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August 1, 2012

William M. Gardner
Secretary of State
State House
Concord, New Hampshire 03301

Re: Effect of *Citizens United* Decision on Enforcement of RSA 664:4 (Prohibited Political Contributions) Regarding Political Committees

Dear Secretary Gardner:

Your office has received several inquiries regarding the United States Supreme Court ruling in *Citizens United v. FEC*, 130 S.Ct. 876 (2010). In light of that decision, you asked whether New Hampshire's political contributions law, RSA 664:4, can be enforced to restrict contributions to political committees that only make independent expenditures.¹ Whether the statute can be enforced to restrict contributions to any political committee is a fact-specific determination that can only be made on a case-by-case basis. In this letter, I will provide an overview of recent case law that should be of assistance to you in the performance of your official duties.

A. New Hampshire's Prohibited Political Contributions Law

RSA 664:4 states:

No contribution, whether tangible or intangible, shall be made to a candidate, a political committee, or political party, or in behalf of a candidate or political committee or political party, directly or indirectly, for the purpose of promoting the success or defeat of any candidate or political party at any state primary or general election:

¹“Independent expenditures’ means expenditures by a . . . political committee. . . expressly advocating the election or defeat of a clearly identified candidate which are made without cooperation or consultation with any candidate, or any authorized committee or agent of such candidate, and which are not made in concert with, or at the request or suggestion of, any candidate, or any authorized committee or agent of such candidate. As used in this paragraph, ‘clearly identified’ means that the name of the candidate involved appears; a photograph or drawing of the candidate appears; or the identity of the candidate is apparent by unambiguous reference.” RSA 664:2, XI.

I. [Repealed.]

II. By any partnership as such or by any partner acting in behalf of such partnership.

III. By any labor union or group of labor unions, or by any officer, director, executive, agent or employee acting in behalf of such union or group of unions; or by any organization representing or affiliated with any such union or group of unions, or by any officer, director, executive, agent or employee acting in behalf of such organization.

IV. [Repealed.]

V. By any person (1) if in excess of \$5,000 in value, except for contributions made by a candidate in behalf of his own candidacy, or if in excess of \$1,000 in value by any person or by any political committee to a candidate or a political committee working on behalf of a candidate who does not voluntarily agree to limit his campaign expenditures and those expenditures made on his behalf as provided in RSA 664:5-a, (2) if made anonymously or under a name not that of the donor, (3) if made in the guise of a loan, (4) if any other manner concealed, (5) if made without the knowledge and written consent of the candidate or his fiscal agent, a political committee or its treasurer, or not to any one of the same.

In contrast to some other states, New Hampshire law does not distinguish between political committees in general and political committees that only make independent expenditures. By definition, independent expenditure-only political committees do not contribute to, or coordinate with, candidates, political parties or political committees of candidates and political parties. Accordingly, as written, RSA 664:4 prohibits partnerships and labor unions, and those acting “in behalf of” such entities, from directly or indirectly making contributions to any political committee to be used for independent expenditures. Additionally, such contributions made by any person are limited to \$5,000 in value. RSA 664:4, V.

B. The Citizens United Decision

In *Citizens United*, the United States Supreme Court concluded that corporations and unions have the same political speech rights as individuals under the First Amendment. It found the government had no compelling interest in prohibiting corporations and unions from using their general treasury funds to make election-related independent expenditures. 130 S.Ct. at 913. The Court held that “the First Amendment does not allow political speech restrictions based on a speaker’s corporate identity.” *Id.* at 903. The Court noted that “[s]peech is an essential mechanism of democracy” and that “political speech must prevail against laws that would suppress it, whether by design or inadvertence.” *Id.* at 898. Indeed, “[t]he First Amendment ‘has its fullest and most urgent application’ to speech uttered during a campaign for political office.” *Id.* (citations omitted). The Court explained that “the First Amendment stands against

attempts to disfavor certain subjects or viewpoints.” *Id.* (citations omitted). “Prohibited, too, are restrictions distinguishing among different speakers, allowing speech by some and not others.” *Id.*

The Court stated in *Citizens United* that “[n]o sufficient governmental interest justifies limits on the political speech of non-profit corporations.” *Id.* at 913. This is because “independent expenditures, including those made by corporations, do not give rise to corruption or the appearance of corruption.” *Id.* at 909.²

Although the *Citizens United* decision addressed federal campaign finance laws, the United States Supreme Court has made clear that the decision also applies to state campaign finance laws. Recently, in a 5-4 decision, the Court summarily reversed a Montana Supreme Court decision upholding a law that prohibited a corporation from making “an expenditure in connection with a candidate or a political committee that supports or opposes a candidate or a political party.” *American Trad’n Partnership v. Bullock*, ___ S.Ct. ___, 2012 WL 2368660 (June 12, 2012). In a one paragraph decision, the Court reaffirmed its *Citizens United* decision and held that “political speech does not lose First Amendment protection simply because its source is a corporation.” *Id.*

C. Judicial Review of Campaign Expenditures v. Campaign Contributions

The *Citizens United* decision addressed campaign expenditures by corporations, and not campaign contributions. In *Buckley v. Valeo*, 424 U.S. 1, 19 (1976) and subsequent cases, the United States Supreme Court “has subjected restrictions on campaign expenditures to closer scrutiny than limits on campaign contributions.” *McConnell v. FEC*, 540 U.S. 93, 134 (2003) (citations omitted). “[C]ontribution limitations are permissible as long as the Government demonstrates that the limits are ‘closely drawn’ to match a ‘sufficiently important interest.’” *Randall v. Sorrell*, 548 U.S. 230, 247 (2006); *see also Davis v. FEC*, 554 U.S. 724, 737 (2008) (“[S]uch limits ... cannot stand unless they are ‘closely drawn’ to serve a ‘sufficiently important interest,’ such as preventing corruption and the appearance of corruption.”). By contrast, expenditure limitations are subject to strict scrutiny, which requires narrow tailoring to meet a compelling governmental interest. *See Citizens United*, 130 S.Ct. at 898; *FEC v. Wis. Right To Life, Inc.*, 551 U.S. 449, 464 (2007). Thus, “the Supreme Court has generally approved statutory limits on contributions to candidates and political parties,” but it “has rejected expenditure limits on individuals, groups, candidates, and parties.” *Emily’s List v. FEC*, 581 F.3d 1, 8 (2009) (emphasis omitted).

Contribution limitations are treated differently from expenditure limitations because they generally “entail[] only a marginal restriction upon the contributor’s ability to engage in free communication.” *Buckley*, 424 U.S. at 20. They “permit the symbolic expression of support evidenced by a contribution but do not in any way infringe the contributor’s freedom to discuss

² The Court has previously concluded that “preventing corruption or the appearance of corruption are the only legitimate and compelling government interests thus far identified for restricting campaign finances.” *FEC v. Nat’l Conservative Political Action Comm.*, 470 U.S. 480, 496-97 (1985).

candidates and issues.” *Id.* at 21. By contrast, “expenditure ceilings impose significantly more severe restrictions on protected freedoms of political expression and association.” *Id.* at 23. As the *Buckley* Court explained, “[b]eing free to engage in unlimited political expression subject to a ceiling on expenditures is like being free to drive an automobile as far and as often as one desires on a single tank of gasoline.” *Id.* Expenditure limitations may restrict the breadth and depth of political dialogue, and they “preclude[] most associations from effectively amplifying the voice of their adherents, the original basis for the recognition of First Amendment protection of the freedom of association.” *Id.* at 22; *see also Nixon v. Shrink Mo. Gov’t PAC*, 528 U.S. 377, 386–88 (2000) (discussing application of expenditure-contribution distinction to associational rights).

D. Post-Citizens United Cases Addressing Campaign Contributions

Although *Citizens United* addressed only expenditure limitations, several federal and state court decisions have relied on *Citizens United* when deciding challenges to federal and state campaign contributions laws. Following the *Citizens United* decision, the U.S. Circuit Court of Appeals for the D.C. Circuit held that “the government has no anti-corruption interest in limiting contributions to an independent expenditure group.” *SpeechNow.org v. FEC*, 599 F.3d 686, 695 (D.C. Cir. 2010), *certiorari denied by Keating v. Federal Election Com’n*, 131 S.Ct. 553 (2010). The D.C. Circuit Court explained “because *Citizens United* holds that independent expenditures do not corrupt or give the appearance of corruption as a matter of law, then the government can have no anti-corruption interest in limiting contributions to independent expenditure-only organizations.” *Id.* at 696. Other U.S. Circuit Courts have struck down limits on contributions to independent expenditure-only committees. *See Wisconsin Right to Life State Political Action Committee v. Barland*, 664 F.3d 139, 155 (7th Cir. 2011) (holding that applying a statutory contribution limit to independent expenditure committees violates the First Amendment); *Long Beach Area Chamber of Commerce v. City of Long Beach*, 603 F.3d 684, 695 (9th Cir. 2010), *certiorari denied by City of Long Beach, Cal. v. Long Beach Area Chamber of Commerce*, 131 S.Ct. 392 (2010); *N.C. Right to Life, Inc. v. Leake*, 525 F.3d 274, 293 (4th Cir. 2008) (holding a statute limiting contributions to independent expenditure political committees unconstitutional).

The D.C. Circuit opinion in *SpeechNow.org* is not controlling authority in a challenge to New Hampshire’s political contributions law. Nevertheless, in our opinion, we believe the United States District Court, District of New Hampshire would likely adopt the position expressed by the Court in *SpeechNow.org*. If the State cannot successfully assert any alternative compelling interests to support the contributions restrictions under state law, it appears unlikely that New Hampshire, at present³, could enforce the contributions restrictions against political committees that only make independent expenditures. In light of the fact that the circuit courts that have addressed this issue have, to date, all found such laws to be unconstitutional, and no circuit courts have found otherwise, we therefore counsel against enforcing RSA 664:4 against political committees that only make independent expenditures. We also recommend that you

³ This analysis does not take into account any new or future data on election financing that may modify the analysis regarding the government’s anti-corruption interest in establishing campaign finance laws.

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consult with our office if you have concerns about whether or not a political committee constitutes an independent expenditure-only political committee.

We limit our analysis and legal opinion to address contributions in connection with political committees that only make independent expenditures. We also offer no opinion about disclosure or registration requirements under state law.

Please do not hesitate to contact me if you have any questions concerning this advisory opinion.

Sincerely,

A handwritten signature in black ink, appearing to read "Matthew Mavrogeorge", written in a cursive style.

Matthew Mavrogeorge
Assistant Attorney General
Civil Bureau