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August 12, 2016

Via ECF

Judge Lorna G. Schofield
United States District Court
Southern District of New York
500 Pearl Street
New York, New York 10007

Re: *The November Team, Inc. et al v. NYS JCOPE, et al.*,
No. 16 Civ. 1739 (LGS)

Dear Judge Schofield:

This firm, together with the Center for Competitive politics, represents Plaintiffs, and we write on behalf of all parties, in accordance with your June 21, July 6, and August 8 orders, to address the effect on this action of legislation that was passed on June 17 by the New York State Legislature but had not been signed into law as of this letter's filing.[1] Plaintiffs state that the legislation has no impact on the case and request that a schedule be set for outstanding briefing on the parties' pending cross motions. Defendant states that the legislation directly affects the core issues of this case; the scope of the issues now to be decided have been significantly limited and Defendant's standing and ripeness concerns only accentuated. As it Defendant states that it will be necessary for Defendant to address the legislation in its reply brief in further support of its Motion to Dismiss, the parties request an amended briefing schedule as set out below.

Plaintiffs' Position

Plaintiffs challenge the constitutionality of Advisory Opinion16-01, which was adopted by the New York State Joint Commission on Public Ethics ("Commission") on January

[1] The text of the legislation, Senate Bill S08160, is available at http://assembly.state.ny.us/leg/?default_fld=&leg_video=&bn=S08160&term=2015&Summary=Y&Text=Y

26, 2016 pursuant to the New York's Lobbying Act. The Opinion expands the Act's definition of "lobbying" to include expansive public-relations activities, including communications with the press about pending or possible legislation or other governmental action. Under the Opinion, anyone who is paid to engage in such activities must register as a lobbyist or face possible criminal prosecution.

If signed into law, the June 17 legislation would amend the Act to exclude from "lobbying" a subcategory of the First-Amendment protected communications that the Opinion sweeps into the Act's coverage, namely communications with the "professional" press. Two months after its passage, the legislation remains unsigned and therefore has no legal significance. Even if it is signed into law, the legislation does not address or correct the constitutional infirmities of Advisory Opinion 16-01, and a live controversy as to the issues presented in the parties' cross motions will still require adjudication.

The legislation addresses a limited portion of the activity unconstitutionally governed by the Opinion. It leaves important First-Amendment protected conduct subject to the Opinion's unconstitutional reach. For example, the Opinion's unconstitutional regulation of Plaintiffs' communications with members of the informal press such as bloggers remains in effect. And the legislation in no way resolves the Opinion's unconstitutional vagueness. With the Opinion, JCOPE purports to regulate any attempt by Plaintiffs to "get" any "third-party"—"whether the public or the press"—to promote a position on governmental matters. The legislation would remove from regulation communications with a subset of journalists, but would leave subject to JCOPE's regulation all other communications with any other "third-parties," a category of conduct that remains both over expansive and inadequately defined.

Briefing in this case has been stayed for more than two months. Before proceedings were stayed, Plaintiffs' motion for a preliminary injunction and Defendant's cross-motion to dismiss were fully briefed with the exception of a single reply brief by Defendant. The Court extended the deadline for Defendant's reply brief three days before it was due so that the parties could consider the legislation's significance. Since that time, the parties have attempted, and failed, to resolve the case. Now briefing should resume without further delay.

Defendant's Position

It is Defendant's position that the pending legislation, once signed into law, indeed resolves a significant aspect of the Plaintiffs' claims, the crux of which is that it is violative of the First Amendment for public relations firms who have communications with the press in an attempt to influence the public to have to register their activities in the same manner as any conventional lobbyist would be required to do. Plaintiffs claim also that the Advisory Opinion violates their Due Process rights because it is unconstitutionally vague as it does not sufficiently identify what press communications are lobbying. This is now sufficiently defined by the legislation and all communications with the professional press would now be excluded from this requirement once the legislation becomes effective.

Specifically, the legislation excludes from the definition of lobbying "Communications with a professional journalist or newscaster, including an editorial board or

editorial writer of a newspaper, magazine, news agency, press association or wire service, relating to news, as these terms are defined in section seventy-nine-h of the civil rights law. . . ." Section 79-h of the Civil Rights law defines as newspapers and magazines only those outlets that have circulated for at least one year. CVR §§ 79-h(a)(1-2). Section 79-h defines as news "written, oral, pictorial, photographic, or electronically recorded information or communication concerning local, national or worldwide events or other matters of public concern or public interest or affecting the public welfare." This definition of news is undoubtedly sufficiently broad to encompass the communications described in the Advisory Opinion. Thus, Plaintiffs' First Amendment and Due Process claims with respect to established media outfits are now moot. Further, there is no vagueness problem because *no* relevant communications with the press will be subject to the regulation, and for the same reason, Plaintiffs' protected activities will not be chilled, and no reporter identities will be disclosed. Plaintiffs, therefore, can now only be concerned about a very limited set of entities and individuals not explicitly covered by the exclusion: bloggers. Accordingly, the scope of the issues now to be decided have been significantly limited and, what's more, Defendant's standing and ripeness concerns raised in its Motion to Dismiss are now even more pronounced.

Defendant has advised Plaintiffs that its Commissioners will be considering regulations this fall which may address those limited aspects of the Advisory Opinion which are not affected by the legislation. The regulatory process will include an opportunity for members of the public, including Plaintiffs, to comment on any proposed regulation. This could, in effect, moot whatever Plaintiffs believe remains outstanding for the Court to decide. In light of that possibility, Defendant would be open to a stay of all proceedings until the regulatory process is completed thereby avoiding burdening the Court with something which may ultimately become unnecessary. Plaintiffs have indicated that they would not agree to such a stay.

* * *

In the event that briefing is to continue, Defendant proposes, and Plaintiffs agree, that its reply brief be due on September 15, 2016. Because Defendant intends to address the legislation in its brief, Plaintiffs request an opportunity to file supplemental briefing limited to the issues raised by the legislation, as well as any brief declarations that might be necessary to sharpen the factual issues. Plaintiff requests that any such briefing be due on September 30, 2016. Defendant consents to Plaintiffs' filing a supplemental brief on that date on condition that Plaintiffs' supplemental brief is limited to addressing any new issues raised by Defendant for the first time in its reply, and that Defendant may file a final reply. Plaintiffs agree that their supplemental brief will address only new issues raised by the Defendant concerning the legislation and oppose Defendants' request to file a further supplemental brief. However, the parties agree that any such brief, if allowed by the Court, should be due on October 7, 2016.

Application GRANTED in part. Defendant shall file its reply brief in further support of its motion to dismiss no later than September 15, 2016. Plaintiffs shall file their sur-reply, not to exceed ten pages and addressing only new issues raised by Defendant concerning the new legislation, no later than September 30, 2016. Defendant's motion for leave to file a sur-reply is denied.

Dated: August 16, 2016
New York, New York

Respectfully submitted,

/s

Hayley Horowitz

LORNA G. SCHOFIELD
UNITED STATES DISTRICT JUDGE