February 5, 2014

By Electronic Mail (seec.compliance@ct.gov)

State Elections Enforcement Commission
Attn: Marianne Sadowski
20 Trinity Street
Hartford, CT 06106

Re: Comments on Proposed Declaratory Ruling 2013-02: Contributions to Political Committees, Independent Expenditures and State Contractor Contribution Limitations

Dear Commissioners:

These comments are filed on behalf of the Campaign Legal Center in regard to Proposed Declaratory Ruling (PDR) 2013-02: Contributions to Political Committees, Independent Expenditures and State Contractor Contribution Limitations. The Campaign Legal Center respectfully urges the State Elections Enforcement Commission (SEEC) to approve and issue Proposed Declaratory Ruling 2013-02.

PDR 2013-02 addresses the petition for a declaratory ruling submitted in October 2013 by the law firm Perkins Coie, seeking guidance on the application of Connecticut campaign finance laws to three types of organizations that Perkins Coie clients are contemplating using to make independent expenditures to influence Connecticut elections. PDR 2013-02 also responds to requests for general compliance advice that Commission staff have received from the regulated community concerning state contractors. PDR 2013-02 at 1.

Based on careful, well-reasoned analysis, PDR 2013-02 correctly concludes that:

- Perkins Coie's contemplated Organization 1, which will not solicit or receive contributions earmarked to make expenditures to influence Connecticut elections, would not be required to register and report as a political committee, *id.* at 13-14;
- Perkins Coie's contemplated Organizations 2 and 3, which will solicit and receive contributions earmarked to make expenditures to influence Connecticut elections, would be required to register and report as political committees, *id*. at 14-21;
- In light of recent court decisions "finding that contribution limits to independent expenditure only political committees are unconstitutional, the Commission will not enforce contribution limits" with respect to such committees, including the committees Perkins Coie's contemplated Organizations 2 and 3 would be required to organize under Connecticut law, *id.* at 22; and
- Campaign finance restrictions applicable to state contractors, pursuant to General Statutes § 612(f), remain in full force and effect. *Id*. at 14, 21.

1. **Organizations 2 and 3 Must Comply With "Political Committee" Registration and Reporting Requirements.**

Under Connecticut law, "no contributions may be made, solicited or received and no expenditures, other than independent expenditures, may be made, directly or indirectly, in aid of or in opposition to the candidacy for nomination or election of any individual or any party or referendum question, unless" a political committee is formed. General Statutes § 602(a); *see also* PDR 2013-02 at 13. As explained in PDR 2013-02, this statutory requirement is clear and unambiguous and has not been invalidated by any court of law. Application of this statute to Perkins Coie's contemplated Organizations 1, 2 and 3 is a straightforward exercise.

Organization 1 would "not accept donations earmarked to make independent expenditures to influence Connecticut elections," while Organizations 2 and 3 would solicit and receive such "earmarked donations." *See* PDR 2013-02 at 2. Perkins Coie uses the term "earmarked," but Connecticut law does not define "earmarked," so PDR 2013-02 reasonably states:

> For purposes of this declaratory ruling, the Commission construes the term "earmarked" to generally mean funds provided for the purpose of promoting or opposing the nomination or election of Connecticut candidates or political parties. Funds are considered earmarked when the person giving or receiving them has manifested an intention that they will be used to promote attack support or oppose Connecticut candidates or parties.

Id. at 2-3.

Earmarked donations to Organizations 2 and 3 clearly meet Connecticut's statutory definition of "contribution," which includes "[a]ny gift, subscription, loan, advance, payment or deposit of money or anything of value, made to promote the success or defeat of any candidate seeking the nomination for election, or election[.]" General Statutes § 9-601a(a)(1); *see also* PDR 2013-02 at 14. Consequently, Organizations 2 and 3 would be required to register and disclose as political committees under Connecticut law.

PDR 2013-02 correctly notes that, in the post-*Citizens United* era, courts around the nation have upheld as constitutionally permissible similar laws requiring political committee registration and disclosure. *Id*. at 8-9 (citing *SpeechNow.org v. Fed. Election Comm'n*, 599 F.3d 686, 689, 696-98 (D.C. Cir. 2010), *Vt. Right to Life Comm. Inc. v. Sorrell*, 875 F. Supp. 2d 376, 392-97 (D. Vt. 2012), *Nat'l Org. for Marriage v. McKee*, 723 F. Supp. 2d 245, 267-68 (D. Me. 2010), *aff'd*, 649 F.3d 34 (1st Cir. 2011), *cert. denied*, 132 S. Ct. 1635 (2012), *Worley v. Fla. Sec'y of State*, 717 F.3d 1238, 1253 (11th Cir. 2013)).

Indeed, for decades the Supreme Court has repeatedly acknowledged that disclosure laws both reflect and advance important First Amendment precepts. Disclosure has been called a "cornerstone" of campaign finance regulation. *See Buckley v. Am. Const. Law Found.*, 525 U.S. 182, 222-23 (1999) (O'Connor, J., concurring in the judgment in part and dissenting in part). As

Justice Brandeis famously recognized nearly a century ago, "Sunlight is . . . the best . . . disinfectant," and "electric light the most efficient policeman." Louis Brandeis, *Other People's Money* 62 (Nat'l Home Library Found. ed. 1933), *quoted in Buckley v. Valeo*, 424 U.S. 1, 67 (1976). Disclosure also secures broader access to the information that citizens need to make political choices, thereby enhancing the overall quality of public discourse. Because disclosure is considered a "less restrictive alternative to more comprehensive regulations of speech" that advance the governmental interests of preventing corruption and maintaining an informed electorate, the Supreme Court has traditionally reviewed disclosure laws under a more relaxed standard than other electoral regulations. *Citizens United v. Fed. Election Comm'n*, 558 U.S. 310, 369 (2010); *see also Buckley*, 424 U.S. at 68 ("[D]isclosure requirements—certainly in most applications—appear to be the least restrictive means of curbing the evils of campaign ignorance and corruption that Congress found to exist."). As the Court noted in *Citizens United*, disclosure requirements "do not prevent anyone from speaking." 558 U.S. at 366 (internal citations omitted); *see also Family PAC v. McKenna*, 685 F.3d 800, 806 (9th Cir. 2012) ("Disclosure requirements . . . impose no ceiling on campaign-related activities, and do not prevent anyone from speaking.") (quoting *Citizens United*, 558 U.S. at 366).

To be certain, recent federal court decisions, applying the reasoning of *Citizens United*, have held contribution limits unconstitutional as applied to independent expenditure political committees. For this reason, under PDR 2013-02, the SEEC "would not enforce contribution limits to political committees that receive and spend funds for independent expenditures only, until it receives further guidance from the Connecticut legislature or a court of competent jurisdiction." PDR 2013-02 at 22.

In short, PDR 2013-02 strikes the right legal and policy balance—giving full force and effect to Connecticut's clearly-constitutional political committee registration and disclosure requirements, while halting enforcement of contribution limits applicable to independent expenditure committees pending further guidance from the legislature and/or the courts.

2. Restrictions on State Contractors Remain in Full Force and Effect.

PDR 2013-02 explains that Connecticut's restrictions on political contributions by state contractors were enacted in 2005 "following numerous scandals that eroded the public's trust in Connecticut's campaign finance and election system." PDR 2013-02 at 5. The state contractor contribution restrictions are a "cornerstone of the [legislature's] response to Connecticut's history of actual corruption and its appearance[.]" *Id*. PDR 2013-02 further explains that the core of the state contractor provisions "survived a legal challenge" in *Green Party of Connecticut v. Garfield*, 616 F.3d 189 (2d Cir. 2010).

Neither *Citizens United*, nor *SpeechNow.org*, nor any of the other cases cited by Perkins Coie in its petition for a declaratory ruling, even considered—let alone invalidated—such state contractor campaign finance restrictions. At issue in *Citizens United* was a "categorical ban" on independent expenditures by corporations, which the Court held was "asymmetrical to preventing *quid pro quo* corruption." *Citizens United*, 558 U.S. at 361. The *Citizens United* Court left room for campaign finance restrictions more closely tailored to preventing corruption. The Court explained:

> When Congress finds that a problem exists, we must give that finding due deference; but Congress may not choose an unconstitutional remedy. If elected officials succumb to improper influences from independent expenditures; if they surrender their best judgment; and if they put expediency before principle, then surely there is cause for concern. We must give weight to attempts by Congress to seek to dispel either the appearance or the reality of these influences. The remedies enacted by law, however, must comply with the First Amendment; and, it is our law and our tradition that more speech, not less, is the governing rule. An outright ban on corporate political speech during the critical preelection period is not a permissible remedy. Here Congress has created categorical bans on speech that are asymmetrical to preventing quid pro quo corruption.

Id.

Connecticut's state contractor provisions are not an "outright ban on corporate political speech" of the sort struck down in *Citizens United*; Connecticut's state contractor provisions are narrowly tailored to prevent a particular type of corruption that was well-evidenced and rampant in the state at the time the restrictions were enacted. Furthermore, as explained in PDR 2013-02, the Connecticut legislature has not provided in state law for "independent expenditure only committees, [and] it is not clear how the state contractor provisions would apply to such committees, as the state contractor prohibitions expressly apply to contributions from state contractors to "a political committee authorized to make . . . expenditures . . . for the benefit of such candidates." PDR 2013-02 at 11 (citing General Statutes § 9-612 (f)(2)(A) & (B)).

Given the fact that the state contractor provisions (1) were upheld as constitutional by the Second Circuit in *Green Party of Connecticut*, (2) have not been invalidated or called into question by any subsequent court decision; and (3) were not amended by the legislature when it enacted legislation post-*Citizens United*, it is the responsibility of the SEEC to give the state contractor provisions full force and effect.

The Federal Election Commission was faced with a similar legal and policy decision in the wake of *Citizens United*, when the Perkins Coie law firm submitted an Advisory Opinion Request on behalf of clients seeking guidance as to whether federal law restrictions on candidate solicitations applied to candidate solicitations for independent expenditure only committees. *See* Fed. Election Comm'n, Ad. Op. 2011-12 (June 30, 2011) (Majority PAC / House Majority PAC). Under the federal law so-called "soft money ban," candidates are prohibited from soliciting, receiving, directing, transferring or spending funds in connection with a federal election "unless the funds are subject to the limitations, prohibitions, and reporting requirements" of the Federal Election Campaign Act. *See* 2 U.S.C. § 441i(e)(1)(A). Notwithstanding this soft money ban, Perkins Coie asked the Federal Election Commission whether candidates were permitted to "solicit unlimited contributions from individuals, corporations, and labor organizations on behalf of political committees that make only independent expenditures." Fed. Election Comm'n, Ad. Op. 2011-12 at 2.

The Federal Election Commission answered this question with a resounding "no." The Commission reasoned that, even though, "[c]onsistent with the *Citizens United* and *SpeechNow* opinions, the Commission concluded that corporations, labor organizations, political committees, and individuals may each make unlimited contributions to [independent expenditure committees], and that these [committees] may solicit unlimited contributions from these sources[,]" the federal law soft money restriction applicable to candidates had been "upheld by the Supreme Court in *McConnell v. FEC*, 540 U.S. 93, 181-184 (2003), and remains valid since it was not disturbed by either *Citizens United* or *SpeechNow*." *Id*. at 4 (citing *RNC v. FEC*, 698 F. Supp. 2d 150, 156-60 (D.D.C. 2010), *aff'd* 130 S. Ct. 3544 (2010)).

Just as the Federal Election Commission concluded that although independent expenditure committees were no longer subject to categorical restrictions on corporate, union or individual contributions, the more narrowly tailored federal law restriction on candidate solicitations remains in effect, so too should the SEEC conclude that the state contractor restrictions remain in effect.

I. Conclusion

For all of the above-stated reasons, and those detailed in PDR 2013-02, the Campaign Legal Center respectfully urges the SEEC to approve and issue Proposed Declaratory Ruling 2013-02.

We appreciate the opportunity to submit these comments.

Sincerely,

/s/ Paul S. Ryan

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