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CARMEN A. TRUTANICH
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REPORT NO. R-10-0181
JUN 09 2010

REPORT RE:

**RECOMMENDATION AND DRAFT ORDINANCE TO REPEAL SECTION 49.7.24
OF THE LOS ANGELES MUNICIPAL CODE AND RECOMMENDATION
THAT CITY CHARTER SECTIONS 470(c)(5) and 803(b)(4)
NOT BE ENFORCED DUE TO RECENT COURT RULINGS**

The Honorable City Council
of the City of Los Angeles
Room 395, City Hall
200 North Spring Street
Los Angeles, California 90012

Honorable Members:

We are writing to inform you of developments in the law regarding contribution limits to committees making independent expenditures and, in light of recent court opinions, to advise you that Los Angeles Municipal Code (LAMC) Section 49.7.24 should be repealed promptly and that City Charter Sections 470(c)(5) and 803(b)(4) should not be enforced and their repeal should be proposed to the voters as early as possible.

Background

Earlier this year, the United States Supreme Court struck down a federal ban on direct independent spending by corporations finding no corruption or appearance of corruption exists with regard to this type of independent spending. *Citizens United v. Federal Election Commission*, 558 U.S. ___, 130 S. Ct. 876, 175 L. Ed. 2d 753 (2010) (*Citizens United*). The Supreme Court held that, with regard to spending limits, the

government entity seeking to impose the limits was required to demonstrate *quid pro quo* corruption, rather than demonstrating merely that the spending encouraged corrupting influence or access by a speaker to elected officials. *Citizens United*, 130 S. Ct. 876, 910. The Supreme Court also held that independent expenditures do not give rise to *quid pro quo* corruption. We have previously advised you regarding the repeal of a LAMC provision, specifically, LAMC Section 49.7.26.2, which is substantially similar to the provision struck down by the Supreme Court. The report and draft ordinance are pending Council approval. (See C.F. 10-0127.)

Subsequent to the *Citizens United* decision, the Ninth Circuit and two other courts have ruled on the validity of contribution restrictions similar to the type of restriction contained in Charter Sections 470(c)(5) and 803(b)(4) and LAMC Section 49.7.24. On April 30, 2010, the Ninth Circuit Court of Appeals ruled unconstitutional a Long Beach ordinance that limits contributions to persons making independent expenditures, as it applies to the Long Beach Chamber of Commerce political action committee and similarly situated parties. *Long Beach Chamber of Commerce v. City of Long Beach*, No. 07-55691 (9th Cir. 2010). The Ninth Circuit's ruling utilized the reasoning of the Supreme Court decision in *Citizens United* in relation to independent expenditures and other decisions regarding contribution limits to political action committees (PACs). The Ninth Circuit reached that conclusion, in part, because Long Beach could not demonstrate *quid pro quo* corruption or the appearance of corruption with regard to contributors to independent expenditure committees either at the time the provision was adopted or during the proceedings.

While the Supreme Court had previously upheld contribution limits to political parties and federal multicandidate committees, the Ninth Circuit in the *Long Beach* case distinguished political parties and federal multicandidate committees from independent committees because of the political parties' and multicandidate committees' demonstrated close relationship with candidates and officeholders. See *California Medical Association v. FEC*, 453 U.S. 182 (1981) and *McConnell v. FEC*, 540 U.S. 93, 154-155.¹ The Ninth Circuit stated that the "need for contribution limitations to combat corruption or the appearance of corruption thereof tends to decrease as the link between the candidate and the regulated entity becomes more attenuated." The Court found that the Chamber of Commerce political action committees were too remotely connected, if connected at all, to candidates, in that political action committees do not operate as "middlemen through which funds merely pass from donors to candidates...." particularly given the lack of coordination. *Long Beach*, Slip op. at 6425. The Court noted that coordination between independent committees and candidates would transform the expenditures into contributions under state law and potentially subject the parties to criminal prosecution. Moreover, the Court suggested a high standard to justify such limits, such as actual corruption involving contributions to independent

¹ A federal multicandidate committee is a type of independent political action committee that makes contributions to at least five federal candidates and has more than 50 contributors in a calendar year. 11 CFR 100.5(a) and 106.6(a).

expenditure committees. Finally, the Court stated its support for individuals expressing themselves collectively, including through committees. *Id.* at 6428.

The Ninth Circuit relied heavily on the reasoning and conclusions of prior decisions from other federal circuit courts that had ruled unconstitutional contribution limits and related restrictions to independent committees. See *Long Beach*, Slip at 6424-6425 citing *N.C. Right to Life, Inc. v. Leake*, 525 F. 3d 274 (4th Cir. 2008) (*Leake*) (striking down contribution limits as applied to committees making only independent expenditures). Also, the D.C. Circuit struck down regulations requiring independent PACs to use hard money accounts to pay for independent expenditures, where individual donations to hard money accounts were subject to contribution limits. *Emily's List v. FEC*, 581 F.3d 1 (D.C. Cir. 2009). This Office understands that *Long Beach* may seek a writ of certiorari from the Supreme Court, though in our view it is unlikely the Court would grant the writ, or even if granted, that the decision would be reversed.

Additionally, other courts have struck down similar provisions after the Supreme Court's ruling. In *Speechnow.com v. Federal Election Commission*, ___ F.3d ___, No. 08-5223/09-5342 (D.C. Cir. 2010) (*SpeechNow*) following an *en banc* hearing, the D.C. Circuit Court ruled that contribution limits to committees making only independent expenditures are unconstitutional. The D.C. Circuit relied heavily on the reasoning of the Supreme Court's decision in *Citizens United* in relation to independent expenditures, concluding as a matter of law that there exists no valid governmental interest for limiting contributions to independent expenditure committees. This Office does not presently know whether the FEC will seek rehearing or whether the Solicitor General will file an appeal with the Supreme Court.

Also, a Southern District of California federal court recently granted a preliminary injunction to bar enforcement of, *inter alia*, San Diego's contribution limits to committees only making independent expenditures. *Thalheimer et al v. San Diego*, No. 09-CV-2862 (S.D. Cal. 2010) (*Thalheimer*). The District Court concluded that no legitimate purpose could be achieved by regulating contribution limits to independent expenditure committees, given that a single person can spend an unlimited amount of funds directly on an independent expenditure (*i.e.*, \$1,000,000) and a limit would require a number of people to contribute a lesser amount to simply achieve the same independent expenditure level (*i.e.*, 100 people spending \$10,000 each), a view previously expressed by a number of courts. Slip op. at 11. San Diego has sought Ninth Circuit review of this ruling. While neither *Speechnow* nor *Thalheimer* are binding on the City, both recognize the change in campaign finance law, especially with regard to independent expenditures resulting from the *Citizens United* case.

Although the *Long Beach* court ruled only on the provisions at issue in that case and applied its ruling only to the parties to that case (and similarly situated parties), in this Office's view, the Ninth Circuit's decision in the *Long Beach* case is applicable to the City and directly impacts the City laws. Because of the strong similarities between

the contribution limits in the City Charter and LAMC to those ruled unconstitutional by the Ninth Circuit in *Long Beach*, we believe that the *Long Beach* case together with the other cases on which the Ninth Circuit relied, *Citizens United*, and the current jurisprudence in the campaign finance area, constitute compelling legal authority to conclude that a constitutional challenge to the City's contribution limits on committees making independent expenditures could not be defended successfully. Moreover, many California jurisdictions already have litigated this issue and lost or voluntarily repealed their limits because they perceived the provisions to be unconstitutional. See e.g., San Francisco (enjoined, litigation pending), Oakland (enjoined and repealed), San Jose (enjoined), Irvine (enjoined and repealed), Anaheim (enjoined), Huntington Beach (enjoined), Ventura County (voluntarily repealed), Sacramento (voluntarily repealed). The City also has a pending case involving these provisions. *Working Californians v. Los Angeles and City Ethics Commission*, U.S. District Court Case No. CV 09-08237 DDP (PJWx).

We understand that the Ethics Commission will be considering at its June 15th meeting a resolution to confirm that it does not intend not to enforce the subject provisions. In addition, there are a number of reasons for the City to repeal the provision. Private parties may complain that the continued existence of the provision inhibits political speech. Private parties could potentially file lawsuits against the City or possibly even against corporations or unions themselves because the provisions remain in the LAMC and remain City law. While we believe that we could defend the City because the provision is not being enforced, failure to repeal the provision invites potential lawsuits resulting in the unnecessary use of public resources to defend the City. Moreover, because the campaign finance ordinance provides for a private right of action, it may cause others to expend resources unnecessarily and provide additional risks to the City. Also, leaving an unconstitutional provision as part of the City's municipal laws may lead to confusion or even an incorrect conclusion for those reviewing and seeking to comply with City laws.

Recommendation

In light of the compelling legal precedent, it is the opinion of this Office that LAMC Section 49.7.24 and Charter Sections 470(c)(5) and 803(b)(4) should not be enforced and further should be repealed at the earliest possible time. For your convenience, we have attached a draft ordinance to repeal the LAMC provision. The Council should also at the earliest possible time place a measure on the ballot proposing to repeal the impacted Charter provisions.

Should you have any questions regarding this matter, please contact Deputy City Attorney Renee Stadel at (213) 978-7100. She or another member of this Office will be present when you consider this matter to answer any questions you may have.

Very truly yours,

CARMEN A. TRUTANICH, City Attorney



By PEDRO B. ECHEVERRIA
Chief Assistant City Attorney

PBE:RS:ac

ORDINANCE NO. _____

An ordinance repealing in its entirety Section 49.7.24, Article 9.7, Chapter IV of the Los Angeles Municipal Code relating to contribution limits to committees making independent expenditures.

**THE PEOPLE OF THE CITY OF LOS ANGELES
DO ORDAIN AS FOLLOWS:**

Section 1. Section 49.7.24, Article 9.7, Chapter IV of the Los Angeles Municipal Code is hereby repealed in its entirety.

Sec. 2. The City Clerk shall certify to the passage of this ordinance and have it published in accordance with Council policy, either in a daily newspaper circulated in the City of Los Angeles or by posting for ten days in three public places in the City of Los Angeles: one copy on the bulletin board located at the Main Street entrance to the Los Angeles City Hall; one copy on the bulletin board located at the Main Street entrance to the Los Angeles City Hall East; and one copy on the bulletin board located at the Temple Street entrance to the Los Angeles County Hall of Records.

I hereby certify that this ordinance was passed by the Council of the City of Los Angeles, at its meeting of _____.

JUNE LAGMAY, City Clerk


By _____ Deputy

Approved _____

Mayor

Approved as to Form and Legality

CARMEN A. TRUTANICH, City Attorney

By 
RENEE A. STADEL
Deputy City Attorney

Date June 9, 2010

File No. _____