

**COMMENTS TO THE CONNECTICUT STATE ELECTIONS ENFORCEMENT
COMMISSION'S PROPOSED DECLARATORY RULING 2018-01:
*Political Activity of Organized Groups***

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Preliminary Statement

The Commission is currently faced with the difficult task of promulgating rules for a statute which, its enactors recognized, is often complicated and vague in its wording. Passed in 2013 to address the *Citizens United v. FEC* ruling, the statute represents an effort by the General Assembly to identify and monitor the influx of money, particularly “outside money,” into our State elections, while at the same time ensuring that fundamental First Amendment rights are protected.

The Commission’s job of interpreting that statute and crafting sensible rules to further its goals has become even more timely due to the dynamic changes that have occurred since the 2016 election. Starting with the “Women’s March” on the day after the inauguration, thousands of grassroots groups have formed across the country spurring a wave of political, grassroots activity.

This new wave has posed a set of important questions for this Commission to address. And, it must do so at a time when our politics are highly fractious and emotions run high. Yet, it is precisely because of this climate and these facts that the Commission must act, as it has in the past, to adopt sensible rules that will satisfy the basic aim of the statute set forth succinctly by Senator Musto:

The underlying function [of the bill] is clear.... We need to make sure that people can respond to out-of-state attacks [from outside money] in the State of Connecticut. *And we need to ensure that by doing this our democracy is kept public and open and that the free and fair exchange of information and ideas is maintained here in the State of Connecticut.*

56 S. Proc., Pt. 15, 2013 Sess., p. 226, 231 (emphasis added) (citation from http://ctstatelibrary.org/wp-content/lh-bills/2013_PA180_HB6580.pdf) (hereinafter “S. Proc. at ___”). It would be more than ironic -- indeed it would be impermissible -- if the statute passed to address concerns about profligate corporate spending in the name of “free speech” due to *Citizens United* were used to impair the rights of ordinary people to participate in the political process through grassroots groups that use little or no money. And yet, misinterpreted, the 2013 Act risks just that. As one senator remarked during debate on the bill:

This bill has so many new aspects to campaign finance rules in Connecticut that I’m wondering if we’re creating a whole new legal practice for people to figure out how to get through the maze of Connecticut campaign finance laws.

S. Proc. at 241. As discussed below, the potential chilling effect of this “maze” on ordinary men and women seeking to engage in our democratic processes poses serious Constitutional concerns.

We believe the modifications and clarifications to the Proposed Ruling set forth herein will enable the people of Connecticut to participate in our election process the way the Framers of our Constitution intended. Specifically, and most importantly, we ask that the Commission:

- (1) clarify and confirm that the definition of “expenditure” excludes those communications that do not have a cost component;
- (2) expand the definition of “membership” to take into account the realities of today’s group structures;
- (3) clarify the definition of “coordination” to reduce gray areas, including, *inter alia*, by considering and recognizing the impact of the interplay between Sections 9-601c(c)2 and 9-601c(d); and
- (4) revisit and clarify burden shifting procedures.

The Commission’s Proposed Ruling offers the opportunity to make certain that the ground rules designed to assure the statutory goals are clear, consistent with fundamental rights and appropriate for today’s world. As such, the grassroots groups who are signatories are pleased to submit their comments for the Commission’s consideration.

I.

FACTUAL BACKGROUND

1. The Groups at Issue

Grassroots political groups, which are comprised of and run by ordinary people, have existed for decades. But the 2016 national election results spawned a dramatic increase in the number and the nature of new groups committed to political involvement. While these groups vary from each other in their form (*e.g.*, some are loose associations, some Facebook groups, some have incorporated, etc.), they all share four characteristics relevant here:

- 1) the participants, including the leadership, are uncompensated, ordinary, everyday people seeking to engage with each other, on a purely voluntary basis, on a range of political issues of importance to them;
- 2) they are not in the business of raising or spending money for Connecticut elections and thus are not “political committees;”
- 3) they are not controlled by, and do not take direction from, anyone other than their own members; and
- 4) most importantly, they engage in political speech, one of the most critical protected rights under the Constitution.

These Connecticut groups act locally and independently of any political group¹ and usually of each other. As has been generally recognized, these groups have produced widespread voter participation and resulted in renewed interest in our government, at the federal, state and local levels.

2. The Connecticut Campaign Finance Laws

a) The General Assembly Passed The 2013 Act to Address Concerns About Outside Money Pouring in to Connecticut After Citizens United

In 2005, Connecticut passed sweeping campaign finance reform legislation. While apparently that worked well, in 2010, the Supreme Court decided *Citizens United v. FEC*, 558 U.S. 310 (2010), which the General Assembly properly recognized “opened the floodgates to independent expenditures that threaten to unduly influence our electoral process.” 56 H.R. Proc., Pt. 25, 2013 Sess., p. 433-34 (hereinafter “H.R. Proc. at ____”). As a result of that concern, in 2013, the General Assembly passed HB6580, *An Act Concerning Disclosure of Independent Expenditures and Changes to Other Campaign Finance Laws and Election Laws* (the “2013 Act”), to address the problem created by *Citizens United*.

¹ Some of the groups choose to follow guidance from Indivisible.org on its website and in its e-mails. However, those that do remain wholly independent of that group, receive no funds from it and have no obligation to it. The groups function solely as determined by their own individual membership.

The primary aim of the 2013 Act was to deal with the contemplated flow of large sums of “outside money” into Connecticut by making certain those large contributions were identified and reported. *See, e.g.*, H.R. Proc. at 493 (concern “with the influx of unlimited amounts of outside money coming in and polluting our electoral process in Connecticut”); S. Proc. at 226 (“we need to know who’s spending money in our state ... and we need to be able to counter that spending on elections by outside groups [in light of *Citizens United*]”). As one senator bluntly put it:

[W]e're not going to turn this country over to secret billionaires and secret corporations or secret contributions from foreign countries, for all we know -- because it's secret money -- and have them come in and dictate to us the outcome of our political process, by not just putting their finger on the scale, but slamming their fist on the scale and tipping that scale decisively to the side of special interests who work against the interests of the average working man and woman and the families across the state of Connecticut and this country. *That's what this is about.*

Id. at 299-300 (emphasis added). As another senator confirmed:

[The 2013 Act is] really meant to capture -- those large donors, those organizations or those -- those persons making independent expenditures who are bringing a great deal of money to the table, who are making those ... independent expenditures really almost solely out of their own pocket, or from the pockets of one or two people, or businesses.

Id. at 269-70.

Of particular concern were commercial advertising expenditures -- a fact that is pertinent in our comments below:

[A]ll of the sudden, in 2012, a vulnerability and a -- a crisis erupted in the process because of the implications of the *Citizens United* decision. What we saw was a late infusion of spending by independent sources in campaigns in the last week or so, 60 and 70 thousand dollars being spent in several races over the space of a week or two.... [S]ome of those -- some of those [television and cable] ads turned out to perhaps have been -- have been wasted. But the problem remains that that -- that infusion of outside -- outside funds could tip the balance in a campaign in a way that was not foreseen when we adopted public financing in 2005, and which had worked very well in the 2008 and 2010 election cycles.

Id. at 291-92.

***b) The Assembly Did Not Intend to Create Hurdles
Or Headaches for Grassroots Participation***

Although anxious to control and monitor the flow of large sums, the General Assembly was equally careful to be certain that ordinary people would not be dissuaded from participating in the political process, whether through grassroots organizing or other forms of political activism. Indeed, as the senator introducing the bill acknowledged:

We're not trying to play gotcha with every single person who wants to speak and wants to make a political statement. We're really trying to say that those people who are coming in and making these large expenditures almost single handedly, or maybe with the help of one or two other people or entities, those people need to report this.

Your local pizza restaurant owner that I was talking about before, your local rotary club, your Chamber of commerce [sic], we don't want to burden those folks any more. We could. I mean, we could lower these limits and cut out some of these exemptions. I think that would be largely unfair to our citizens. That's not what we're trying to get at with this bill.

So taking any of these sections in isolation, I think, could easily bury the point that we're trying to make with this bill.

Id. at 270 (emphasis added).

Despite the clear purpose of the 2013 Act, the fact is that the bill came to the Senate “as an amalgamation of several bills that came out of GAE and some other ideas that came from other committees and other places.” *Id.* at 226. It was nearly 100 pages long and several legislators complained about the lack of process leading up to the bill: “nobody has been given the opportunity, including the experts ... to really chime in on what is the impact of this legislation before us.” *Id.* at 250. There was “very little reflection and very little time for – for the public to weigh in, no time really for the public to weigh in.” *Id.* at 272; *see, e.g., id.* at 271 (not enough time to consider); *id.* at 277 (passed in “wee hours of the morning”); H.R. Proc. at 440 (23 concepts in the bill never had a public hearing); *id.* at 469-70 (26 sections were not given a public hearing; “issue with transparency”). The concerns these legislators voiced focused, in major part, on the complexity of the legislation and the new requirements it was imposing. As one senator remarked during debate:

In fact, if I knew a good attorney who knew this bill and other campaign finance rules in the State of Connecticut, ... the first person I would hire for my campaign is a lawyer to make sure that we don't get stuck in a hiccup somewhere.

S. Proc. at 241. *See id.* at 266 (“very complicated sections referring to independent expenditures that I would not pretend to feel that I can – I can wrap my mind around”); H.R. Proc. at 469 (definitions very complicated with a wide range of coverage and consequences).

These concerns, expressed by the legislators, were and are real. If state representatives and senators had difficulty with the “maze” of campaign finance laws and various sections of the 2013 Act, *imagine the difficulty of ordinary people trying to navigate through them*. Because of that, we submit it is critical that, when considering the Proposed Ruling, the Commission focus on the purpose behind the 2013 Act and keep the overriding principle of citizen engagement in our democratic process at the forefront.

3. Grassroots’ Free Speech Rights Are Critically Important

The 2013 Act, like all legislation, should be read so as to avoid an interpretation that could pose a serious constitutional challenge to the law. *See Ashwander v. Tennessee Valley Authority*, 297 U.S. 288 (1936); *see also* Philip Frickey, “*Getting from Joe to Gene (McCarthy): The Avoidance Canon, Legal Process Theory, and Narrowing Statutory Interpretation in the Early Warren Court*,” 93 Cal. L. Rev. 398 (2005).² With respect to the Proposed Ruling, that means paying particular attention to the First Amendment rights which could be imperiled if the statute were interpreted to authorize rules that threaten or inhibit the free speech rights of our citizens. The Supreme Court explained in *Citizens United*:

Speech is an essential mechanism of democracy, for it is the means to hold officials accountable to the people. ... The right of citizens to inquire, to hear, to speak, and to use information to reach consensus is a precondition to enlightened self-government and a necessary means to protect it. *The First Amendment* “‘has its fullest and most urgent application’ to speech uttered during a campaign for political office.” *Eu v. San Francisco County Democratic Central Comm.*, 489 U. S. 214, 223 (1989) [further quotation omitted; emphasis added]; *see Buckley, supra*, at 14 (“Discussion of public issues and debate on the qualifications of candidates are integral to the operation of the system of government established by our Constitution”).

For these reasons, political speech must prevail against laws that would suppress it, whether by design or inadvertence. *Laws that burden political speech are “subject to strict scrutiny,” which requires the Government to prove that the restriction “furthers a compelling interest and is narrowly tailored to achieve that interest.”*

Citizens United, 558 U.S. at 23 (emphasis added). *See id.* at 17 (noting the “primary importance of speech itself to the integrity of the election process. As additional rules are created for

² Statutory interpretations should also reflect “enduring public values.” *See Ernest Young, “Constitutional Avoidance, Resistance Norms, and the Preservation of Judicial Review,”* 78 Tex. Law Rev. 1549, 1551 (2000).

regulating political speech, any speech arguably within their reach is chilled”). “The remedies enacted by law . . . must comply with the First Amendment; and, it is our law and our tradition that more speech, not less, is the governing rule.” *Id.* at 45.

Against this backdrop, we turn to the Commission’s Proposed Ruling.

II.

COMMENTS TO THE PROPOSED RULING

The grassroots groups submitting these comments do not have “tractor-trailers filled with money,” H.R. Proc. at 481, to bring to Connecticut elections.³ In fact, our groups do not raise or spend money for campaigns; we do not have offices or other physical presences; and we have no staff. For the most part, our groups own few, if any, physical possessions – other than some posters, markers and such. What we do have, however, are members with varying degrees of time and energy who wish to both be engaged in the political process, and to encourage others to do likewise. They believe in standing up for democratic values by, among other things, calling attention to certain issues, urging the men and women of Connecticut to get out and vote, holding their representatives accountable and – at times -- urging support for particular candidates of their choosing. In short, we engage in activities fundamental to our democracy, protected by the First Amendment and permitted under the language of and intent behind Connecticut’s campaign finance laws. The hallmark of all these groups is volunteerism at the ground level by the people of Connecticut.

This Commission has been steadfast in its commitment to the General Assembly’s goal of making certain that large sums of money do not sneak into our State elections without disclosure and monitoring. At the same time, the Commission has worked to make certain, consistent with the legislative mandate, that it not interfere with the political process, especially with respect to the activities of Connecticut residents involving themselves in that process -- not with money but with time, energy and enthusiasm. Neither of these efforts by the Commission should be altered or diminished. To the contrary, the Proposed Ruling should be a vehicle for promoting both goals. In furtherance of that, we submit our comments, our requests for clarification and our suggestions to improve the understanding of the rules and the legislation.⁴

We have attempted, to the extent possible, to track the organization set forth in the Proposed Ruling with respect to the various subjects and questions addressed. However, there are a few circumstances where we found it appropriate to raise specific matters or unifying

³ Nor do the vast majority of them have lawyers in their membership who can provide ongoing assistance on issues presented by the proposed rules.

⁴ It may go without saying, but it is worth noting in any event, that the hallmark of effective regulations is clarity. These grassroots groups neither have nor can afford to hire armies of lawyers to interpret rules or guide them through a legislative thicket. Hence, the concern and plea for clarification of certain portions of the Proposed Ruling.

themes under headings earlier than they appear in the Proposed Ruling. We have attempted to identify those instances and we have put our requests for clarification and guidance in **bold** for delineation.

1. Registration Requirements

The Proposed Ruling makes it clear that a group deemed an incidental spender (as defined in Proposed Ruling at 2) making independent expenditures is not required to register as a political committee and that “incident-based” reporting is required only after spending in excess of \$1,000. Proposed Ruling at 2. Additionally, it is equally clear that registration is not required unless a group is “soliciting and receiving contributions in excess of \$1,000 *earmarked for expenditures with respect to Connecticut elections.*” See Proposed Ruling at 1-2 (emphasis added). See also Proposed Ruling at 2 (requiring registration only where direct contributions are to be made).

None of the groups submitting this comment is in the business of raising or spending money for Connecticut elections and, if any election spending occurs, it is incidental to the groups’ purpose. Applying these parameters, the groups submitting this comment are incidental spenders and therefore have no registration requirement.

2. Independent Expenditures

Prior to reaching the issue of whether an expenditure is “independent”, one must determine whether the item constitutes an “expenditure” at all. Section 9-601b(a)(1) defines an “expenditure” as: “Any purchase, payment, distribution, loan, advance, deposit or gift of money or anything of value” Clearly each enumerated item in that section has an ascertainable monetary value. Thus, if there is no money or item having an ascertainable value involved, there can be no “expenditure.” *Accord* Proposed Ruling at 11 (examples of potential coordinated communication expenditures all contain a *cost* component – postage, cost of printing mailers). As a matter of definition and logic, in order to constitute an expenditure under campaign finance laws, one must be able to place some economic value on that amount. Otherwise, it could not be quantified and listed for purposes of any reporting requirement.

In general, our groups do not make “expenditures” for communications within the meaning of the 2013 Act, since the groups usually communicate through no cost channels of communication. Further, any expenditures the groups do make (*i.e.*, for photocopies, pens, pencils, rentals, etc.) would nearly always be *de minimus*. The 2013 Act “expands the list of *de minimus*” activities to include *volunteer* activities. S. Proc. at 243.

a. No Cost Communications are not Expenditures

While the use of the internet for some purposes may involve the payment of money (for instance paid ads) and hence constitute an expenditure, use of free e-mail and free social media such as Facebook, Instagram and Twitter (hereinafter “No Cost Communications”), do not involve monetary consideration and hence are not expenditures within the meaning of the 2013 Act.

As an initial matter, we note that in its Proposed Ruling, the Commission has confirmed that the term “contribution” does not encompass the use of e-mail and social media created by volunteers.⁵ Proposed Ruling at 13, n.6, *citing* Section 9-601a(b)(18). Where an item is not a “contribution”, it also is not an “expenditure.”⁶ S. Proc. at 228; *accord* Proposed Ruling at 9 (permitting dissemination of “the results of questionnaires and scorecards or endorsements to the general public” via “the use of free social media that is created by volunteers”).

Sections 9-601b(a)(2) and 9-601b(b)(5) substantiate the point: communications that cost money are an “expenditure” and those that do not cost money are not expenditures. Thus, Section 9-601(a)(2) specifically provides that time on a commercial radio or television station (which has a monetary value and fee) is an expenditure, while time broadcast by a public access channel is not. Communications involving satellites, newspapers, magazines, billboards and those sent by mail are considered expenditures because they typically involve a *payment*. Thus, too, a telephone communication is an expenditure only if it is “paid for.”

The term “Internet,” which was inserted in the 2013 Act, is properly read with the same qualification as the other terms.⁷ The internet, like broadcast or telephone, has both paid aspects and free aspects, with the former being an expenditure and the latter not.

If there were any question in this regard, the sponsoring senator of the 2013 Act laid it to rest on the floor of the General Assembly when he explained that the use of the “Internet” related

⁵ The content of such communications is, pursuant to the First Amendment, unrestricted and may include: (i) advising residents of the positions of candidates or office holders; (ii) advocating the election or defeat of a particular candidate; (iii) endorsing candidates; (iv) distributing the contents of questionnaires, interviews, scorecards to a candidate; and/or (v) suggesting volunteers sign up to help a campaign or candidate, including financially, which said volunteers are free to undertake—or not—as they choose. *See Citizens United*, 558 U.S. at 37 (“[t]he First Amendment was certainly not understood to condone the suppression of political speech in society’s most salient media” (referring at the time to networks and newspapers)).

⁶ “[E]ndorsements by other candidates where no money is passed” are not contributions; and “*if something is not a contribution it is neither an expenditure.*” S. Proc. at 228 (emphasis added). *See* Electionlawblog.org, “Of Contributions and Expenditures and the Land in Between” (“If I (alone or with others) spend money to advance my message, that’s an expenditure. If I give money to someone else to advance their purposes, message-related or otherwise, that’s a contribution.”)

⁷ “The Framers [of the Constitution] may have been unaware of certain types of speakers or forms of communication, but that does not mean that those speakers and media are entitled to less First Amendment protection than those types of speakers and media that provided the means of communicating political ideas when the Bill of Rights was adopted.” *Citizens United*, 558 U.S. at 37-38.

to the different media in which *paid advertising* took place, rather than the particular media itself:

And even though, ... one part of the bill would take up a lot of airtime on the radio, well, at least we know who's speaking.... If they have to buy 35 seconds instead, then they might have to buy 35 seconds. The same for the TV. *The same for the Internet.*

This is the way the bill, as a whole, works.⁸

S. Proc. at 288-89 (emphasis added). *See also id.* at 268 (referring to ads when discussing independent expenditures). Bluntly and simply put, if there is an outlay of money or something of an ascertainable economic value, there may be an expenditure that may implicate the 2013 Act. If there is no such outlay, such as using free e-mails or free social media platforms, there is no expenditure and therefore no issue under the 2013 Act.

That simple conclusion is also supported by Section 9-601b(b)(5) which recognizes that a group *may* distribute information to the public by a variety of free means that do not comprise paid advertising -- including through a “news story, commentary or editorial distributed through the facilities of any broadcasting station, newspaper, magazine or other periodical” These methods do not constitute an “expenditure.” It would make no sense to provide that a group could issue an editorial or commentary stating its endorsement or urging the support for or defeat of a candidate and have it published for the world to see and yet not be able to disseminate the same information using No Cost Communications. Nothing in the debate on the floor or the 2013 Act itself suggests this result.

Given the foregoing, we request that the Commission clarify its Proposed Ruling to expressly exclude all No Cost Communications from the definition of an “expenditure.”

This clarification would also bring Connecticut into conformance with federal election law on this point, *see* 11 C.F.R. 100.94,⁹ something it is clear Connecticut legislators attempted to do in passing the 2013 Act. *See, e.g.,* S. Proc. at 239 (“so we’re using language that we believe fits that standard, and would hope that SEEC ... would comply with federal law ... and apply that federal

⁸ That the Assembly drew a distinction between the use of the term the Internet (to demonstrate a communications medium) and the terms e-mail and social media, is also evident elsewhere. *See* Section 9-601(25)(A) (distinguishing between electronic mail and sites on the Internet); Section 9-601(31) (defining the term social media).

⁹ As part of the volunteer exemption in FECA and FEC regulations, the FEC clarified in its Internet regulations that an individual’s use of equipment and personal services for blogging, creating or hosting a website for the purpose of influencing a federal election—as long as the individual is not compensated for those activities—is exempt from the definitions of expenditure under FECA. This exemption applies whether or not the Internet activities are conducted independently or in coordination with a candidate.

law and those standards when they are enforcing these – this language”); *id.* at 265 (General Assembly intends to include issues of federal law in election statutes).

b. Finally, we seek the following additional clarifications with respect to particular areas relating to the definitions of expenditure and contribution:

- **a questionnaire, scorecard, or interview that is not coordinated can be distributed in any manner *without* it constituting a contribution to a candidate so long as the distribution itself was not coordinated with the candidate** (Proposed Ruling at 9-10);
- **e-mail lists created by volunteers (or uncompensated staff) but housed by groups are exempt from the definition of contribution** (Proposed Ruling at n.5);
- **please clarify what is meant by a “non-commercial e-mail list”** (Proposed Ruling at 10); and
- **please confirm that groups may use websites and web pages that have a cost component on which they are permitted to engage in free speech but that they must report any expense above \$1000 during any campaign season to the extent any space is devoted to the promotion or defeat of a candidate.**

3. The Definition of Membership Should be Expanded

If, as set forth, *incidental spenders* are permitted to communicate with the public about election-related information and other items using No Cost Communications and vehicles enumerated in, *e.g.*, Section 9-601b(b)(5), it is axiomatic that they should also be permitted to communicate with a smaller subset of the public, namely those who have elected to receive free e-mail or social media posts and who they consider to be their “members.”

The Proposed Ruling notes the existence of a “safe harbor” for a variety of communications from a group to its members. However, the Proposed Ruling would perpetuate an outmoded and unjustified limitation on the definition of “members,” by requiring that the “members” have some financial connection to the group or that the group operate in an artificially formulized manner. These limitations are unnecessary and unrealistic in 2018.

Limiting “membership communications” to groups consisting of persons who have a financial or other significant organizational attachment is simply too rigid and fails to take into account the realities of today’s dynamic memberships. In these new, grassroots groups (and others), membership is voluntary and consists primarily (if not solely) of an individual affirmatively asking to receive e-mail communications, affirmatively electing to sign into or follow social media accounts, and/or participating as they desire in group meetings and other offered activities. These participants are bound in a common cause that, while not involving money or governance, involves a more basic commitment – one of time and energy. Unless clarified, the Proposed Ruling might be interpreted to mean that grassroots groups cannot

communicate with their membership “regarding political subjects, and even encourage them to support, volunteer on behalf of or vote for or against selected candidates, regardless of prior coordination with that candidate.” Proposed Ruling at 7. Any such interpretation would exalt form over substance and have an impermissible chilling effect on political speech. *Cf. Citizens United*, 558 U.S. at 40 (“When Government seeks to use its full power, including the criminal law, to command where a person may get his or her information or what distrusted source he or she may not hear, it uses censorship to control thought. This is unlawful. The First Amendment confirms the freedom to think for ourselves”).

Accordingly, we respectfully request that the Commission update its definition of “member” to account for the reality that membership today in grassroots groups can and usually does mean something other than dues paying, voting individuals. Specifically, we ask that the term “member” as used in Section 9-601(b)(2) include those individuals who affirmatively request to receive e-mails from such organization/group or who affirmatively choose to follow social media platforms of such organization/group.¹⁰ A voluntary group of like-minded individuals who affirmatively elect to be part of said group, (1) whether in the form of a loose association or a more formal organizational structure, and (2) whether it collects membership dues or not, is properly within the ambit of Section 9-601(b)(2) so that communications with its members are properly excluded from the definition of expenditures.

We note that non-members or individuals with a nefarious purpose who happen to attend or infiltrate communications or events intended for members only could sabotage an otherwise lawful communication or event. **Therefore, we ask that the Commission clarify that a group would have no liability for unauthorized acts of third parties and/or members who forward communications beyond the group’s members.**

Finally, we seek clarification with respect to whether the Commission’s definition of “member,” Proposed Ruling at 6, applies to political committees or more broadly to contributions and expenditures generally.

4. Attributions Should Not Be Required For No Cost Communications

The Proposed Ruling acknowledges that No Cost Communications may be used to communicate “the results of questionnaires and scorecards or endorsements to the general

¹⁰ “Our Nation’s speech dynamic is changing, and informative voices should not have to circumvent onerous restrictions to exercise their First Amendment rights. Speakers have become adept at presenting citizens with sound bites, talking points, and scripted messages that dominate the 24-hour news cycle. ... Rapid changes in technology—and the creative dynamic inherent in the concept of free expression—counsel against upholding a law that restricts political speech in certain media or by certain speakers. ... *Soon, however, it may be that Internet sources, such as blogs and social networking Web sites, will provide citizens with significant information about political candidates and issues. ... The First Amendment does not permit Congress to make these categorical distinctions based on the corporate identity of the speaker and the content of the political speech.*” *Citizens United*, 558 U.S. at 48-49 (emphasis added).

public” but further states that “[a]ttribution still must be used on such communications.” *Id.* at 10. Similarly, it states that “[i]nformation distributed by a volunteer via social media would not be considered a contribution but would require an attribution.” *Id.* We ask that the Commission delete that requirement for the reasons below.

If the attribution requirement is simply meant to ensure that the group or person disseminating the No Cost Communication is identified, that is already the case. E-mails and social media posts identify the sender/poster. If, however, the Commission intends for the attributor to use the words “paid for by,” as provided in Section 9-621, the requirement would make no sense because, again, when a group uses a No Cost Communication, no monetary consideration is expended. Thus, using the words “paid for by” in the context of such a communication would not only be stating false information – no one is paying for anything -- but the communication itself would be rendered inaccurate and confuse the public by asserting that a payment is being made.¹¹ This is yet another indication that No Cost Communications were not intended to be encompassed by the 2013 Act.

Accordingly, for these reasons we request the Commission clarify its Proposed Ruling so as not to require attribution on any No Cost Communication.

5. Campaign Coordination – What It Is, What It Is Not and Clarifications Requested

The remainder of the Proposed Ruling addresses specific activities by grassroots groups where there is or may be an interaction with a campaign or campaigns. As the Commission acknowledges, “There are, however, certain exceptions to the definitions of expenditure and contribution, some of which allow for coordinated political activity by incidental spenders, even for CEP candidates, and which are described later in this ruling.” Proposed Ruling at 3.

Before we address these specific activities and requests for clarification, we note that there appears to be a premise underlying the Commission’s views. The Commission recognizes two distinct types of communication and coordination: 1) discussions of legislative or policy matters and interactions to facilitate other permitted activity with candidates/campaigns;¹² and 2)

¹¹ The purpose behind the attribution provisions is to enable the public to know who is speaking to them (what money is being spent), *see, e.g.*, S. Proc. at 227, 229. But with No Cost Communications – e-mails, social media posts and the like -- no money is being spent and the speaker is the one sending the e-mail or posting to social media. As long as that is clear, anything further would be superfluous and, worse, misleading.

¹² “The Commission recognizes that ... an organized group is capable of making an independent expenditure for a candidate despite prior, limited communication between the two parties.” Proposed Ruling at 4-5. *See, e.g., id.* at 7- 15 (permitting, *e.g.*, interviews and communications to facilitate scorecards, endorsements, forums, etc.). **Please confirm that communications regarding issue advocacy (interacting with elected officials) and limited communications regarding logistical issues can still take place within the 90-day window before an election** *See, e.g.*, Proposed Ruling at 5 (position on a legislative or policy matter), 7 (for purposes of member communications), 9-10 (decision to endorse)).

something more – such as those concerning “advertising, message, strategy, policy, polling, allocation of resources, fundraising, or campaign operations.” Proposed Ruling at 5. *See also, e.g., id.* at 8 (“Questionnaires should not include questions aimed at determining campaign plans, projects and/or needs”; “discussion during an interview of “the group’s plans regarding the content, intended audience, timing, location and/or mode and frequency of communications regarding the endorsement” could be deemed coordinated). When coupled with an expenditure, the latter is impermissible. “*The important fact is that a communication, no matter when it occurs, does not [without more] establish consent or coordination or serve as a consultation between the parties regarding the expenditure or campaign strategy generally.*” *Id.* at 5 (emphasis added). This conclusion is consistent with the remarks on the floor during consideration of the bill. *See, e.g.,* S. Proc. at 265 (de minimus exception allowed in federal law so that everything doesn’t constitute coordination”). **We ask the Commission to please confirm this distinction in the Proposed Ruling.**

Further, two sections of the 2013 Act describe what does *not* count as presumed evidence of coordination. Section 9-601c(c) provides that: “the following shall not be presumed to constitute evidence of consent, coordination or consultation within the meaning of subsection (a) of this section: ... (2) membership of the candidate or agent of the candidate in the entity, *unless the candidate or agent of the candidate holds an executive or policymaking position within the entity after the candidate becomes a candidate*” Emphasis added. Section 9-601c(d) provides that “[w]hen the State Elections Enforcement Commission evaluates an expenditure to determine whether such expenditure is an independent expenditure, the commission shall consider, as an effective rebuttal to the presumptions provided in subsection (b) of this section, the establishment by the person making the expenditure of a firewall policy designed and implemented to prohibit the flow of information between (1) employees, consultants or other individuals providing services to the person paying for the expenditure, and (2) the candidate or agents of the candidate.”

There is thus a distinction between “members” who work on campaigns in support roles and those who are intimately involved in the running of a campaign. Section 9-601c(c)(2) differentiates between those two and 9-601c(d) permits groups to have a policy in place that insulates the management of groups from members who are intimately involved in the running of a campaign. **We seek clarification that the carve-out from Section 9-601c(d) applies to those groups that are making an expenditure that is deemed “independent” due to the presence of a firewall.**

We further seek clarification that when Section 9-601c(d), together with Section 9-601c(c)(2) regarding “executive or policymaking position” within the entity, are applied together, the need for the firewall contemplated by Section 9-601c(d) is only required when there are group leaders who are also the “candidate or agent of the candidate,” per Section 9-601c(c)(2).

Below are our further requests for clarification with respect to certain activities based on this distinction noted above and in an effort to understand more clearly what constitutes coordination in the Commission’s view.

***a) Encouraging Supporters To Work For Campaigns
Of Endorsed Candidates (Proposed Ruling at 11-12)***

As an initial matter, we note that the Commission uses the qualification of “endorsed candidates” and *we seek clarification as to whether the Commission intended a distinction regarding endorsed and non-endorsed candidates and, if so, what the purpose and nature of the distinction is.*

We also note that the Commission uses the term “supporters” and we seek confirmation that the term is not limited to members or donors but rather includes the general public.

The Proposed Ruling states that “[a]n additional problem may be created if volunteers or staff work for both the group and a candidate’s campaign” because it “create[s] an avenue for communication and coordination between the group and the committee” as to which a subsequent expenditure may be impermissible. *Id.* at 12. **We refer back to the discussion of the interaction between Section 9-601c(c)(2) and 9-601c(d) under the point above regarding firewalls, and seek:**

- **Further clarification that the information exchanged between a member and a campaign must be more than logistical; it must be related to strategy, policy, plans and the like to be deemed coordinated; and**
- **Further clarification and guidance with respect to the Commission’s statements that it will scrutinize the timing of expenditures relative to communications. *E.g.*, Proposed Ruling at 5. We are unclear what relationship the timing has to any evaluation.**
- **In the event a group makes an expenditure subject to an evaluation by the Commission, we ask that the Commission confirm that “the establishment by the person making the expenditure of a firewall policy designed and implemented to prohibit the flow of information between [the group] and the candidate/campaign” is sufficient to rebut the presumptions in Section 9-601c(b) as stated in subsection (d). Stated differently, if such a firewall policy exists, please confirm that it then becomes the Commission’s burden to establish that it was not effective or sufficient under the circumstances.**

b) Questionnaires and Interviews (Proposed Ruling at 7-8)

As a threshold matter, we seek clarification that questionnaires and interviews may be used with candidates for reasons in addition to endorsements and scorecards.

We further request that the Commission clarify that scorecards can give a group information about a candidate’s particular position on a particular issue, and groups can

be supportive or critical of a candidate’s particular position (without making specific reference to voting for or against a clearly identified candidate).

Additionally, we request that the Commission clarify that a group may advocate the election or defeat of categories of candidates who hold certain legislative or policy positions in communications even where they may not clearly identify a particular candidate.

Finally, we note that, while it may be best practices, as a practical matter it is unlikely and not realistic to expect that grassroots groups will know or remember to specifically call a candidate’s attention to those statutes containing the definitions of “independent expenditures” and “contribution,” Proposed Ruling at 8, preceding an interview with said candidate. The complexity of trying to comply with the Commission’s expectations for questionnaires and interviews will weigh heavy on grassroots groups – and could require attorneys or people who are compliance experts to review all materials prior to even interacting with a candidate (which again could chill speech and association as discussed *supra* at I.2.b and I.3 and *infra* at II. 7 and 8). **Therefore, we request that the Commission revisit its expectations in this regard.**

c) Phone Banking, Canvassing and Post Card Writing for a Campaign

Grassroots groups usually participate in one of two ways in these activities and we request clarification from the Commission as to the following:

1. Encouraging the public and members (using the aforementioned definition of like-minded individuals who opt in to receive certain No Cost Communications) to volunteer to phone bank and canvass for candidates. These individuals then decide whether to do so -- in their individual, volunteer capacities *using a candidate’s call or canvass list*. These volunteers do not participate on behalf of the group and groups do not have follow up communications with, or track the efforts of, these volunteers about said activities. The group merely publishes publicly available campaign contact information and individuals decide whether to pursue canvassing and phone bank activity.

We ask the Commission to clarify that, standing alone, these are not coordinated activities that could give rise to impermissible contributions.

We further request that the Commission clarify that members who volunteer in their individual capacities for phone banking and canvassing for a campaign and who do not discuss the methodology of the call or canvass lists are not “coordinating” and therefore do not pose a problem under the 2013 Act when they use the campaign call and canvass lists for such activities.

In the context of phone banking and canvassing, we further ask the Commission to elaborate on the type of information exchange that would be both permissible/ impermissible where a future expenditure/contribution would be considered to have been coordinated?

2. Group hosting of phone bank and canvass events

If participants use their own phone and their own group-supplied phone lists and/or canvass lists, please

- **further confirm that such acts do not qualify as campaign coordination or an impermissible coordinated expenditure; and**
- **clarify call-lists which would be deemed to have a value and how that value should be calculated in the event the grassroots group is not itself paying to use the list.**

Please clarify that using a voter list obtained from a campaign or political party is a permissible non-coordinated activity.

3. Post Card Writing – **Please confirm that groups may host post card writing campaigns where volunteers provide their own postcards and stamps.**
4. Voter lists from town committees – **Please confirm that groups may obtain voter lists from town political committees to use in canvassing, phone banking and post-card writing prior to elections.**

d) Candidate Forums¹³

We view candidate forums as extensions of questionnaires. They are opportunities for group members (and possibly the public) to learn, ask questions and gather information about a candidate's position on issues – as opposed to a rally that is supportive once the group has made the determination to support or back a candidate. **We ask that the Commission adopt this interpretation. We thus ask the Commission to rule that communications between the group and candidate(s) for purposes of arranging a meeting time and location are logistical and therefore do not rise to the level of coordination for purposes of the 2013 Act.**

We further ask that the Commission clarify that a group may invite candidates of a specific political party to a candidate forum and that any expense to conduct the forum (e.g., space rental) would not be considered an expenditure and therefore a contribution.

We further seek confirmation that:

¹³ We note that rules governing this area could raise First Amendment freedom of association concerns. Working with a party committee or candidate to hold a candidate forum should be permissible. To rule otherwise would prevent free association. If the Commission believes, contrary to our view, that the 2013 Act could be read to preclude publicity for candidate forums within 90 days of an election **we ask that the ruling make clear this is permitted. Failing that, we seek assurances that the Commission will not act to interpret the law in this manner.**

- a group may have one candidate present at a given time, provided that the invitation was given to all candidates of a particular party;
- the fact that one candidate declines an invitation does not render expenditures to be considered contributions to those who do attend;
- a group may work with a party committee to host a candidate forum provided the party committee and the group each pay their pro-rata proportion of the forum's expense (be that publicity, overhead, etc.); and
- that publicizing a candidate forum will not be deemed a contribution or expenditure so long as the publicity does not promote, attack, support or oppose a clearly identified candidate.

With respect to candidate appearance at group meetings, we seek confirmation that groups may invite any candidate(s) in order to afford their members the opportunity to ask questions and get to know the candidate provided the group itself is not advocating the support of that candidate. We further seek confirmation that groups may support the election of candidates provided that no subsequent expense is incurred with respect to that candidate. We further seek confirmation that the answer remains the same even if there is a cost associated with the event so long as there is no proscribed coordination.

e. Meet & Greets; Fundraisers – We understand that individual members may host. Please confirm that groups may give notice of these events in their No Cost Communications and advise whether it would make a difference if the communications involved a cost.

6. Clarification Sought With Respect to the Burden Shifting Issue (e.g., Proposed Ruling at 12, 14)

As the Senate's sponsor noted when the 2013 Act was before the General Assembly, "We're not trying to play gotcha with every single person who wants to speak and wants to make a political statement." S. Proc. at 265. The fact of a communication should not "automatically subject [groups] to an SEEC investigation. And – and again, it's an issue of federal law. It's an issue of free speech." *Id.*

There is possibly no area of the Proposed Ruling that is more far reaching and potentially dangerous than the issue of burden shifting. Recalling that the General Assembly was quite clear in its desire to not burden or chill the activities of "mom and pop" or grassroots groups, any action which places an onus on a particular group must be viewed carefully and skeptically. This is particularly true given the vagueness of much of the 2013 Act.¹⁴

¹⁴ See S. Proc. at 250 ("Do we have a clear understanding about what rebuttable presumption means with independent expenditures? No. ... I must tell you that the lawyers that I've asked to look at this, and I believe the SEEC are still scratching their head on what's the impact of this

In the Proposed Ruling there are several instances where the Commission discusses placing the burden on groups to demonstrate a lack of coordination with respect to a particular expenditure. *E.g.*, Proposed Ruling at 12 (“[u]nless the group could show some extraordinary set of facts that would rebut the presumptions of coordination ...”).

This burden shifting chills the exercise of First Amendment rights by groups and their members and runs counter to the legislative goal. Moreover, it allows individuals with impure motives to force grassroots groups to spend time, energy and resources defending baseless accusations by pointing to permitted activity and asserting, with no evidence, there was impermissible coordination and expenditures.

Because the potential for political mischief is great, as the Commission well knows, we respectfully submit that *concrete evidence* of both impermissible coordination and an actual financial expenditure should first be required before the Commission shifts the burden to groups to prove the negative. Otherwise, those with political motives could point to a campaign or candidates mentioned in grassroots’ groups materials and claim wrongdoing resulting in burden shifting and placing an unwarranted onus on the group – all with no evidence. The cost and burden of having to respond to a baseless charge can by itself often accomplish the goal of a disrupter, *e.g.*, intimidate grassroots groups from continuing their constitutionally protected activities because they either lack the knowledge or the resources to fight the baseless complaint.

At a minimum, the presence of a written document containing a firewall procedure should be sufficient to rebut any presumption, absent an additional showing by any complainant or the Commission, that the firewall had actually been breached. The General Assembly understood that this was the case: to rebut the presumption with a firewall “[y]ou really have to prove that there was a reason you didn’t talk about it [and] follow federal law on that ground.” S. Proc. at 236. **We seek clarification that is the case here as well.**

7. Clarification of The Proposed Ruling to Ensure That It Does Not Run Afoul of Protected First Amendment Freedom of Association

In several instances, the Proposed Ruling could be read to prohibit or chill interactions between members and candidates/campaigns when members are not having those interactions in their capacities as members of a group but rather as individuals.

The 2013 Act was designed to ensure that people “have the ability to make independent expenditures for things they believe in and speak.” S. Proc. at 228. For example, “mere participation in membership parties does not make an expense by someone in that party a coordinated expense.” *Id.*

Members of groups should not lose their ability to engage in political parties, run for office or volunteer for campaigns unless, at a minimum, they are members of leadership *and*

legislation. So if the people in the business of enforcing elections, and in one case, defending election law, don't understand what's before us, where did it come from? That's my point”).

engage in leadership activities (campaign strategy and the like) of a campaign. Anything short of that kind of dual membership (leadership of a group and engagement with a political campaign strategy and the like) should not implicate campaign coordination. To hold otherwise would unreasonably restrict or chill an individual's right to associate with multiple groups or to exercise one's First Amendment rights and be contrary to the letter and intent of the 2013 Act.

Finally, as previously stated, the grassroots groups that present this comment are not in the business of making expenditures on behalf of Connecticut candidates. Therefore, any cross-over between a given group's membership (or for that matter leadership), and/or a given party's candidate's or candidate committee's staff (or leadership) is wholly irrelevant. That is, such overlap would only come into play as part of the Commission's multi-factored analysis when or if the grassroots groups were to engage in independent expenditures, which is generally not the goal of these groups. Rather, these groups operate within and indeed enjoy statutory exemptions and constitutionally protected freedoms. The ability to join collective activity of a grassroots group, engage in a political party and support the candidate of one's choosing are all ensconced in First Amendment protected realms of free speech and association. *See Williams v. Rhodes*, 393 U.S. 23 (1968); *Bullock v. Carter*, 405 U.S. 134, 142–143 (1972); *Storer v. Brown*, 415 U.S. 724 (1974); *Illinois State Bd. of Elections v. Socialist Workers Party*, 440 U.S. 173 (1979).

We ask that the Commission please confirm that the Proposed Ruling is intended to permit group members, *including those in leadership*, to also be members of other groups and simultaneously wear more than one “hat” in their lives.

We further ask that the Commission clarify its ruling to make it clear that members of grassroots groups may also be candidates, members of town and state political committees, and work on campaigns as long as there is no impermissible coordination.

We also ask for confirmation that those in leadership may participate in ordinary campaign volunteer activities – *i.e.*, phone banking and canvassing as regular members may. Stated differently, unless there is actual coordination involving strategic matters in addition to a financial expenditure, any overlap and communication is permitted and not deemed to be an impermissible coordinated event.

8. Request to Consider Potential Chilling Effect Of Commission Positions and Interpretation

As noted above, during consideration of the 2013 Act, legislators expressed the very clear concern that there had been a lack of time and consideration given to many subjects. *See supra* at point I.2.b). The significance of the foregoing is that admittedly gray areas or overly-complicated rules could cause some groups to remove themselves from the electoral process because participation becomes too onerous. Indeed, to the extent a group feels the need to consult an election lawyer on an on-going basis in order to understand what it may and may not do, that fact would already evidence a burden. It is important that grassroots groups not shy away from democratic participation because of overly technical election laws and a lack of clear understanding of what is and is not permissible. We are not suggesting that there should be no rules, or that the rules have to be written for kindergartners. Rather, we submit that the rules must

be plain, straightforward and capable of being understood by ordinary, lay citizens while protecting their constitutional right to participate in the political process. As the Supreme Court observed in *Citizens United*:

As a practical matter, however, given the complexity of the regulations and the deference courts show to administrative determinations, a speaker who wants to avoid threats of criminal liability and the heavy costs of defending against FEC enforcement must ask a governmental agency for prior permission to speak. . . . These onerous restrictions thus function as the equivalent of prior restraint by giving the FEC power analogous to licensing laws implemented in 16th- and 17th-century England, laws and governmental practices of the sort that the First Amendment was drawn to prohibit.... When the FEC issues advisory opinions that prohibit speech, “[m]any persons, rather than undertake the considerable burden (and sometimes risk) of vindicating their rights through case-by-case litigation, will choose simply to abstain from protected speech—harming not only themselves but society as a whole, which is deprived of an uninhibited marketplace of ideas.” *Virginia v. Hicks*, 539 U. S. 113, 119 (2003) (citation omitted). Consequently, “the censor’s determination may in practice be final.” *Freedman*, supra, at 58.

Citizens United, 558 U.S. at 18-19.

Conclusion

As the Supreme Court has reiterated: “The First Amendment “has its fullest and most urgent application’ to speech uttered during a campaign for political office.” *Citizens United*, 558 U.S. at 23 (citation omitted). Recognizing and respecting the effort put forth by the Commission in promulgating the Proposed Ruling, we respectfully submit that the comments set forth herein will further the intent of the 2013 Act while allowing grassroots groups to engage meaningfully in the political process.

Respectfully submitted,

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