

Suzanne Novak
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April 27, 2005

United States Senate
Washington, D.C. 20510

Re: Safe-TEA Act of 2005 and the Corzine pay-to-play amendment

Dear Senators:

I write on behalf of The Brennan Center for Justice to support Senator Jon Corzine's "pay-to-play" reform protection amendment to S. 732, the "Safe, Accountable, Flexible, and Efficient Transportation Equity Act of 2005." Since its inception in 1995, the Center's Democracy Program has been working in the area of campaign finance reform on federal, state, and local levels. We believe that the amendment is important for ensuring that states maintain the flexibility to choose effective tools for protecting the integrity of government contracting.

Systems for government contract bidding have long sought to satisfy the laudable and compatible goals of contracting with low-cost and ethical bidders. For example, current federal law regarding state transportation projects that use federal money provides that "[c]ontracts for the construction of each project shall be awarded only on the basis of the *lowest responsive bid* submitted by a bidder meeting *established criteria of responsibility*." 23 U.S.C. § 112(b)(1) (emphasis added). Federal law expressly charges the state transportation department with establishing the criteria of responsibility. 23 C.F.R. § 635.114(a).

Several recent scandals regarding government contracting in New Jersey prompted New Jersey to establish a criterion of responsibility for government contracting, which prohibited the state from contracting with an entity that has contributed to a candidate for or holder of the office of Governor, or to any State or county political party committee, within certain time frames. *See* New Jersey Executive Order 134 (September 22, 2004). The executive order explicitly stated that "the growing infusion of funds donated by business entities into the political process at all level of government has generated widespread cynicism among the public that special interest groups are 'buying' favors from elected officeholders." *Id.* Courts have recognized that contributions from government contractors present a severe risk of engendering corruption or the appearance of corruption, and thus have generally upheld "pay to play"

contribution bans. *See, e.g., Blount v. SEC*, 61 F.3d 938, 944-48 (D.C. Cir. 1995) (upholding constitutionality of SEC regulations that prohibit municipal finance underwriters from making campaign contributions to politicians who award government underwriting contracts); *Casino Ass'n of Louisiana v. State*, 820 So. 2d 494 (La. 2002), *cert. denied*, 529 U.S. 1109 (2003) (upholding ban on contributions from riverboat and land-based casinos); *Gwinn v. State Ethics Comm'n*, 426 S.E.2d 890 (Ga. 1993) (upholding ban on contributions by insurance companies to candidates for Commissioner of Insurance).

Recent action by the Federal Highway Administration, however, has threatened to strip New Jersey and other states of their capacity to determine criteria of responsibility, undermining legitimate state efforts to protect against corruption, or the appearance thereof, in government contracting. The FHA took the unprecedented position that it would not authorize federal funds for use in New Jersey transportation contracts because of Executive Order 134. The FHA took this position even in light of the scandals in New Jersey, and despite the facts that (1) all bidders would have notice of New Jersey's responsibility criteria and (2) contracting awards still would be granted to the lowest bidder. The State of New Jersey is challenging the FHA's position in court. In the meantime, however, New Jersey was forced to rescind much of its executive order since it, like most states, significantly relies on federal funding for many of its transportation contracts. No state should be forced to compromise legitimate and well-grounded efforts to protect the integrity of its government in order to receive federal transportation funds.

The FHA's position could also undermine the FHA's goal of awarding contracts only to responsible bidders and may risk actual, or the appearance of, corruption in the process of choosing bidders. Without rules prohibiting "pay to play" arrangements, states may deem entities "responsible" not because they have displayed any objective characteristics of responsibility, but rather because they have made contributions to government officials. Federal ethical standards should provide a floor beneath which a state may not go, but federal law should not be used to restrict a state from implementing stricter ethical standards that it deems necessary to protect the integrity of its government.

Senator Corzine's amendment proposes that a provision be added to the Safe-Tea Act of 2005 stating that "[n]othing in this section may be construed to prohibit a state from enacting a law or issuing an order that limits the amount of money an individual, who is doing business with a state agency for a federal-aid highway project, may contribute to a political campaign." For all the reasons discussed above, we urge you to adopt the amendment to ensure that federal highway funding provisions are not wrongly interpreted to permit interference with state efforts to both prevent corruption or the appearance thereof and restore public confidence in its government.

Sincerely,

A handwritten signature in cursive script, appearing to read "Suzanne Novak", written in dark ink.

Suzanne Novak