CENTER for COMPETITIVE POLITICS

Congress shall make no law...

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April 16, 2015

The Honorable Martin M. Looney
Legislative Office Building
300 Capitol Avenue
Room 3300
Hartford, CT 06106

The Honorable Len Fasano
Legislative Office Building
300 Capitol Avenue
Room 3400
Hartford, CT 06106

Re: Significant Constitutional and Practical Issues with Senate Bill 1126 (as Substituted)

Dear President Pro Tempore Looney, Senate Minority Leader Fasano, and members of the Senate:

On behalf of The Center for Competitive Politics (CCP),[1] Senior Fellow Eric Wang[2] has analyzed S.B. 1126, as substituted favorably by the Joint Government Administration and Elections Committee[3] and finds that the bill severely threatens core First Amendment rights.

This legislation would treat an expansive universe of activities having absolutely nothing to do with elections as potentially being coordinated spending with a candidate, thereby converting such activities into prohibited or excessive in-kind contributions. To the extent some may believe candidates already give too much face time to donors and not enough time to voters, this bill would worsen this problem exponentially by revoking the existing statutory exception under which groups may sponsor "meet the candidate"-type events without having them be regulated as in-kind contributions to candidates. Additionally, the bill would cripple the state's political party committees by significantly impeding their candidates' ability to raise money for them. Lastly, the bill would unconstitutionally prevent candidates' immediate relatives from supporting them, while lobbyists, corporations, and other unrelated interests would be free to spend as much as they want.

These concerns are discussed in more detail below.

[1] The Center for Competitive Politics is a nonpartisan, nonprofit 501(c)(3) organization that promotes and protects the First Amendment political rights of speech, assembly, and petition. It was founded in 2005 by Bradley A. Smith, a former Chairman of the Federal Election Commission. In addition to scholarly and educational work, the Center is actively involved in targeted litigation against unconstitutional laws at both the state and federal levels. For instance, it presently represents nonprofit, incorporated educational associations in challenges to state campaign finance laws in Colorado and Delaware. It is also involved in litigation against the state of California.

[2] Eric Wang is also Special Counsel in the Election Law practice group at the Washington, D.C. law firm of Wiley Rein, LLP. Any opinions expressed herein are those of the Center for Competitive Politics and Mr. Wang, and not necessarily those of his firm or its other clients.

[3] All references to S.B. 1126 and proposed statutory provisions herein are to the language in the substitute bill adopted by a vote of the majority of the Government Administration and Elections Committee on March 30, 2015 (Substitute Bill No. 1126).

I. SB 1126 could convert a virtually limitless universe of civic activities into "coordinated" spending.

As substituted, S.B. 1126 could turn virtually any civic group with which an individual is involved into a "coordinated spender," if the individual later becomes a candidate, thereby converting all of the group's activities into prohibited in-kind contributions to the candidate.

A "coordinated spender" includes any entity that is "directly or indirectly formed, controlled or established in the current election cycle by, at the request or suggestion of, or with the encouragement of" a candidate.[4] In addition, any entity for which an individual raises money – even if that individual does not become a candidate until several years later – also is considered a "coordinated spender," unless it segregates funds raised by such an individual into a separate account that is not used to "benefit" that individual (whatever that means).[5]

For the purposes of the coordination law, someone could be considered a "candidate" even long before the individual decides to run or explores a possibility of running, so long as he or she later becomes a candidate and "benefits" from an expenditure made by a "coordinated spender.[6]

Similarly, "expenditure" is defined quite broadly and can include virtually anything imaginable that is deemed to "promote the success or defeat of any person seeking" nomination or election,[7] although there are specific exceptions, such as communications that refer to candidates prior to 90 days before an election in which the referenced candidate will be on the ballot.[8]

Assuming an "election cycle" for a gubernatorial candidate is four years,[9] one can easily imagine how a common scenario such as the following becomes a tremendous problem: Imagine a former Connecticut state senator named Alice Gore, who is a prominent advocate of policies to prevent climate change. In 2015, a group of individuals consults with her about forming a 501(c)(4) environmental advocacy group, Connecticut Cares About Climate Change (CCACC). She encourages them in their endeavor and raises money for the group. In 2018, Ms. Gore decides to run for governor, and climate change is a major part of her campaign platform.

Because CCACC was formed "with the encouragement" of Ms. Gore and she raised money for the group, CCACC is a "coordinated spender." Due to the broad definition of "expenditure," the millions of dollars that CCACC has spent during the "election cycle" on climate change advocacy easily could be deemed to "benefit" and "promote the success" of Ms. Gore's candidacy, and thus would be a prohibited and excessive contribution to her campaign.[10]

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[4] Proposed Conn. Gen. Stat. § 9-601c(c)(1).
[5] Proposed Conn. Gen. Stat. § 9-601c(c)(2)(B).
[6] Proposed Conn. Gen. Stat. § 9-601c(b).
[7] Proposed Conn. Gen. Stat. § 9-601b(a)(1).
[8] Proposed Conn. Gen. Stat. § 9-601b(b)(7).
[9] The Connecticut statute and regulations, the proposed legislation, and the State Elections Enforcement Commission declaratory rulings and advisory opinions do not appear to define the term "election cycle."
[10] *See* Proposed Conn. Gen. Stat. §§ 9-601c(d)(1) (treating any expenditure made by a "coordinated spender" as an expenditure made "with the consent, coordination or consultation of, or at the request or suggestion of" a candidate); 9-601a(a)(4) (treating any "expenditure that is not an independent expenditure" as a contribution); 9-601c(a) (defining "independent expenditure"). *See*

Alternatively, suppose Ms. Gore founded CCACC in 2015. According to her critics and opponents, Ms. Gore used CCACC as a springboard for her gubernatorial ambitions, notwithstanding the legitimate work the organization has done in promoting climate change advocacy. Again, as an organization "established in the current election cycle by" Ms. Gore, CCACC is deemed to be a "coordinated spender," and almost everything the group does could be deemed to be coordinated expenditures and prohibited in-kind contributions to Ms. Gore's campaign (outside of the specific exceptions set forth in proposed Conn. Gen. Stat. § 9-601b(b)). Paradoxically, if CCACC were to sponsor an television ad 91 days before the general election praising Ms. Gore for her work promoting climate change awareness, that would not be considered an expenditure or coordinated expenditure.[11]

II. S.B. 1126 would diminish candidates' opportunities to interact with voters.

S.B. 1126 inexplicably and unjustifiably removes the provision in current Conn. Gen. Stat. § 9-601c(c),[12] which exempts any event at which a candidate participates from being treated as a coordinated expenditure, provided that the event does not "promote[] the success of the candidate's candidacy or the defeat of the candidate's opponent, or unless the event is during the period that is forty-five days prior to the primary for which the candidate is seeking nomination for election or election to office."

The current provision, eliminated by S.B. 1126, provides critically important breathing space for organizations to sponsor events, such as a county fair or Rotary Club meeting, where voters have a chance to get to know the candidates without being required to make a campaign contribution. The current provision rightfully acknowledges that, so long as these "meet the candidate" events are not campaign rallies that the campaigns themselves should pay for, the sponsors of these events should not be treated as making a coordinated expenditure or in-kind contribution to the candidates who show up at these events.

It is important to note that, although many organizations sponsoring events at which candidates appear under the current statute probably would not meet the definition of a "coordinated spender" under S.B. 1126, an organization does not have to be a "coordinated spender" in order for its activities to be considered a coordinated expenditure and in-kind contribution.[13] Given the extremely broad and vague definition of "expenditure" discussed previously, as well as the legislative history that would result if the General Assembly were to affirmatively remove the provision in current Conn. Gen. Stat. § 9-601c(c), it is very likely that any "meet the candidate" events would be considered coordinated expenditures going forward. Connecticut candidates and voters would then be left with a regulatory vicious circle in which

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also Conn. Gen. Stat. § 9-613 (prohibiting corporate contributions). Please note that proposed Conn. Gen. Stat. § 9-601c(e) sets forth certain circumstances that create a rebuttable presumption for when an expenditure is *not* an independent expenditure. However, this provision only applies to an expenditure "that is not covered under subdivision (1) of subsection (d) (*i.e.*, expenditures that are not made by "coordinated spenders").

[11] *See* Proposed Conn. Gen. Stat. § 9-601b(b)(7).

[12] *See* LCO No. 5975 at 11, lines 320-337.

[13] Specifically, proposed Conn. Gen. Stat. § 9-601c(d)(1) categorically treats any expenditure made by a "coordinated spender" as being a coordinated expenditure. However, that does not mean that expenditures made by other types of entities would not also be considered to be coordinated. In fact, proposed Conn. Gen. Stat. § 9-601c(e) provides a whole litany of situations in which expenditures made by entities that are not "coordinated spenders" may be deemed to be coordinated.

candidates would need to attend more and more fundraisers in order to pay for the declining number of events where they can have grassroots contact with voters.

Candidates participating in the Citizens' Election Program – as most candidates for Connecticut statewide and legislative office do[14] – would suffer an even greater impact from the removal of current Conn. Gen. Stat. § 9-601c(c). Candidates participating in the program may not accept additional contributions once they receive their allotment of public funding, and they also may not spend above strict expenditure limits.[15] Thus, S.B. 1126 would squeeze Citizens' Election Program candidates from both directions: not only are they prohibited from accepting in-kind contributions in the form of events sponsored by third parties where they may meet with voters, but they are also limited in how many events their own campaigns may pay for.

To the extent many critics of the current campaign finance system argue that politicians spend too much time raising money, and not enough time meeting with voters,[16] S.B. 1126 is a step in the wrong direction. If anything, S.B. 1126 should be expanding the provision in current Conn. Gen. Stat. § 9-601c(c) by removing the 45-day restriction prior to primaries so that the exception applies to events held at all times prior to any type of election.

III. S.B. 1126 would unduly undermine the parties' relationship with their candidates.

The rise of super PACs in recent years, has, according to some, further diminished the importance and role of the political parties, which had already been beleaguered by laws such as the federal Bipartisan Campaign Reform Act of 2002.[17] CCP does not side with either the super PACs or the political parties. Instead, CCP believes both are vitally important to a healthy democracy, and both are entitled to the maximum rights afforded by the First Amendment.

S.B. 1126 severely undermines the inherently and necessarily close relationship between the political parties and their candidates.[18] Candidates are the public faces of the parties and their representatives on the ballot. As such, they are typically the biggest draws at fundraising events for the party committees. S.B. 1126, however, would treat a party committee as a "coordinated spender" if one of its candidates raised so much as a cent for the party.[19]

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[14] Gregory B. Hladky, "Record Public Financing Amounts Awarded to Candidates," *Hartford Courant*. Retrieved on April 16, 2015. Available at: http://www.courant.com/politics/capitol-watch/hc-record-amount-in-public-financing-awarded-to-connecticut-candidates-20141020-story.html (October 20, 2014) ("'80 percent or more of the candidates [running this year] are receiving public financing,' Joshua Foley, a spokesman for the [State Elections Enforcement Commission], said Monday.").

[15] Conn. Gen. Stat. §§ 9-702(c); 9-707.

[16] *See, e.g.*, U.S. Representative Anna G. Eshoo, "Money in Politics," Office of U.S. Representative Anna G. Eshoo. Retrieved on April 16, 2015. Available at: http://eshoo.house.gov/news-stories/e-newsletters/money-in-politics/ ("Candidates spend far too much time fundraising and not enough time connecting with and engaging voters."). CCP does not necessarily agree with this point of view. However, to the extent any supporters of S.B. 1126 are inclined to agree with this view, CCP contends the legislation would severely worsen the purported problem.

[17] *See, e.g.*, Ray La Raja, "The Supreme Court might strike down overall contribution limits. And that's okay," *The Washington Post*. Retrieved on April 16, 2015. Available at: http://www.washingtonpost.com/blogs/monkey-cage/wp/2013/10/09/the-supreme-court-might-strike-down-overall-contribution-limits-and-thats-okay (October 9, 2013).

[18] *See, e.g., Randall v. Sorrell*, 548 U.S. 230, 253 (2006) (noting the importance of protecting "the ability of political parties to help their candidates get elected").

[19] Proposed Conn. Gen. Stat. § 9-601c(c)(2)(A).

Unless the party committee creates a separate account for each fundraiser at which a candidate appears, and which account would be off-limits for use in supporting that respective candidate, any expenditure the party makes in support of that candidate would be treated as an in-kind contribution to the candidate and subject to the state's contribution limits.[20] If even a dozen candidates raise money for a state party committee, that means the party would have to create a dozen different accounts, each of which would be restricted from spending money in support of those respective candidates. If more than one candidate appears at any given fundraising event, the permutations for the accounting and recordkeeping requirements multiply exponentially. Given these daunting burdens, the candidates effectively would be prevented from raising money for their party committees.

However, S.B. 1126 attacks candidate fundraising for party committees at an even more preliminary level. The bill would create a rebuttable presumption that any "fundraising activities with or for a candidate...or party committee" are coordinated expenditures.[21] Thus, before even getting to the question of whether the party committee has to create separate accounts for each candidate, and what each account may be used for, the legislation treats the very act of holding a fundraiser itself as a coordinated expenditure between the party committee and the participating candidate. If a state party committee spends $10,000 to rent a hotel ballroom and for catering at its annual Jefferson-Jackson Day or Lincoln Day dinner fundraiser, and a state Senate candidate shows up and speaks, the committee is already deemed to have given the maximum contribution it is entitled to make to that candidate.[22] This simply makes no sense.

IV. S.B. 1126 would unnecessarily and unconstitutionally restrict family support for a candidate.

S.B. 1126 would effectively prohibit any member of a candidate's immediate family from giving more than $2,000 to a super PAC to support that candidate.[23] Are we really concerned about mothers and fathers corrupting their sons and daughters by supporting their children's bid for elective office?[24]

If corruption is not the concern, then the only public policy rationale for this prohibition seems to be to "level the playing field" so that certain candidates who may have greater family wealth do not have an "unfair" advantage over other candidates. Whatever one personally thinks

[20] Proposed Conn. Gen. Stat. § 9-617(b)(1).
[21] Proposed Conn. Gen. Stat. § 9-601c(e)(6).
[22] Conn. Gen. Stat. § 9-617(b)(1) ("No state central committee shall make a contribution or contributions to…a candidate or a committee supporting or opposing any candidate's campaign…for election, to the office of…state senator…in excess of ten thousand dollars.").
[23] Proposed Conn. Gen. Stat. § 9-601c(c)(4)(A) (treating any entity that has received more than $2,000 from a member of a candidate's immediate family as a "coordinated spender").
[24] Although the Supreme Court upheld the contribution limits under the Federal Election Campaign Act as applied to candidates' family members, the Court acknowledged that the potential for corruption is not as great in such contexts. *See Buckley v. Valeo*, 424 U.S. 1, 53 n.59 (1976). The provision at issue here, however, does not even pertain to direct contributions to candidates, but rather to independent expenditures, which the Supreme Court has held "do not lead to, or create the appearance of, *quid pro quo* corruption. In fact, there is only scant evidence that independent expenditures even ingratiate." *Citizens United v. FEC*, 558 U.S. 310, 360 (2010).

of this public policy concern, the Supreme Court has made it emphatically and repeatedly clear that campaign finance laws aimed at "leveling the playing field" are unconstitutional.[25]

Paradoxically, a candidate's third cousin, who is a lobbyist for the Acme Widget Corporation, or the Acme Widget Corporation itself – both of whom would like to see a candidate elected who favors the widget industry – could give unlimited amounts to a super PAC supporting the candidate.[26]

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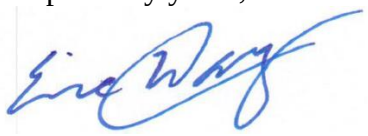
As substituted, S.B. 1126 would convert a stunning variety of activities into "coordinated" spending, diminish candidates' opportunities to interact with voters, undercut the parties' relationship with their candidates, and unconstitutionally restrict a family's support for a candidate. Given the aforementioned issues, there exists a significant possibility of litigation on the provisions contained within this measure. The Center recognizes, of course, that these serious issues were likely unintended. Nevertheless, members of the Senate must realize these significant constitutional and practical issues as they contemplate this bill.

Thank you for considering this analysis of Senate Bill 1126, as substituted by the Joint Government Administration and Elections Committee. Should you have any further questions regarding these issues or any other campaign finance proposals, please do not hesitate to contact the Center at (703) 894-6800 or by e-mail to Matt Nese, the Center's Director of External Relations, at mnese@campaignfreedom.org.

Respectfully yours,



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[25] *See Buckley*, 424 U.S. at 48-49 (invalidating the Federal Election Campaign Act's limitations on the amount of political expenditures that individuals may make); *Davis v. FEC*, 554 U.S. 724 (2008) (invalidating the "Millionaire's Amendment" under the Bipartisan Campaign Reform Act providing for increased contribution limits for candidates running against self-funding opponents); *Citizens United*, 558 U.S. at 350 ("The rule that political speech cannot be limited based on a speaker's wealth is a necessary consequence of the premise that the First Amendment generally prohibits the suppression of political speech based on the speaker's identity."); *Arizona. Free Enterprise Club's Freedom PAC v. Bennett*, 131 S. Ct. 2806, 2825 (2011) ("We have repeatedly rejected the argument that the government has a compelling state interest in 'leveling the playing field' that can justify undue burdens on political speech.").

[26] *See* Proposed Conn. Gen. Stat. §§ 9-601c(4)(C) (defining "member of the family"); 9-601d (providing for super PACs).