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**“Addressing Dark Money in Politics”**

Opinion of Alphonso B. David  
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The lack of clarity in Article 14 of the Election Law, coupled with uneven enforcement, has created uncertainty regarding the boundaries of permissible conduct and has led to concerns of flagrant abuses of the law. To address this concern, and consistent with the Governor’s constitutional obligation to ensure that the laws of the State of New York are faithfully executed, N.Y. Const. art. IV, § 3, this opinion provides guidance on the interpretation of independence and coordination under New York State election law.

**Background: Citizens United**

Independent expenditures are sums spent to support or oppose a specific candidate that are not coordinated or pre-arranged with the candidate. See Buckley v. Valeo, 424 U.S. 1, 47 (1976). In January 2010, the United States Supreme Court in Citizens United v. FEC, 588 U.S. 310 (2010), struck down federal prohibitions on independent expenditures, allowing unlimited independent expenditures in the electoral arena. The Court identified “quid pro quo” corruption as a government interest justifying regulation of money in politics, and ruled that there is no risk of quid pro quo corruption as long as money is spent independently of a candidate. Id. at 357. Thus, while direct contributions to candidates, and spending that is coordinated with candidates, can be regulated via tight contribution limits, independent expenditures are not subject to any limitation. Further, the Citizens United decision allows states the power to regulate what constitutes independence, as opposed to improper coordination between candidates and supposedly “independent” spenders.

**New York State Election Law**

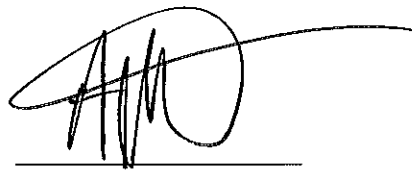
Under current New York State election law, an independent expenditure cannot include communications where the candidate, the candidate’s political committee, or a party, constituted or political committee “authorize, request, suggest, foster, or cooperate in such communication.” N.Y. Elec. Law § 14-107(1)(a). The terms “authorize, request, suggest, foster, or cooperate” are not defined in the statute. Pursuant to well-established Supreme Court jurisprudence, when a term is not specifically defined in a statute, it is construed “in accordance with its ordinary or natural meaning.” FDIC v. Meyer, 510 U.S. 471, 476 (1994). For example, the natural meaning of “authorize” is “[t]o empower; to give a right or authority to act.” Black’s Law Dictionary 133 (6<sup>th</sup>

ed. 1990). The natural meaning of “suggest” is “[t]o introduce indirectly to the thought . . . to hint; to intimate.” Id. at 1433.

There is a commonality among the factors that fit into these basic definitions, which highlight coordination and a lack of independence. Each of these factors, which are illustrative, should be taken into account by regulators tasked with enforcing the independent expenditures provisions of the election law:

- Whether a candidate formed an entity that later makes expenditures benefitting the candidate;
- Whether a candidate raised funds on behalf of an entity that later makes expenditures benefitting the candidate;
- Whether an entity making expenditures benefitting a candidate is operated by former staffers or immediate family members of the candidate;
- Whether a communication reproduces material prepared by a candidate’s campaign, such as b-roll footage;
- Whether an entity making expenditures benefitting a candidate engages in strategic discussions with the candidate’s campaign regarding the campaign’s strategy;
- Whether an entity making expenditures benefitting a candidate shares vendors or space with the candidate’s campaign; and
- Whether a donor to a candidate also provides a material portion of total funding to an entity making expenditures benefitting the candidate.

These factors are necessary to ensure an appropriate separation between candidates and independent entities and achieve the basic intent of the existing legislation. However, as referenced above, the existing law does not adequately define these terms. Accordingly, a change in existing law is necessary to appropriately codify a demarcation between candidates and independent spenders and to support the public’s interest in an open and accountable electoral process. The law can also be further strengthened to clearly outline per se violations of the independence requirements with appropriate safe harbors if necessary.

A handwritten signature in black ink, appearing to read 'A. David', with a large, sweeping flourish extending to the right.

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