

BRENNAN
CENTER
FOR JUSTICE

Brennan Center for Justice
at New York University School of Law

161 Avenue of the Americas
12th Floor
New York, NY 10013
646.292.8310 Fax 212.463.7308
www.brennancenter.org

**Testimony of Brent Ferguson
Counsel, Brennan Center for Justice**

**Submitted to the Connecticut General Assembly
Government Administration and Elections Committee
S.B. 1126**

March 27, 2015 Hearing

Introduction

The Brennan Center for Justice at NYU School of Law appreciates the opportunity to discuss the proposed amendments to Connecticut's law that would strengthen Connecticut's rules preventing coordination between candidates and outside groups.¹ The Supreme Court has made it clear that Connecticut has the power to guard against the dangers of corruption and its appearance by setting reasonable contribution limits. To prevent circumvention of such limits, expenditures coordinated between candidates and outside groups must be treated as contributions. Robust coordination rules have never been more important, given the recent exponential increase in outside election spending resulting from *Citizens United* and other court decisions.

Such laws are especially important in Connecticut for two reasons. First, they are integral to the success of its public financing system. When candidates accept taxpayer dollars to ensure a fairer election system, it is crucial to ensure that the system is not manipulated by improper collaboration between candidates and outside groups that may raise and spend money without limit. Second, Connecticut has seen a particularly pronounced spike in independent expenditures in the last five years. As the Brennan Center noted in a report last year, outside spending in Connecticut's 2014 gubernatorial race was 20 times greater than it was in 2010, as of late last summer.² When outside spending is at high levels, it is especially important to make certain that spenders remain independent from candidates they support.

¹ The Brennan Center is a non-partisan public policy and law institute that focuses on the fundamental issues of democracy and justice. The Center's Money and Politics project works to reduce the real and perceived influence of money on our democratic values. The opinions expressed in this letter are only those of the Brennan Center and do not necessarily reflect the opinions of NYU School of Law, if any.

² Chisun Lee, Brent Ferguson, & David Earley, *After Citizens United: The Story in the States*, THE BRENNAN CENTER FOR JUSTICE 1 (2014), <https://www.brennancenter.org/publication/after-citizens-united-story-states>.

Connecticut recently strengthened its coordination law, and the improved statute has undoubtedly prevented some of the worst abuses. However, we support the proposed amendments to § 9-601c, which would add language to make the law clearer and ensure that it is comprehensive enough to protect against all types of coordination that commonly occurs. The new law would replace the “rebuttable presumption” that is currently applied to certain circumstances, instead automatically deeming some spending coordinated. This common-sense approach recognizes that in some situations, such as when a candidate forms a super PAC and the PAC shortly thereafter supports her, outside spending should always be treated as a contribution. Further, the new version of the statute removes a complex subdivision of the law that some argue can be interpreted in multiple ways, and was the subject of a lawsuit last year. Amending the law in these two ways will help safeguard the integrity of contribution limits, make enforcement more straightforward, and provide better guidance to candidates and outside groups.

While we support the parts of the bill that would strengthen the coordination law, we suggest altering two portions of the bill. First, we recommend adding a provision to ensure that the coordination provision of § 9-601c applies to incumbents during their entire term; otherwise, the law could be interpreted to allow activity that would normally be deemed coordination until an incumbent declares his or her candidacy in the months before the election. Second, the proposed amendment to § 9-7b(a)(5) that would immunize certain candidates from audits should be removed. Insulating a candidate from the auditing process could encourage her to be less vigilant in ensuring that her campaign complies with the law.

The Constitutionality of Regulating Coordinated Spending

In *Buckley v. Valeo*, the Supreme Court drew a clear line between limits on independent expenditures and limits on contributions to candidates. The Court reasoned that while limits on independent spending warrant strict constitutional scrutiny, contribution limits “entail[] only a marginal restriction” on First Amendment rights, and therefore merit less onerous judicial review.³ The *Buckley* Court further explained that outside expenditures “coordinated” with a candidate could be “treated as contributions,” because “[t]he ultimate effect is the same as if the [spender] had contributed the dollar amount [of the expenditure] to the candidate.”⁴

In the years after *Buckley*, the Court made clear that coordination laws need not require express “agreement or formal collaboration” between a candidate and outside group in order for an expenditure to be treated as coordinated.⁵ “[E]xpenditures made after a ‘wink or nod,’” it has repeatedly observed, “will be ‘as useful to the candidate as cash.’”⁶ Accordingly, many jurisdictions presently consider a wide variety of conduct to be indicia of coordination, including sharing material information, employment of common staff or use of common vendors,

³ 424 U.S. 1, 20, 23 (1976). The controlling plurality in the Court’s recent decision in *McCutcheon v. FEC* explicitly disclaimed “any need to revisit *Buckley*’s distinction between contributions and independent expenditures and the corollary distinction in the applicable standards of review.” 164 S.Ct. 1434, 1445 (2014) (plurality opinion).

⁴ 424 U.S. at 36-37.

⁵ *McConnell v. FEC*, 540 U.S. 93, 219 (2003).

⁶ *Id.* at 221 (quoting *FEC v. Colo. Republican Fed. Campaign Comm.*, 533 U.S. 431, 442, 446 (2001)).

republication of campaign communications or materials and candidate fundraising for an outside group.⁷

Although *Citizens United* overruled the Court's prior jurisprudence in other respects, it left the Court's longstanding approach to coordination undisturbed. *Citizens United*'s holding invalidating most limits on truly independent expenditures turned on the "absence of prearrangement and coordination" characteristic of such expenditures.⁸ That absence of coordination, in the Court's view, "undermines the value of the expenditure to the candidate" and alleviates the danger of *quid pro quo* corruption.⁹

If anything, *Citizens United* and related cases necessitate a more proactive regulatory approach to coordination. Because of these decisions, outside spending is rising exponentially in U.S. elections; at the federal level, it tripled between the 2008 and 2012 presidential elections, and increased eight-fold between the 2006 and 2014 midterm elections.¹⁰ Moreover, such spending increasingly comes from groups devoted to electing a single candidate, often staffed by the candidate's family, friends or former staffers.¹¹ These single candidate groups allow maxed-out contributors to target particular races in exactly the same way as they can with direct contributions, resulting in exponentially greater corruption concerns.

Finally, more and more outside spending comes from "dark money" groups who are not required to disclose their donors.¹² Although Connecticut's "covered transfer" law no doubt prevents much dark money spending, coordination law helps ensure that groups evading the required disclosure must do so without the aid of candidates or their employees.

For all of these reasons, we believe that the enhancements to the coordinated spending provisions of § 9-601c reflected in the proposed amendments would survive judicial review.

⁷ See 11. C.F.R. § 109.21(d); Fla. St. Ann. § 106.011(12)(b); Ohio Admin. Code § 111-3-02; Cal. Code Regs. tit. 2, § 18550.1(b); Minn. Campaign Fin. & Pub. Disclosure Bd. Advisory Op. No. 437, at 5.

⁸ *Citizens United v. FEC*, 558 U.S. 310, 360 (2010).

⁹ *Id.*

¹⁰ See Center for Responsive Politics, *Total Outside Spending by Election Cycle, Excluding Party Committees*, at http://opensecrets.org/outsidespending/cycle_tots.php.

¹¹ Chisun Lee, Brent Ferguson, & David Earley, *After Citizens United: The Story in the States*, The Brennan Center for Justice 1 (2014), <https://www.brennancenter.org/publication/after-citizens-united-story-states>; PUBLIC CITIZEN, *SUPER CONNECTED 10* (2013), <http://www.citizen.org/documents/super-connected-march-2013-update-candidate-super-pacs-not-independent-report.pdf> (estimating that 45% of super PAC spending in 2012 was by groups devoted to electing a single candidate).

¹² See Trevor Potter & Bryson B. Morgan, *The History of Undisclosed Spending in U.S. Elections and How 2012 Became the "Dark Money" Election*, 27 NOTRE DAME J. L. ETHICS & PUB. POL'Y 383, 384 (2013) (noting dark money currently accounts for almost sixty percent of all outside spending at the federal level); Robert Maguire, *How 2014 Is Shaping Up To Be the Darkest Money Election To-Date*, CENTER FOR RESPONSIVE POLITICS, Apr. 30, 2014, <http://www.opensecrets.org/news/2014/04/how-2014-is-shaping-up-to-be-the-darkest-money-election-to-date/> (finding the 2014 cycle's dark money total was on pace to exceed that of 2012 three-fold, notwithstanding the absence of a presidential race).

Proposed Section 9-601c

As noted above, the new § 9-601c would deem certain spending as coordinated in all circumstances, removing the “rebuttable presumption” that is currently used. Further, it would remove § 9-601c(c), which has created some confusion and could hinder the SEEC’s ability to enforce the law. These amendments would make the statute clearer and would properly broaden the scope of the law where necessary, which is why we firmly support them.

It is true that Connecticut already has a more comprehensive coordination law than many states; however, that should not prevent the legislature from working to improve the law’s clarity and scope such that it provides better guidance to outside groups and candidates and more thoroughly prevents circumvention of contribution limits by super PACs.

Clarity

It is vital that any law regulating political spending and campaigns be as clear as possible, both to ensure optimal enforcement and to give accurate guidance to candidates and other participants. The bill’s changes to the law, detailed below, will provide that guidance and help the SEEC focus its enforcement efforts.

Section 9-601c(c) currently provides that the SEEC shall not presume that certain actions, such as a candidate fundraising for an outside group, constitute evidence of coordinated activity. It then instructs that the prohibition does not apply in some circumstances. For example, candidate fundraising for an outside group “shall not be presumed to constitute evidence of” coordination with the group “unless the entity has made or obligated to make independent expenditures in support of the candidate.”

While the general intent of the current provision is discernible, some claim that its language can be interpreted in multiple ways. Because of that problem, last year the Democratic Governors Association sued the state arguing in part that § 9-601c(c) “chill[ed] its ability to make independent expenditures.”¹³ The challenge was unsuccessful, and the provision is constitutional as it currently reads. But by deleting the provision and providing clearer language regarding what types of activity constitute coordination, the new law would help the SEEC in its enforcement efforts and would provide better guidance for candidates and outside groups. This could have the effect of reducing future litigation.

By adding § 9-601c(d)(2), the new bill also would ensure that candidates and outside groups are aware that they are permitted to discuss legislative and policy matters without triggering a finding of coordination. This safeguard will make certain that the coordination law focuses on election-related activity and preserves groups’ right to engage in issue discussion to the fullest extent.

¹³ Democratic Governors Ass’n v. Brandi, 2014 WL 2589279, at *7 (D. Conn. June 10, 2014).

Substantive Additions

Aside from its improvements to clarity, the bill makes substantive changes to the law that would improve enforcement in Connecticut and better protect its public financing system from circumvention of contribution limits by outside groups. The current law relies almost entirely on a rebuttable presumption under which if certain circumstances are met, the SEEC may presume coordination has occurred, but a candidate or group may present evidence to rebut the finding. The rebuttable presumption is valuable, and is a useful tool in many circumstances. For example, the law creates a rebuttable presumption that spending is coordinated “if the person making the expenditure . . . has informed the candidate” about the expenditure.¹⁴ In this situation, the candidate or group should be afforded an opportunity to explain to the SEEC why the sharing of information did not amount to coordination.

Yet in other circumstances, coordination is more self-evident and it will be simpler and more efficient for the SEEC to treat such spending as coordinated in all cases, as most states do. For instance, the new § 9-601c(a)(2) provides that an expenditure is deemed coordinated if it is used to republish or disseminate any campaign materials prepared by a candidate. If a super PAC uses video or print material prepared by a candidate, there is no question that it should qualify as a contribution, because it will have the same or similar value as a direct payment to the candidate.¹⁵ Likewise, if a candidate has established a PAC or other group, and that group later supports the candidate within the same election cycle, it is tightly linked with the candidate and that spending should be treated as a contribution.

The bill also treats an expenditure as coordinated if the group making the expenditure is managed by a person who has recently worked for a candidate. This subsection is vital to a comprehensive coordination law because it prevents the formation of groups that may essentially serve as shadow campaign committees, which appear to be an increasingly common method of circumventing contribution limits. Though coordination law is rarely enforced at the federal level, just last month the Department of Justice announced a conviction (by plea deal) of a political operative who managed a Virginia candidate’s congressional campaign while also creating a super PAC to assist the candidate.¹⁶ A report issued by the Brennan Center last fall surveyed coordination law enforcement from across the country, and found several instances in which campaign employees worked with or directed outside groups, essentially making them part of the campaign team.¹⁷ In perhaps the most egregious example, staffers of Utah Attorney General John Swallow “created a web of benignly-named groups” to collect over \$450,000 from payday lenders that Swallow had promised to help once in office.¹⁸

Not all instances of such coordination are so overt, but they have a similar effect of turning what should be independent spending into an indirect campaign contribution. In Arizona,

¹⁴ Conn. Gen. Stat. Ann. § 9-601c(b)(8).

¹⁵ Of course, the candidate should not be held liable for an excessive contribution in such a case unless there is an indication that the candidate encouraged or consented to the dissemination.

¹⁶ Matt Zapotosky & Matea Gold, *Va. political operative pleads guilty to coordinating campaign contributions*, WASH. POST, Feb. 12, 2015, http://www.washingtonpost.com/local/crime/va-man-pleads-guilty-to-coordinating-campaign-contributions/2015/02/12/e63a92dc-b146-11e4-827f-93f454140e2b_story.html.

¹⁷ Chisun Lee, et al., *supra* note 2.

¹⁸ *Id.* at 8.

a county prosecutor brought a case against Attorney General Tom Horne after one of his campaign employees resigned from the campaign to start an outside group. The group attacked Horne's opponent, and received its first contribution only three days after the staffer's resignation from the campaign.¹⁹ There was additional evidence of collaboration, such as the fact that the former staffer forwarded emails from Horne to the outside group's advertising agency.

The proposed strengthening of coordination law in Connecticut will prevent instances like these, and will not require the SEEC's enforcement efforts to depend on subpoenas or whistleblowers who alert authorities to improper activity. Even without direct collaboration, an employee that has learned valuable campaign strategy cannot assist a group and call it truly "independent" spending; the new provision in the bill reflects that reality.

While we believe the law is constitutional as proposed, it may be advisable to narrow the provision concerning candidates' employees to ensure that it covers only employees that have knowledge of nonpublic campaign strategy that would be valuable if the employee were to later use it to advise a super PAC on its advertising. Thus, we suggest amending the final clause of proposed § 9-601c(b)(3) from "held a formal position with a title for such candidate or candidate committee" to "held a managerial or advisory position for the candidate or committee in which the person acquired knowledge of substantial nonpublic campaign information."

Finally, we recommend adding a sentence to the beginning of § 9-601c to ensure that all coordination rules apply to incumbents, even if they do not otherwise qualify as "candidates" under Chapter 155. Expanding the definition will help to ensure that those who hold office may not freely coordinate with outside groups before they are officially considered a candidate. Allowing such coordination would defeat the purpose of strengthening the state's coordination law, which is intended to ensure that independent expenditures remain truly independent, lessening the likelihood that they are made in exchange for favorable legislative or executive action.

Proposed Section 9-7b(a)(5)

The bill also makes changes to § 9-7b(a)(5), which currently directs the Commission to audit not more than 50% of candidate committees. The bill would alter the law to ensure that no candidate for state senator, representative, or judge of probate would be audited if his candidate committee was audited in the previous election or primary. While we recognize that complying with an audit can be burdensome for candidates and their committees, audits are necessary to ensure compliance with the law, especially in a state that relies on a public financing system. In an effort to reduce the burden, this provision of the law would guarantee that a significant number of candidates would not be audited. While it is unlikely that candidates would purposely violate the law because of that guarantee, the provision could affect the diligence of their compliance. If the state seeks to ensure that its public financing and coordination laws are successful and closely followed, it should not immunize certain candidates from audits.

¹⁹ *Id.* at 22; Order Requiring Compliance, In The Matter of Tom Horne, Office of Yavapai County (Ariz.) Attorney Campaign Finance Proceeding (Oct. 17, 2013).

Conclusion

For all of these reasons, we strongly support Connecticut's effort to strengthen its coordination law. We support the provisions of the bill that would clarify the reach of the law and make it more comprehensive. However, it is important that the bill's coordination provisions apply to all incumbents. Further, we would remove the proposed amendment to the law that would reduce audits of candidate committees. Thank you once again for providing us with the opportunity to testify, and we are happy to answer any questions you have.

