UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF CONNECTICUT

DEMOCRATIC GOVERNORS ASSOCIATION, Plaintiff, v. MICHAEL J. BRANDI, et al., Defendants.	)	Civil Action No. 3:14-CV-00544-JCH

SUPPLEMENTAL MEMORANDUM OF *AMICI CURIAE* CAMPAIGN LEGAL CENTER, COMMON CAUSE OF CONNECTICUT, CONNECTICUT CITIZEN ACTION GROUP AND THE LEAGUE OF WOMEN VOTERS OF CONNECTICUT

INTRODUCTION

On April 23, 2014, the Democratic Governors Association (DGA or plaintiff) filed a complaint against Connecticut's State Elections Enforcement Commission (SEEC) seeking to have this Court declare unconstitutional § 9-601b(l) of Connecticut Public Act No. 13-180, *An Act Concerning Disclosure of Independent Expenditures and Changes to Other Campaign Finance Laws and Election Laws*, 2013 Conn. Acts 13-180 (Reg. Sess.) (2013 Act), and enjoin the SEEC from considering certain evidence as relevant to a determination of whether a candidate coordinated activity with the DGA. Since the filing of this action and an initial round of briefing, it appears this case has become untethered from the allegations and prayer for relief in the original complaint. What began as a challenge to SEEC opinions and staff comments regarding the 2013 Act, as interpreted by the plaintiff, has somehow been transformed into a broad constitutional attack on the

state's definition of political committee, the resolution of which appears to be turning on hypotheticals that nowhere appeared in the original complaint or papers. *Amici* are concerned that the DGA is using the original complaint, which does not present a case or controversy and is unable to stand on its own, as a vehicle to launch new broad claims and arguments that distort and misrepresent state and federal law. Still unconcerned with Article III standing and now unrestrained by the Rules of Civil Procedure, the DGA is using new hypotheticals to lead this Court to rule on issues not properly presented and embrace a constitutional view well outside the mainstream and not supported by the Supreme Court's decisions.

It is not clear whether the DGA initiated this lawsuit as a Trojan horse, with the intention of starting with a narrow complaint that it would later try to expand into a broad attack on the definition of political committee, or whether the current posture of this case is a result of an ongoing search for some argument and set of hypotheticals that present a justiciable challenge to the 2013 Act. Regardless, the manner in which the DGA is attempting to litigate this case presents a textbook example of why plaintiffs must be limited to arguing the case they present in their pleadings—and why the Constitution and prudential considerations require courts to decide only actual cases and controversies. Litigating constitutional issues based on abstract hypotheticals that exist outside the real world, without the benefit of a well-pleaded complaint or a factual record, requires those defending the law to chase after the DGA's evolving theories and deprives this Court of the opportunity to arrive at a considered decision that applies the law to actual facts. The stakes are too high for the citizens of Connecticut, who have a right to the proper interpretation and enforcement of duly enacted laws aimed at curbing real and apparent

corruption and maintaining a well-informed electorate, to allow this case to go forward on the shifting sands upon which the DGA is asking this Court to build its decision.

I. Plaintiff is Seeking Adjudication of Constitutional Claims Not Properly Before this Court.

At the heart of DGA's complaint is the allegation that it is unconstitutional for the SEEC to consider Governor Malloy's fundraising efforts on behalf of the DGA if a question arises as to whether the DGA's advocacy of his reelection is truly independent of his campaign. The harm alleged in the complaint is the possibility that the DGA would be subject to an investigation by the SEEC regarding the independence of its activities on behalf of Governor Malloy. Further, the complaint alleges that if the SEEC determines that the DGA has coordinated with Governor Malloy, the DGA would be harmed by being subjected to campaign finance limits and restrictions. Compl. ¶ 3; Mem. Supp. Pl.'s Mot. Prelim. Inj. 8 (PI Mot.) Most of the complaint is then devoted to discussing the 2013 Act's definition of coordination and the SEEC's interpretation of the Act.

> In its prayer for relief, the DGA seeks a declaration that:
>
> (1) The definition of expenditure found in Conn. Gen. Stat. § 9-601b(l), is unconstitutionally overbroad and vague and may only be enforced as applied to express advocacy and its functional equivalent as those terms have been interpreted by the U.S. Supreme Court;
>
> (2) A candidate or a candidate's agent's non-earmarked solicitation or fundraising in association with or on behalf of DGA cannot give rise to a rebuttable presumption that an expenditure in support of that candidate that DGA either makes or provides for through a covered transfer is not an independent expenditure; and
>
> (3) A candidate or a candidate's agent's non-earmarked solicitation or fundraising in association with or on behalf of DGA cannot be a basis for a finding of, or otherwise constitute evidence that an expenditure in support of that candidate that DGA either makes or provides for through a covered transfer is not an independent expenditure.

Compl. Prayer for Relief ¶ A; Mem. Supp. Pl.'s Mot. Prelim. Inj. 8 (PI Mot.).

The SEEC, represented by the Connecticut Attorney General's Office, filed a Motion to Dismiss for Lack of Subject Matter Jurisdiction, arguing that the DGA has failed to allege "any facts to demonstrate that it has yet been harmed" by the provisions about which it complained and that the DGA had presented "nothing more than a barebones set of abstract and hypothetical facts that may or may not lead to some future injury." Def. Mem. Mot. Dis. (Def. Mem.) 1.

Because the plaintiff's attempt to hobble the ability of the SEEC to ensure the independence of the DGA's support of candidates would have a profound effect on the right of the citizens of Connecticut to effective enforcement of the campaign finance laws, *Amici Curiae* sought and were granted permission to participate in this case and filed an opposition to plaintiff's motion to dismiss. In its brief, *Amici* argue that the complaint must be dismissed because the DGA lacks standing to bring this action and DGA's substantive claims regarding the nature of coordination lack merit and are based on a misreading of the relevant law and Supreme Court precedent.

Since the filing of the initial round of briefs there has been a hearing in open court, as well as a subsequent telephonic status conference between the parties and the Court, during which the Court apparently requested the parties to submit supplemental memoranda.[1] Following that status conference, the DGA filed a 16 page Supplemental Memorandum (DGA Sup. Mem.) that presents two hypotheticals and addresses whether the DGA would have to register as a political committee under either scenario. Both

[1] According to docket available on PACER (Doc. No. 37), the telephonic status conference was held on May 28, 2014. However, no transcript for the status conference is available on PACER, so *Amici's* understanding of what the Court requested is primarily based on the supplemental memoranda filed by the parties.

scenarios are based on the DGA creating the following hypothetical script for a television advertisement:

> *On April 4, 2013, Governor Malloy signed Senate Bill 1160 into law, which strengthened our gun safety laws. Now, some want to repeal its toughest provisions. Senate Bill 1160 has saved lives. Weakening it would result in violence and tragedy. Call Governor Malloy and tell him to oppose any effort to weaken Senate Bill 1160.*

In the first scenario, the DGA shows the script to five individuals—two from Connecticut, two from New York, and one from New Jersey—with a known interest in gun safety legislation and asks each individual for $200,000 to produce a television advertisement based on the script. Each individual agrees to give $200,000, and the DGA uses the $1,000,000 to produce and disseminate the advertisement. In the second scenario, the DGA uses $1,000,000 in funds already on hand to produce and disseminate the advertisement. In both scenarios, the advertisement airs within 90 days of the general election and the DGA claims that "[t]he advertisement is made without the consent, coordination, or consultation of a candidate or an agent of the candidate, candidate committee, political committee, or party committee. DGA Sup. Mem. 1-2.

The DGA argues that it would have to register as a political committee under Scenario A, but would only have to file an expenditure report under Scenario B. It then proceeds to argue that the application of the Connecticut statute to these scenarios is unconstitutional for the following reasons:

- "The statute provides no clear notice as to when sponsors of an issue advertisement must file political committee reports." DGA Sup. Mem. 2.
- "Connecticut law impermissibly requires organizations that sponsor issue advocacy 'expenditures' to register as political committees if they solicit funds for their activities." DGA Sup. Mem. 5.
- "The class of issue advocacy communications that Connecticut law regulates is far broader than the law allows." DGA Sup. Mem. 11.

With its Supplemental Memorandum, the DGA presents the Court with a totally different case that seeks to strike down Connecticut's definition of political committee as applied to organizations such as the DGA, whose major purpose is the election or defeat of candidates. Thus, rather than just seeking to have this Court declare certain facts irrelevant to a question of coordination, the DGA now seeks to clear the way for political organizations to be active in Connecticut elections free from the limitations, prohibitions and disclosure rules applicable to political committees. The radical shift in this case is apparent from the fact that the only reference in the complaint to the issue of the DGA's activity triggering political committee status is in one sentence alleging that "state law does not allow them to engage in protected non-electoral speech without registering as a political committee or a lobbyist, and complying with the panoply of statutes and regulations that govern such activities." Compl. ¶ 71.

As we have previously argued, the DGA's complaint does not meet the basic Article III requirement that it present an actual case or controversy capable of resolution. Amici Mem. 7. In a desperate effort to address this defect, the DGA has compounded the problem by presenting the Court with new claims and arguments, which, having not been raised in the complaint, cannot now be considered.

II. The New Hypotheticals Do Not Provide DGA with Article III Standing.

Ironically, even if the DGA's new arguments are properly before the Court, they are even further removed from presenting a live case or controversy than the meager facts alleged in the complaint because they are based on hypotheticals that the DGA does not even attempt to present as its planned activity. Moreover, as is so often the case with hypotheticals, they are so broad and lacking in specificity that they cannot serve as a

meaningful basis for Article III standing. The lack of standing in this case is especially significant when the Court is being asked to decide how a state executive agency will interpret and apply a state legislative enactment. *See Clapper v. Amnesty Int'l USA*, 133 S. Ct. 1138, 1146 (2013).

While the Connecticut Attorney General's office, representing the SEEC, filed a Response to Plaintiff's Supplemental Memorandum providing an overview of Connecticut's campaign finance registration, reporting and disclosure requirements, and analyzing the DGA's two scenarios, its efforts cannot cure the hypothetical nature or the lack of specificity afflicting plaintiff's new allegations. For example, among the many unanswered factual questions raised by the scenarios are:

- What percentage of the DGA's total activity is the $1 million being spent on the hypothetical ad?
- Is the hypothetical ad the only activity the DGA is going to undertake in support of Connecticut candidates? If not, what percentage of the DGA's total activity is the amount of money being spent on Connecticut elections?
- In Scenario A, what were the five individuals told regarding the purpose of their donation?
- Scenario B states that the $1 million will come from money already raised. However, there is no discussion regarding how that money was raised or the purposes for which it was raised. For example, was the $1 million raised prior to the script being written, but with the donors being told that their contributions would fund an ad supporting Governor Malloy? Was the money solicited by Governor Malloy? Was the money in any way earmarked to support the candidacy of Governor Malloy or any Connecticut candidates?
- Both Scenarios A and B make the conclusory statement that "[t]he advertisement is made without the consent, coordination, or consultation of a candidate or an agent of the candidate, candidate committee, political committee, or party committee." However, there are no facts regarding the type of discussions or interaction the DGA has with the candidate about the advertisement. Is the statement that there was no coordination or consultation intended to be limited to the specific ad or is it also intended to be a representation that there was no consultation with the candidate regarding these types of advertisements and messaging?

These are not irrelevant questions. They go to the heart of the Supreme Court's analysis found in every case holding limits on independent expenditures unconstitutional, while upholding limits on contributions to candidates, including in-kind contributions in the form of expenditures coordinated with candidates. From the Supreme Court's decision in *Buckley v. Valeo*, 424 U.S. 1, 47 (1976), where the contribution/independent expenditure distinction was first articulated, through *Citizens United v. FEC*, 558 U.S. 310, 365-66 (2010), where the Court applied the distinction to corporate and union election activity, and *McCutcheon v. FEC*, 134 S. Ct. 1434, 1455 (2014), the Court has relied on what it perceives to be the factual differences between coordinated and independent expenditures. *See, e.g.*, *Buckley*, 424 U.S. at 47 (Independent expenditures are "made totally independently of the candidate and his campaign."). Deciding a facial or as-applied challenge to the regulation of election advocacy based on simple hypotheticals, and without any reference to specific facts or any actual intended conduct on the part of the plaintiff, is to ignore not only the requirements of Article III standing but also the basis for much of the Supreme Court's campaign finance jurisprudence.

III. The DGA's Reimagined Version of this Litigation is Again Based on Its Erroneous Application of the Law.

The DGA's reimagining of its claims to encompass a wholesale attack on the definition of a political committee and related disclosure requirements does not create a justiciable claim because it is based on a series of hypotheticals and not on any specific activities the DGA has said it plans to undertake. Nevertheless, the DGA has used this opportunity to allege that having to register as a political committee in Connecticut under any of its hypotheticals is a violation of its constitutional rights. DGA Sup. Mem. 5. The DGA's argument begins with a recitation of the various recordkeeping and disclosure

requirements applicable to political committees[2] and essentially ends with an assertion that requiring politically active organizations to form political committees imposes an unconstitutional burden on the exercise of First Amendment rights. *Id.*

Initially, the DGA relies on broad statements taken out of context and applicable to situations that are materially different from the one facing the DGA. The DGA starts by quoting the Supreme Court's statement in *Citizens United* that "PACs are burdensome …; they are expensive to administer and subject to extensive regulations." 558 U.S. at 337. However, throughout this litigation, the DGA has failed to acknowledge the significance of the fact that it is registered with the Internal Revenue Service as a "political organization" under section 527 of the Internal Revenue Code, 26 U.S.C. § 527 (2012), and describes itself as "the only organization dedicated to electing Democratic governors and candidates…[participating] at all levels of campaigns, from providing resources to fund operations to helping articulate and deliver their messages."[3] For this reason, the DGA's reliance on *Citizens United* is misplaced. In *Citizens United*, the Supreme Court described the "burdens" of political committee status to explain why the ability of a corporation whose major purpose was not political activity to establish a political committee to make independent expenditures was not an adequate alternative to allowing a corporation to exercise its First Amendment right to make independent expenditures using its general treasury funds. 558 U.S. at 337-38. Nevertheless, even in

[2] The Defendant's Response to Plaintiff's Supplemental Memorandum includes a detailed discussion of how the Connecticut law applies to political committees and identifies numerous misstatements and errors regarding the law it has found in plaintiff's supplemental memorandum. *Amici* will not repeat the exercise, but must note that the changing nature of the plaintiff's claims requires the defendants (and the Court) to respond to a constantly moving hypothetical target, increasing the likelihood that any resulting resolution of this case on the substantive merits of plaintiff's claims—as they exist any given time—is likely to suffer from plaintiff's shape-shifting approach to litigation.

[3] Democratic Governors Association, http://democraticgovernors.org/#about (last visited May 13, 2014). A more complete description of the DGA as an organization dedicated to electing Democratic governors can be found at *Amici* Mem. 5-6.

the context of a non-major purpose organization such as Citizens United, the Supreme Court said that the disclosure requirements in the law are not limited to express advocacy communications. *Id*. at 368-69 ("As a final point, Citizens United claims that, in any event, the disclosure requirements in § 201 must be confined to speech that is the functional equivalent of express advocacy. … We reject this contention.").

Moreover, in *Buckley*, the Court rejected a constitutional challenge to the requirement that groups whose major purpose is the election or defeat of candidates had to register and report as political committees, finding that the governmental interests supporting the rules applicable to political committees "are sufficiently important to outweigh the possibility of infringement" of First Amendment rights. The governmental interests sufficient to support disclosure requirements include: (1) "provid[ing] the electorate with information as to where political campaign money comes from and how it is spent" to "aid the voters in evaluating those who seek federal office[,]" (2) "deter[ring] actual corruption and avoid[ing] the appearance of corruption by exposing large contributions and expenditures to the light of publicity[,]" and (3) enabling campaign finance regulators to "gather[] the data necessary to detect violations of the contribution limitations . . . ." 424 U.S. at 66-68 (citations, footnotes and internal quotation marks omitted).[4]

Likewise, as fully explained in *Amici's* initial memorandum, the Supreme Court has consistently held that the regulation of organizations whose major purpose is election or defeat of candidates does not present the same constitutional concerns as it has found

[4] One of the by-products of allowing the DGA to abruptly change its underlying claims is that it gives the DGA an opportunity to try to ignore the fact that a less strict standard of review and the above-stated additional governmental interests apply in challenges to disclosure requirements versus challenges to coordination restrictions, which determine whether an expenditure will be treated as an in-kind contribution. *See*, *e.g.*, *Buckley*, 424 U.S. at 64-69.

with the regulation of non-major purpose organizations. *Amici* Mem. 22-27. Thus, the DGA's repeated assertion that only activity meeting the definition of express advocacy can be considered when determining whether a major purpose organization has triggered political committee status is without merit.[5]

CONCLUSION

This litigation began as an attack on the SEEC's refusal to provide blanket assurance that fundraising activities undertaken by Governor Malloy for the DGA would never be relevant to an allegation that the DGA's support for Governor Malloy's candidacy was coordinated with his campaign. As the DGA had never actually asked the SEEC about the application of the law to its activities, and the DGA's complaint was noticeably devoid of any specific facts, it tried to fashion this action as a facial challenge to the constitutionality of the 2013 Act's definition of coordinated expenditures. However, after the initial round of briefing and conferences with the Court, the DGA has attempted to reinvent its case as a broad attack on the rules applicable to organizations whose major purpose is election or defeat of candidates in Connecticut.

While the result is that the supplemental briefing covers very different arguments and issues than are presented in the complaint and initial briefs, there is a certain consistency throughout the DGA's various formulations of its claims. First, it is clear that

[5] The Seventh Circuit's recent decision in *Wisconsin Right to Life, Inc. v. Barland*, No. 12-3158, 2014 WL 1929619 (7th Cir. May 14, 2014), striking down many of Wisconsin's statutory requirements for political committees does not affect the analysis of plaintiff's claim. First, *Barland* involved an as applied challenge brought by a social-welfare organization established under 26 U.S.C. § 501(c)(4), which, unlike the DGA, cannot have as its major purpose the election or defeat of candidates. Second, and more importantly, the Seventh Circuit's decision in *Barland* is inconsistent with *Buckley* and *Citizens United*, as well as numerous other cases upholding disclosure and reporting requirements for political activity that does not involve express advocacy. In fact, *Barland* tries to distinguish *Citizens United*'s approval of disclosure requirements applying to the non-express advocacy electioneering communications of a corporation by calling it *dicta* and then limiting its application. Moreover, the court is forced to acknowledge that its decision is contrary to the "approaches to *Buckley*'s major- purpose principle" taken by the First, Fourth, Eighth, Ninth and Tenth Circuits. Slip. Op. at 74 n.23.

the DGA's ultimate goal is to severely limit the reach of Connecticut's campaign finance law and move into the shadows the activities of organizations, like the DGA, that are actively trying to elect or defeat candidates in Connecticut. Second, it is also clear that none of the permutations of the case presented by the DGA present an actual case or controversy and satisfy Article III standing requirements. Therefore, this Court must dismiss the complaint.

Respectfully submitted,

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Dated: June 6, 2014

CERTIFICATE OF SERVICE

I hereby certify that I caused a copy of the foregoing Supplemental Memorandum of *Amici Curiae* to be served by email, pursuant to the provisions of Fed. R. Civ. P. 5(b)(3), through filing with the Clerk of Court using the CM/ECF system on this 6th day of June 2014.

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