’s reasoning in *McConnell* makes clear that permitting a candidate to directly solicit unlimited funds from corporations and individuals in the name of an IEPC, which will then use the funds for ads expressly advocating the same candidate’s election, poses “a substantial threat of corruption.” Here, the plan is for state candidates to solicit unlimited contributions to an IEPC, precisely the “quid” that Justice Kennedy identified as toxic, and it poses just as serious a threat of a return “quo” to the million-dollar donor from the grateful candidate who solicited the funds (and who will benefit from the spending of them) as a large contribution made directly to the candidate.

The approach to defining coordination reflected in the second draft of AO 437 would ensure that a donor cannot gain undue influence over a candidate by routing unlimited funds through an IEPC for the candidate’s direct benefit, and thus effectuates the state’s interest in

¹ 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* 2 U.S.C. § 441i(e)(1)(A) (prohibiting such activity in connection with federal elections) and (B) (prohibiting such activity in connection with nonfederal elections).

² 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).

preventing corruption and the appearance of corruption. Permitting a candidate to participate in, and solicit unlimited contributions for, IEPC fundraising efforts—when the fundraising proceeds will be used to benefit that very candidate—undeniably presents a “danger that expenditures will be given as a *quid pro quo* for improper commitments from the candidate.” *Buckley*, 424 U.S. at 47. Similarly, such an arrangement would also give rise to “the appearance of improper influence[,]” which must be prevented “if confidence in the system of representative Government is not to be eroded to a disastrous extent.” *Id.* at 27 (citation omitted).

Furthermore, the assumed facts present an obvious risk that candidates and donors would exploit the situation to circumvent Minnesota’s individual contribution limits, as well as its prohibition on corporate contributions. 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 interest “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). As such, conceiving of “coordination” in broad terms, as the second draft AO does, is amply justified by the state’s anticircumvention interest.

When a candidate is specifically sought out by an IEPC for fundraising assistance, in fact assists with fundraising, and does so by soliciting unlimited contributions, the IEPC’s later express advocacy 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 IEPC receiving those funds will use them in express advocacy ads 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. In short, the degree of entanglement between the candidate and the IEPC, under the facts as given, is constitutionally sufficient to conclude that independence will be destroyed.³

III. Conclusion

For all of the above-stated reasons, the Campaign Legal Center respectfully urges the Board to adopt the second draft version of AO 437.

We appreciate the opportunity to submit these comments.

³ As noted in the second draft AO, a candidate’s fundraising support may not destroy the independence of expenditures beyond some particular time, such as the end of an election cycle. As that question is not currently before the Board, we will not speculate as to an appropriate temporal limit.

Sincerely,

/s/ J. Gerald Hebert

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