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March 4, 2015

HAND-DELIVERED

Mr. Michael J. Brandi
Executive Director
State of Connecticut Elections
Enforcement Commission
20 Trinity Street
Hartford, CT 06016

Dear Mr. Brandi:

Attached please find a Petition for Declaratory Ruling and supporting Memorandum being filed with the Commission on behalf of the Connecticut Democratic State Central Committee pursuant to Gen. Stats. §§ 4-175 and 4-176 and § 9-7b-64 of the Commission's Rules of Practice.

Thank you for your attention to the processing of the Petition.

Very truly yours,

DAVID S. GOLUB

DSG/ds
Enclosures

cc: Kevin M. Ahern, Esq. (via electronic mail)

STATE OF CONNECTICUT
ELECTIONS ENFORCEMENT COMMISSION

IN RE PETITION OF CONNECTICUT
DEMOCRATIC STATE CENTRAL COMMITTEE

VERIFIED PETITION FOR A DECLARATORY RULING

Pursuant to Gen. Stats. §§ 4-175 and 4-176 and § 9-7b-64 of the Rules of Practice of the Connecticut State Elections Enforcement Commission (the "Commission"), the Connecticut Democratic State Central Committee, 30 Arbor St., Suite 404, Hartford, CT 06106, tel.: (860) 560-1175 ("Petitioner"), through counsel, hereby requests a declaratory ruling to determine its rights and obligations under conflicting provisions of federal and state campaign finance laws, as follows:

1. Under the Federal Election Campaign Act of 1971 ("FECA"), certain "Federal election activities," including voter registration and "get-out-the-vote" ("GOTV") activities in connection with elections in which federal candidates are on the ballot, must be paid for with "hard money" – *i.e.*, money which is subject to federal regulation. The use of money raised and spent on "Federal election activities" outside of the regulatory framework provided by FECA is prohibited. FECA also explicitly provides that the federal campaign finance laws, where applicable, preempt state law and occupy the field. *See* 52 U.S.C. § 30143(a).

2. To comply with federal campaign finance law, Petitioner maintains "federal" accounts, and ensures that those accounts are funded solely by money which has been contributed in accordance with federal regulations and that expenditures out of those accounts are made in compliance with federal law. Petitioner is permitted under federal law to receive (into its federal

accounts) contributions from contractors who do business with the State of Connecticut, and it is required to make expenditures out of those accounts to finance "Federal election activities."

3. Under Connecticut campaign finance law, Petitioner would be barred from using money from its federal accounts to fund voter registration and GOTV activities in Connecticut in connection with elections in which federal candidates are on the ballot if such activities mention or relate to state candidates, because federal funds are not subject to state campaign finance regulation – especially with respect to contributions made by contractors who do business with Connecticut. *See* Conn. Gen Stat. § 12(f); *see generally* Conn. Gen Stat. Title 9, Chapter 155.

4. Petitioner engages in continual voter registration and GOTV activities in Connecticut in preparation for each biennial Congressional election. Representatives of this Commission have informed Petitioner that they consider the use of federal funds to finance voter registration and GOTV activities to be a violation of Connecticut's campaign finance laws – even though federal law requires Petitioner to finance such activities out of federal funds whenever candidates for federal office are on the ballot in an upcoming election and expressly preempts state law in the same field. More broadly, the Commission has taken the position that Connecticut's campaign finance laws are controlling with respect to all communications which refer only to candidates for state office, even though such communications also constitute voter registration or GOTV activity, as defined by federal law. As the Commission recently stated in its decision in *In the Matter of Complaint by Andreas Duus, III* , Sept. 16, 2014 (File No. 2013-176):

> General Statutes § 9-612(f) does not prevent a Connecticut state contractor from contributing to the federal account of a state central party committee. However, the Commission notes there could be scenarios where the Commission might consider such contributions by a state contractor to a state central committee's federal account in connection with subsequent expenditures as problematic under Connecticut's campaign finance laws. See General Statutes §§ 9-601c, 9-612(f) and 9-622(5). See also Advisory Opinion 2014-001, *The Use of Federal and State Accounts of Party Committees*, advising that Connecticut state party committees with state and federal accounts must pay for their expenses for state candidates with money raised within the Connecticut financing system, i.e., from permissible contributions properly reported under Connecticut law. Federal law does not create a loophole in Connecticut campaign finance laws that would allow federal committees to make expenditures that are also contributions regarding Connecticut candidates. State Committees should structure their plans to comply with both state and federal law. In some instances this may mean, for example, that they cannot support state or federal candidates within the same communication . . . .

Id. ¶ 8. *See also* Commission Advisory Opinion 2014-01, p. 6 (adopted February 11, 2014).

5. Petitioners believe this statement by the Commission fundamentally misapprehends the effect of FECA preemption on Petitioner's campaign finance law obligations. Petitioner believes – contrary to the Commission's statements on this issue – that, in areas where state and federal campaign finance law overlap in their coverage, federal law occupies the field and, therefore, supersedes state law. Nonetheless, based on the Commission's position, its representatives have recently threatened Petitioner with sanctions if it fails to adhere to the Commission's view of this issue.[1]

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[1] Petitioner notes, however, that the Commission has elsewhere acknowledged that these issues reflect a "gray area," and – in a recent submission to the Federal Election Commission ("FEC") – the Commission has asked the FEC to clarify them. *See* October 12, 2014 Letter from the Commission to the FEC, re: Advisory Opinion Request 2014-16, p. 7.

6. These issues have recently arisen in connection with Petitioner's use of certain "mailers" in Connecticut's 2014 state and federal election. Those mailers, although pertaining specifically to a state candidate (Governor Dan Malloy), also – on the front and the back of each mailer – called on recipients to vote, specified the date of the election, and provided recipients with information regarding the times when polling places are open and the availability of transportation to the polls. Activities and communications that are not otherwise exempted by the regulation containing such information, when used in connection with elections in which federal candidates are on the ballot, are specifically defined in Federal election law as constituting GOTV activities, *see* 11 C.F.R. § 100.24(a)(3) (September 10, 2010) which must be financed with money subject to federal regulation.

7. Although federal regulation of such activities preempts the field, 52 U.S.C. § 30143(a); 11 C.F.R. § 108.7 (2014), and supersedes state regulation affecting the same activities, the Republican Party of Connecticut ("Republican Party"), on the eve of the most recent election, filed an action in Hartford Superior Court – challenging Petitioner's campaign finance practices based, in part, on a Petitioner's use of the mailers described above. In that action, the Republican Party sought (1) to enjoin Petitioner from using the mailer at issue, and (2) to obtain a mandatory injunction that, if granted, would have deprived the Dan Malloy for Governor Candidate Committee of funds with which to continue its campaign. *See* Verified Complaint for Declaratory and Injunctive Relief, dated October 17, 2014, in *Republican Party of Connecticut v. Democratic Party of Connecticut*, HHD CV 14-6054730-S. Although this action was subsequently dismissed due to plaintiff's failure to exhaust its administrative remedies the underlying issue of federal preemption has not been resolved and will likely re-surface in

connection with future biennial elections as Petitioner continues its voter registration and GOTV activities.[2] As a result, Petitioner has a specific, personal and legal interest in obtaining a definitive resolution of the issue set forth above.

8. In light of the foregoing facts and circumstances, Petitioner respectfully requests a declaratory ruling on the issue of whether Connecticut's campaign finance laws, including, but not limited to, Gen. Stat. 9-612(f), are preempted by federal law with respect to the funding of "Federal election activities," including voter registration and GOTV activities, when those activities relate to an election in which a federal candidate is on the ballot, even where materials used in furtherance of those activities do not refer to a candidate for federal office, and even though those materials only refer to a candidate for state office.

THE FEDERAL REGULATORY SCHEME

A. Campaign Finance Reform

9. The Federal Election Campaign Act ("FECA"), originally enacted in 1971 and now codified at 52 U.S.C. § 30101, *et seq.*, sets forth an intricate federal statutory scheme governing campaign contributions and expenditures related to federal elections. The primary purpose of the Act is to regulate campaign contributions and expenditures in order to prevent large donors from exerting undue influence over candidates for public office.

10. In 2002, Congress, concerned with the use of so-called "soft money" (*i.e.*, money contributed outside the legal framework provided by FECA and other federal regulatory restrictions) provided by national, state and local political parties, enacted the Bipartisan

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[2] The Republican Party is now pursuing the same issues before the Commission. Representatives of the Commission have informed Petitioner that the Commission does not intend to adjudicate the preemption issues raised herein.

Campaign Reform Act of 2002 ("BCRA"), Public Law 107-155 (2002). In adopting the BCRA, Congress recognized the potentially corrupting influence of campaign contributions used to influence the outcome of federal elections through indirect means, including "get-out-the-vote" activity.

11. The BCRA provides that restrictions on the use of federal campaign funds extend beyond funds used for the direct support of federal candidates and also apply to the funding of campaign activities by state political parties that can affect the outcome of federal elections – even when the activities do not specifically refer to federal candidates.

12. To prevent the use of non-federal funds to influence federal elections in an indirect manner, the BCRA expressly applies FECA campaign expenditure restrictions to any "Federal election activity" – a term defined in the Act and in the Act's implementing regulations, *see* 52 U.S.C. 30101(20)(A); 11 C.F.R. § 100.24 – irrespective of whether the activity directly supports or names a particular federal candidate or even mentions a federal election.

13. Title I of the BCRA imposes restrictions on the expenditure of funds by state and local political parties that might influence the outcome of federal elections, even when those communications only reference non-federal candidates. The Act defines "Federal election activity" to mean any of the following:

> **(i)** *voter registration activity* during the period that begins on the date that is 120 days before the date a regularly scheduled Federal election is held and ends on the date of the election;
>
> **(ii)** voter identification, *get-out-the-vote activity*, or generic campaign activity conducted *in connection with an election in which a candidate for Federal office appears on the ballot* (regardless of whether a candidate for State or local office also appears on the ballot);

> **(iii)** a public communication that refers to a clearly identified candidate for Federal office (regardless of whether a candidate for State or local office is also mentioned or identified) and that promotes or supports a candidate for that office, or attacks or opposes a candidate for that office (regardless of whether the communication expressly advocates a vote for or against a candidate); or
>
> **(iv)** services provided during any month by an employee of a State, district, or local committee of a political party who spends more than 25 percent of that individual's compensated time during that month on activities in connection with a Federal election.

52 U.S.C. 30101(20)(A) (emphasis added).

14. In constructing a coherent scheme of campaign finance regulation, Congress recognized that, given the close ties between federal candidates and state party committees, BCRA's restrictions on national committee activity would be ineffective if state and local committees remained available as conduits for soft-money donations. The BCRA is, therefore, designed to curb state committees' ability to use large soft-money contributions to influence federal elections by preventing donors from contributing nonfederal funds to state and local party committees to help finance "Federal election activity." As a result, all activities that fall within the statutory definition of "Federal election activity" must be funded with money that is subject to federal regulation.

15. Title I of BCRA establishes restrictions on campaign expenditures by a state political party that provide indirect support for a federal candidate that could influence the outcome of a federal election, even when the campaign activity does not mention a federal candidate or even the federal election by name. In particular, campaign activity that can influence the outcome of a federal election by increasing voter turnout is made subject to federal regulation by the BCRA. Pursuant to 52 U.S.C. § 30125(b)(2), any amount expended for "Federal election activity" –

including voter registration and GOTV activity – by a state political party is subject to Title I of the BCRA and must be funded from a political party's federal account.

16. Regulations promulgated by the Federal Election Commission confirm this regulatory scheme. In conjunction with the enactment of FECA, Congress created the Federal Election Commission ("FEC"), which is charged with the administration and enforcement of the FECA. Pursuant to its rulemaking authority, the FEC has adopted regulations defining each of the components of "Federal election activity." *See* 11 C.F.R. § 100.24.

With respect to "voter registration activity," 11 C.F.R. § 100.24(a)(2)(i) provides:

> Voter registration activity means:
>
> > (A) Encouraging or urging voters to register to vote . . . .
> >
> > (B) Preparing and distributing information about registration and voting;
> >
> > (C) Distributing voter registration forms or instructions to potential voters;
> >
> > (D) Answering questions about how to complete or file a voter registration form, or assisting potential voters in completing or filing such forms;
> >
> > (E) Submitting or delivering a completed voter registration form on behalf of a potential voter;
> >
> > (F) Offering or arranging to transport, or actually transporting potential voters to a board of elections or county clerk's office for them to fill out voter registration forms; or
> >
> > (G) Any other activity that assists potential voters to register to vote.

With respect to "get-out-the-vote activity," 11 C.F.R. § 100.24(3)(i) provides::

> Get-out-the-vote activity means:
>
> > (A) Encouraging or urging potential voters to vote, whether by mail (including direct mail), email, in person, by telephone (including pre-recorded telephone calls, phone banks and messaging such as SMS and MMC), or by any other means;
> >
> > (B) Informing potential voters, whether by mail (including direct mail), email, in person, by telephone (including pre-recorded telephone calls, phone banks and messaging such as SMS and MMC), or by any other means about,
> >
> > (1) Times when polling places are open;
> >
> > (2) The location of particular polling places; or
> >
> > (3) Early voting or voting by absentee ballot;
> >
> > (C) Offering or arranging to transport, or actually transporting, potential voters to the polls; or
> >
> > (D) Any other activity that assists potential voters to vote.

11 C.F.R. § 100.24(a)(3) (September 10, 2010).

17. FEC regulations exclude from the definition of "Federal election activity" a "public communication that refers solely to one or more clearly identified candidates for State or local office and that does not promote or support, or attack or oppose a clearly identified candidate for Federal office;" however, this is subject to the proviso *"that such a public communication shall be considered a Federal election activity if it constitutes voter registration activity . . .[or] get-out-the-vote activity . . . ."* 11 C.F.R. § 100.24(c)(1) (emphasis added).

18. Notably, these regulations were revised following a determination by the United States Court of Appeals for the District of Columbia Circuit, that an earlier version of the regulations – in defining "voter registration" and "get-out-the vote" activities – had created unacceptable "loopholes" that undermined the statutory scheme of the BCRA by "allow[ing] the use of soft money for many efforts that influence federal elections." *Shays v. Federal Election Commission*, 528 F.3d 914, 932 (D.C. Cir. 2008) ("'common sense dictates' that 'any efforts [by state or local parties] that increase the number of like-minded registered voters who actually do go to the polls' will 'directly assist [a] party's candidates for federal office'") (quoting *McConnell v. Federal Election Commission*, 540 U.S. 93, 167-68 (2003)). As a result, the FEC promulgated its present broader definitions of "Federal election activities" to prevent circumvention of the federal regulatory scheme. *See* 75 Fed. Reg. 55257-67 (Sept. 10, 2010).

B. Federal Preemption

19. FECA contains a preemption provision, enacted in 1974, that replaced an earlier version of the statute, which had expressly saved state laws from preemption, except where compliance with state law would result in a violation of the FECA, or would prohibit conduct permitted by the FECA. FECA's current preemption provision states:

> The provisions of this Act, and of rules prescribed under this Act, supersede and preempt *any provision of State law with respect to election to Federal office*.

52 U.S.C. § 30143(a) (emphasis added).

20. The legislative history of this provision shows that Congress intended "to make certain that the Federal law is construed to *occupy the field* with respect to elections to Federal office and that the Federal law will be the sole authority under which such elections will be regulated." H.R. Rep. No. 1239, 93d Cong., 2d Sess. 10 (1974) (emphasis added). More

specifically, Congress intended "Federal law [to] occupy the field with respect to reporting and disclosure of political contributions to and expenditures by Federal candidates and political committees." S. Rep. No. 93-1237 (1974) (Conf. Rep.), reprinted in 1974 U.S.C.C.A.N. 5587, 5668.

21. FECA's preemption provision specifically incorporates by reference "rules prescribed under" FECA, and, pursuant to its authority, the FEC has issued a regulation interpreting the scope of § 30143(a). This regulation provides as follows, in pertinent part:

> (a) The provisions of the Federal Election Campaign Act of 1971, as amended, and rules and regulations issued thereunder, supersede and preempt any provision of State law with respect to election to Federal office.
>
> (b) Federal law supersedes State law concerning the –
>
> ....
>
> (3) Limitation on contributions and expenditures by Federal candidates and political committees.

11 C.F.R. § 108.7 (2014).

22. Consistent with FECA's statutory preemption provision, 52 U.S.C. § 30143(a), and its enabling regulation, 11 C.F.R. § 108.7 (2014), courts and the FEC have both consistently found that FECA preempts state campaign finance laws with respect to campaign activities that might influence federal elections.