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March 4, 2016

Appropriations Committee  
Room 2700, Legislative Office Building  
Hartford, CT 06106

Re: House Bill No. 5086  
“An Act Concerning The Constitutional Spending Cap”

Dear Chairpersons Bye and Walker, Vice Chairs Hartley, Genga and Porter, Ranking Members Kane and Ziobron, and members of the Appropriations Committee:

In 1991, when the administration of former Governor Lowell Weicker pressed the General Assembly to adopt a state income tax, it also sought to assure the people of the State of Connecticut that it would control the future growth rate of the state budget by asking voters to amend the state constitution to include a spending cap. In 1992, the voters supported the amendment, which is now article 3, § 18 of the state constitution.

Passing the amendment, however, was only the first step in a two-step process; by its terms, article 3, § 18(b) requires the General Assembly to pass legislation defining certain key terms that are integral to the cap.<sup>1</sup> However, nearly a quarter-century has passed and the General Assembly has yet to fulfill its responsibility to define the essential terms of the constitutional spending cap. Thus, the people got the income tax, but they did not get an effective spending cap. I am very pleased that House Bill No. 5086 is a step in that long-overdue direction.

I have no expertise relevant to how key terms in the spending cap should be defined. However, as a former Connecticut Supreme Court law clerk (1990-91) and a practicing attorney for the past 26 years, I have a longstanding interest in state constitutional law. Over the past year I have researched and written about whether the spending cap is *judicially enforceable*. Specifically, last April I explained why the constitutional spending cap was legally unenforceable.<sup>2</sup> The Attorney General subsequently expressed the same opinion in a letter to Senator Fasano dated November 17, 2015.

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<sup>1</sup> Article 3, § 18(b) provides in relevant part: “The general assembly shall by law define 'increase in personal income', 'increase in inflation' and 'general budget expenditures' for the purposes of this section and may amend such definitions, from time to time, provided general budget expenditures shall not include expenditures for the payment of bonds, notes or other evidences of indebtedness. The enactment or amendment of such definitions shall require the vote of three-fifths of the members of each house of the general assembly.”

<sup>2</sup> <http://appealinglybrief.com/2015/04/28/is-connecticuts-spending-cap-judicially-enforceable/>.

The Attorney General wrote that the spending cap is not judicially enforceable because the General Assembly has not defined its key terms. He relies (as did I) on a 1996 Connecticut Supreme Court decision, *Nielsen v. State*, 236 Conn. 1, which held that the courts did not have the jurisdiction or power to force the General Assembly to pass legislation required to fill the definitional “holes” in the spending cap.

My concern—and my reason for submitting this testimony—is that I believe that even if the General Assembly fills those definitional holes, there is a risk that the Connecticut Supreme Court would still view the constitutional spending cap as legally unenforceable. My concern is based on how the court might apply something called the “political question” doctrine, which is discussed at length in the *Nielsen* decision.

Courts do not like to be drawn into resolving political disputes between or within coordinate branches of government. Consider the following: the General Assembly enacts legislation that defines the key terms in the spending cap. At some point in the future, the legislature passes a budget, but someone (perhaps a taxpayer, perhaps a legislator who voted against the budget) believes the budget violates the spending cap. That person files a lawsuit and asks the courts to declare that the budget is unlawful.

Based on my experience as an attorney who appears frequently in the Connecticut courts, including the Supreme Court, I can tell you with a high degree of confidence that many, if not most, judges would be extraordinarily reluctant to decide that a budget passed by a majority of the members of the General Assembly *and* signed by the governor, is unconstitutional. Moreover, they will be inclined *not* to exercise jurisdiction over the case at all if there is any basis in law for them to refrain from hearing the case. The political question doctrine may provide such a basis.

Although I cannot say with certainty that the Supreme Court would invoke the political question doctrine to refuse to hear a spending cap dispute, I do not believe anyone can say with certainty that the court would *not* invoke the doctrine. In short, the risk that it would invoke the doctrine is significant enough to be cause for concern.

Fortunately, there is a remedy for this problem. The General Assembly has the authority to define the jurisdiction of the courts and, therefore, it can override the political question doctrine.<sup>3</sup> Article 5, § 1 of the state constitution states:

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<sup>3</sup> It is conceivable that the Supreme Court could decide that the text of the state constitution commits budget decisions solely to the legislative and executive branches of government and, therefore, that the *constitution* precludes the courts from resolving disputes over such decisions. In such a case, only a constitutional amendment (as opposed to a statute) directing the courts to exercise jurisdiction would suffice.

The Judicial power of the state shall be vested in a supreme court, an appellate court, a superior court, and such lower courts as the general assembly shall, from time to time, ordain and establish. *The powers and jurisdiction of these courts shall be defined by law.*

Thus, in addition to filling in the definitional holes in the constitutional spending cap, the General Assembly can also pass a law that specifically requires the courts to exercise jurisdiction over, and resolve, spending cap disputes if and when they arise.

In sum, given the risk, however small, that the Connecticut Supreme Court might use the political question doctrine as grounds for refusing to adjudicate spending cap disputes, I respectfully urge the General Assembly to consider including language in the proposed bill that expressly directs Connecticut courts to exercise jurisdiction over such disputes.<sup>4</sup> I can discern no downside to including such language in the law. By contrast, the presence of such language in the law will ensure, to the maximum extent possible short of including such language in the state constitution, that the spending cap is judicially enforceable.

Sincerely,

Daniel J. Klau

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<sup>4</sup> *E.g.*, “The Superior Court shall have and shall exercise original jurisdiction over any disputes involving Article 3, § 18 of the Connecticut Constitution, and the Supreme and Appellate courts shall have and shall exercise appellate jurisdiction over such disputes.”