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October 14, 2014

Adav Noti
Acting Associate General Counsel
Federal Election Commission
999 E St. NW
Washington, DC 20463

RE: Advisory Opinion Request 2014-16 (Connecticut Democratic State Central Committee)

Dear Mr. Noti:

I write on behalf of the Brennan Center for Justice at NYU School of Law to comment on Advisory Opinion Request 2014-16, submitted by the Connecticut Democratic State Central Committee ("Requestor").[1] Requestor, a state party committee, asks whether it may use federal law to circumvent Connecticut contribution limits and source prohibitions, most notably Connecticut's ban on contributions by state contractors. We urge the Commission to decline this request.

The Request asks three questions. First, it asks whether a mailing touting Governor Dannel Malloy's record and urging his reelection constitutes "federal election activity" (FEA) under 52 U.S.C. § 30101(20) and 11 C.F.R. § 100.24. The apparent basis for this question is that the mailing includes in one corner a telephone number that people can call to obtain a ride to the polls, as well as information about poll hours, which Requestor suggests is sufficient to make the entire mailing "get-out-the-vote" (GOTV) activity under 11 C.F.R. § 100.24(a)(3).[2] Second, if the mailing constitutes FEA, Requestor seeks confirmation that federal law permits it to pay for all or most of the mailing with federal funds that do not comply with Connecticut law,

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

[2] Requestor suggests that information regarding the recipient's polling place may also be included, but does not indicate how prominently that information will be displayed. Request at 2.

notwithstanding that the mailing is primarily related to a Connecticut election. Third, Requestor seeks a declaration from the Commission that any effort by Connecticut to enforce its own campaign finance laws in connection to the mailing would be preempted by the Federal Election Campaign Act (FECA), 52 U.S.C. § 30143(a).

The Bipartisan Campaign Reform Act

In 2002 Congress passed the Bipartisan Campaign Reform Act (BCRA), which amended FECA to, among other things, close the "soft money" loophole that had allowed political parties to raise unlimited funds to pay for a variety of activities related to federal elections. BCRA's primary focus was on national party committees, but Congress also recognized that the law "would rapidly become ineffective if state and local [party] committees remained available as a conduit for soft money."[3] Accordingly, BCRA created the new regulatory category of FEA to cover certain state and local party activities related to both federal and state elections. These activities must be funded at least partly with money that complies with federal contribution limits, source prohibitions, and other requirements.[4] The Supreme Court upheld BCRA's regulation of FEA in *McConnell*, reasoning that Congress was entitled to take into account "the hard lesson of circumvention" running through "the entire history of campaign finance regulation."[5]

Nevertheless, in passing BCRA, Congress also recognized the vital interest the States continue to have in enforcing their own campaign finance laws. The Act "imposes no requirements whatsoever on States or state officials, and, because it does not expressly preempt state legislation, it leaves the States free to enforce their own restrictions on the financing of state electoral campaigns."[6] In fact, BCRA permits many types of FEA, including GOTV activity, to continue being partially funded through so-called "Levin funds"–-non-federal dollars that need only comply with state restrictions, subject to a $10,000 contribution limit that applies only in the absence of a lower state limit.[7] The availability of Levin funds often lightens the regulatory burden on state and local party committees; use of such funds also provides a straight-forward mechanism to ensure that the state portion of a committee's activities will be paid for with funds that comply with state law.[8]

Connecticut Law

Connecticut has some of the strongest and most thoroughly-vetted campaign finance laws in the country. Much of the Connecticut system was enacted in the wake of a series of

[3] *McConnell v. FEC*, 540 U.S. 93, 161 (2003).

[4] *Id.* at 162.

[5] *Id.* at 165.

[6] *Id.* at 186.

[7] *Id.* at 162-63; *see also* 52 U.S.C. § 30125(b)(2); 11 C.F.R. § 300.31.

[8] The Commission's regulations specify minimum allocations between federal funds and Levin funds depending on the type of federal election, *see* 11 C.F.R. § 300.33, which can also serve as a useful proxy for calculating the federal and state shares of a particular expenditure.

"corruption scandals involving state and local government that helped earn the state the nickname 'Corrupticut.'"[9] In the most notorious incident, former Governor John Rowland pled guilty to federal charges resulting from his acceptance of over $100,000 in gifts from state contractors in exchange for helping them to secure lucrative contracts.[10] As a result of this and other scandals, over three quarters of Connecticut voters came to believe that special interests were using campaign contributions to obtain "favors and preferential treatment" from Connecticut's government.[11]

To combat corruption and restore the confidence of Connecticut citizens in their elected officials, Connecticut enacted "expansive campaign finance reforms"—including strict contribution limits, the ban on contractor contributions, and public financing.[12] Various portions of this regime were challenged in federal court; in 2010, their constitutionality was largely upheld by the United States Court of Appeals for the Second Circuit (the Brennan Center participated extensively in this litigation).[13] It is this thoroughly-vetted regulatory framework that Requestor now seeks permission to evade.[14]

Analysis

The Request raises difficult issues pertaining to BCRA's preemption of state law. We question whether it is appropriate to decide such important and far-reaching matters through the Commission's abbreviated Advisory Opinion procedures. Fortunately, the Commission need not grapple with these issues, because the proposed mailing is not FEA.

As Requestor concedes, there is only one category of FEA under which the mailing could arguably fall: GOTV activity pursuant to 52 U.S.C. § 30101(20)(A)(ii). *See also id.* § 30101(20)(B)(i). The Commission's regulations defining GOTV activity were most recently revised in 2010, as a result of the long-running *Shays* litigation in the District of Columbia federal courts.[15] The current definition of GOTV activity lists various practices, including "[e]ncouraging or urging potential voters to vote," providing information about "[t]imes when polling places are open," and "[o]ffering or arranging to transport, or actually transporting, potential voters to the polls."[16]

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[9] *Green Party of Connecticut v. Garfield*, 616 F.3d 189, 193 (2010) (*Green Party II*) (internal quotations omitted).

[10] *Id*.

[11] *Green Party of Connecticut v. Garfield*, 590 F. Supp. 2d 288, 307-08 (D. Conn. 2008) (*Green Party I*).

[12] *Green Party II*, 616 F.3d at 193; *see also, e.g.*, Conn. Gen. St. §§ 9-612(f), 9-613(a), 9-615, 9-617, 9-705.

[13] *Green Party II*, 616 F.3d at 192-93; *see also Green Party of Connecticut v. Garfield*, 616 F.3d 213, 218 (2010) (*Green Party III*).

[14] We recognize that Requestor plans to take certain *voluntary* steps to comply with Connecticut law. *See* Request at 4 n.7. Leaving aside the adequacy of those steps, an affirmative response to the Request would plainly open the door for Requestor or any other similarly-situated party committee to ignore state law at any time it chooses.

[15] *See* Final Rules: Definition of Federal Election Activity, 75 Fed. Reg. 55257 (Sept. 10, 2010) ("FEA E&J").

[16] 11 C.F.R. § 100.24(a)(3)(i).

The Commission's regulations go on to make clear, however, that "[a]ctivity is not get-out-the-vote activity solely because it includes a brief exhortation to vote, so long as the exhortation is incidental to a communication, activity, or event."[17] In other words, the exhortation must not occupy many minutes of a speech or large amounts of space in written materials, and must not be the central focus of the communication.[18] For example, the Explanation and Justification accompanying the final rules notes that "a mailer praising the public service record of a mayoral candidate and/or discussing the candidate's campaign platform" that concludes by reminding recipients to vote does not constitute GOTV activity.[19]

The mailer proposed by Requestor here is almost identical to that described in the Commission's example. It features nine photographs of Governor Malloy, focuses entirely on his record, and mentions no other candidate. One small corner, occupying less than 1% of the mailer's surface area, contains voting-related information.[20] That portion is part of an exhortation to vote that is plainly incidental to the overall message of the mailer, which is to advocate for Governor Malloy's reelection. Accordingly, the mailer is not FEA.[21]

A contrary conclusion—particularly in these circumstances—would enable virtually effortless circumvention of Connecticut law. Congress passed the relevant provisions of BCRA to combat exactly this sort of gamesmanship. The Commission's construal of its regulations must be guided by that overarching consideration.[22]

Because the proposed mailing does not constitute FEA, the Brennan Center takes no position on Requestor's remaining questions at this time. Nevertheless, we note that Requestor's third question, if reached, raises significant concerns. "[C]ourts have consistently indicated that FECA's preemptive scope is narrow in light of its legislative history." *Janvey v. Democratic Senatorial Campaign Committee, Inc.*, 712 F.3d 186, 201 (5th Cir. 2013); *accord Stern v.*

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[17] *Id.* § 100.24(a)(3)(ii).

[18] *See* FEA E&J, 75 Fed. Reg. at 55263-64.

[19] *Id.* at 55264.

[20] *See* Request Attachment A.

[21] Requestor's suggestion that the Commission need not consider whether this portion of the mailing is incidental because "the mailing includes sufficient voting information … to trigger a separate portion of the rule at section 100.24(i)(B) and (C)" is unfounded. *See* Request at 2. First, there is no "section 100.24(i)(B) and (C)" in the relevant regulation. *See id.* Presumably, the Requestor means to invoke subsections (B) and (C) of section 100.24(a)(3)(i). But there is no basis to think that these provisions are not subject to the exception in section 100.24(a)(3)(ii) for brief, incidental exhortations. The term "exhortation" is undefined in the regulations, but to "exhort" generally means to "urge by strong argument, advice, or appeal." WEBSTER'S NEW COLLEGE DICTIONARY 400 (2005). Thus, an exhortation plainly can include the provision of information or an offer of assistance; if it is nevertheless brief and incidental, as is the exhortation here, the exception applies.

[22] The Commission's decision to supersede Advisory Opinion 2006-19 (Los Angeles County Democratic Party Central Committee), *see* FEA E&J, 75 Fed. Reg. at 55266, does not compel a different result. While the mailer at issue there bore some resemblance to that which the Requestor proposes, there was no indication that it had been designed to circumvent state campaign finance laws. Moreover, that LACDPCC's mailer was part of a larger voter mobilization campaign that also included pre-recorded telephone calls urging registered Democrats to vote. And the analysis set forth in the opinion focused on different considerations, such as the lack of "individualized" contacts with voters, which the Commission has since abandoned and which are not invoked here.

General Electric Company, 924 F.2d 472, 475 (2d Cir. 1991). We are unaware of any court decision holding that BCRA's regulation of state and local party committees automatically preempts overlapping state regulation of these entities—let alone that it is permissible to use BCRA's own *anti-circumvention* provisions to actively circumvent other valid laws. If anything, the Court in *McConnell* suggested precisely the opposite.[23] If the Commission feels it must venture onto such terrain, we respectfully suggest that it should at least develop a full administrative record before doing so.[24]

Thank you for the opportunity to comment on this Request.

Respectfully submitted,

/s/

Daniel I. Weiner
Counsel
Democracy Program

[23] To be sure, BCRA extends federal regulation to certain activities that were once primarily state concerns. Ordinarily, however, the fact that Congress has chosen to regulate a given activity "does not preclude [a state] from pursuing its independent interest" in the activity, provided that state regulation does not preclude compliance with federal law or undermine federal objectives. *See Stern*, 924 F.2d at 475.

[24] Indeed, the Commission may lack statutory authority to even decide this question in the context of an advisory opinion request. The FECA, 52 U.S.C. § 30108(a)(1), directs the Commission to issue advisory opinions in response to "requests concerning the application of" the statutes within the Commission's jurisdiction or the Commission's regulations "to a specific transaction or activity *by the person*" submitting the request (emphasis added). "Requests … regarding the activities of third parties do not qualify as advisory opinion requests." 11 C.F.R. § 112.1(b). The Requestor's third question asks the Commission to address FECA's application not to its own activity, but to a possible enforcement action by the Connecticut State Elections Enforcement Commission (SEEC). Such an enforcement action would be a "specific transaction or activity" by the SEEC, not the Requestor.