



215 E Street, NE, Washington, DC 20002  
tel: 202-736-2200 fax: 202-736-2222

---

**Testimony of Megan P. McAllen<sup>1</sup> before the Philadelphia Board of Ethics**  
*Re: Proposed Amendments to Regulation No. 1, Campaign Finance*

**September 17, 2014**

Thank you for this opportunity to provide my views on the proposed amendments to Ethics Board Regulation No. 1, Campaign Finance, on behalf of the Campaign Legal Center.<sup>2</sup>

These comments will primarily address the revisions that would improve the regulation's treatment of "coordinated expenditures."<sup>3</sup> Specifically, those changes include a new provision clarifying that any expenditure made to "reproduce, republish, or disseminate" material that was "prepared by a candidate's campaign" constitutes an "in-kind contribution" to the preparing candidate (proposed ¶ 1.40), as well as an addition to paragraph 1.39 specifying that an expenditure is coordinated with (i.e., is not "independent" from) a candidate if the person making the expenditure uses funds that the candidate's committee raised on the person's behalf (proposed ¶ 1.39(e)).

In *Buckley v. Valeo*, the Supreme Court recognized that only "true" independence from candidates "alleviates the danger that expenditures will be given as a quid pro quo for improper commitments from the candidate."<sup>4</sup> The Court has since made clear that only "totally," "wholly," or "truly" independent expenditures are non-corruptive, whereas expenditures coordinated with candidates pose the same corruption and circumvention risks as do direct contributions. As such, the proposed amendments to Regulation No. 1 are amply justified and well-tailored anticorruption measures: they are designed to ensure that purportedly "independent" advocacy undertaken for a candidate's benefit is *truly* independent from the candidate, and thus to prevent "outside" groups from evading the City's candidate contribution limits under the guise of "independent" spending. The proposed revisions are constitutionally sound and represent wise policy, and I urge the Board to adopt them.

**1. Republication of campaign communications or materials (proposed ¶ 1.40)**

Proposed paragraph 1.40 ("Republication of campaign communications or materials") is a form of "coordination" regulation intended to complement the existing standards governing the determination of an expenditure's "independence." Under current law, if a person or committee makes an expenditure that is "coordinated with" and "made for the benefit of" a candidate's campaign, it constitutes an in-kind contribution "subject to the contribution limits set forth in Subpart B."<sup>5</sup> However, if a purportedly

---

<sup>1</sup> Associate Counsel, Campaign Legal Center.

<sup>2</sup> The Campaign Legal Center (CLC) is a nonpartisan, nonprofit organization founded in 2002 that works in the areas of campaign finance, elections and government ethics. The CLC offers nonpartisan analyses of issues and represents the public interest in administrative, legislative and legal proceedings, at the federal, state and local levels.

<sup>3</sup> See Proposed Amendments to Regulation No. 1, Subpart H, ¶¶ 1.39–1.41 (approved for public comment July 16, 2014).

<sup>4</sup> 424 U.S. 1, 47 (1976).

<sup>5</sup> Regulation No. 1, ¶ 1.48 (recodified at ¶ 1.38 under proposed amendment).

“independent” group pays to reproduce or widely disseminate a candidate’s own campaign materials, it would be difficult to treat the expenditure as “coordinated”—notwithstanding the clear connection between the candidate’s campaign and the group’s expenditure, and the manifest risk that such activity would pose to the candidate contribution limits—absent a showing of explicit prearrangement. The new regulation closes this gap by effectively expanding the definition of “in-kind contribution” to reach such payments. Without such a provision, a supposedly “independent” person or group can subsidize a candidate’s campaign and evade the candidate contribution limits by simply distributing the candidate’s materials as its own.

*a. The proposed republication rule will prevent circumvention of the contribution limits.*

The Board’s proposed republication provision is modeled on a similar federal regulation involving the duplication of candidate campaign material, which provides that financing the “dissemination, distribution, or republication, in whole or in part,” of any campaign materials prepared by a candidate or an agent of the candidate “shall be considered a contribution for the purposes of contribution limitations and reporting responsibilities of the person making the expenditure.” 11 C.F.R. § 109.23. Like proposed paragraph 1.40(a), the FEC regulation treats an expenditure for the republication of campaign materials as an in-kind contribution irrespective of whether the expenditure is also a “coordinated communication”—i.e., meets one of the specified “conduct” prongs of the FEC’s “coordinated communication” regulation.<sup>6</sup> Therefore, under both the federal provision and proposed paragraph 1.40(a), only the person or group financing the republication of candidate materials—but not the candidate herself—is liable for the in-kind contribution.<sup>7</sup>

Paragraph 1.40(b) further provides that if the republished material is obtained “directly from the candidate’s campaign or from another source with the consent of the candidate’s campaign,” it will also constitute an in-kind contribution as to the candidate herself. The republished material has been obtained with the candidate’s consent “if the candidate provides it to a third party so that another person is able to obtain the communication or material from that third party.” This provision directly addresses situations in which a candidate has developed material and posted it online with the plain expectation that it will be picked up and disseminated by a deep-pocketed “independent” committee—free of charge to the candidate.<sup>8</sup> The illustrative scenario included in paragraph 1.40 makes clear that when an independent

---

<sup>6</sup> “Coordination” only occurs under federal law when an expenditure for a specific communication meets *both* prongs of the “coordinated communication” regulation: (1) the ad contains specified content *and* (2) the candidate suggests or requests the ad; is materially involved in the spender’s decisions regarding the content of the ad, the intended audience, or the media outlet used; or otherwise meets one of the rule’s narrow “conduct” standards. *See* 11 C.F.R. § 109.21(c) (content standards) and 109.21(d) (conduct standards). The “conduct” standards are also met by use of a “common vendor” absent a firewall, or involvement of a person or contractor who had been employed by the candidate in the previous 120 days, absent a firewall. *See* 11 C.F.R. § 109.21(d)(1)–(5); 109.21(h). To establish “coordination” with respect to republished campaign materials, the republication is itself sufficient to satisfy the regulation’s “content” standards. 11 C.F.R. § 109.21(c)(2). The “conduct” standards, however, include exceptions for material obtained from the public domain. *Id.* § 109.21(d)(2).

<sup>7</sup> *See* 11 C.F.R. § 109.23(a) (providing that “[t]he candidate who prepared the campaign material does not receive or accept an in-kind contribution, and is not required to report an expenditure,” unless the expenditure is also coordinated within the meaning of 11 C.F.R. § 109.21 (coordinated communications) or 11 C.F.R. § 109.37 (party coordinated communications)).

<sup>8</sup> This practice has become increasingly widespread. *See, e.g.,* Sean Sullivan, *McConnell-aligned group launches seven-figure ad campaign with his footage*, Wash. Post, Mar. 18, 2014, [http://www.washingtonpost.com/blogs/post-politics/wp/2014/03/18/mcconnell-aligned-group-launches-seven-figure-ad-campaign-with-his-footage/?wprss=rss\\_politics](http://www.washingtonpost.com/blogs/post-politics/wp/2014/03/18/mcconnell-aligned-group-launches-seven-figure-ad-campaign-with-his-footage/?wprss=rss_politics); *see also* Sean Sullivan, *How campaigns and outside groups communicate silently, revisited*, Wash. Post, Sept. 15, 2014,

committee incorporates a candidate’s publicly-posted “b-roll” video footage into its own advertisement, it has coordinated with the candidate’s campaign: the footage was created by the candidate and obtained “with the candidate’s consent,” so the committee’s payment for its republication constitutes an in-kind contribution.

The federal regulation sets forth five exceptions to the general rule treating the financing of republication of campaign materials as a contribution by the republisher—(1) republication by the candidate who prepared the material, (2) republication of material by an opponent of the candidate who prepared the material, (3) press exemption, (4) brief quote of material by a person expressing her own views, and (5) republication by a party committee as a coordinated expenditure. 11 C.F.R. § 109.23(b). Similarly, the provisions of proposed paragraph 1.40 do not apply if the communication or material is “incorporated into a communication that *advocates the defeat* of the candidate that prepared the material,” ¶ 1.40(c)(i), or is “reproduce[d], republishe[d], or disseminate[d]” by the “news media,” ¶ 1.40(c)(ii). These exceptions roughly track the federal law, and reflect a considered approach that balances the Board’s interest in preventing the abuse and circumvention of the campaign finance laws with the regulated community’s need for clear guidance.

*b. The proposed republication provision is constitutional.*

There are no constitutional barriers to subjecting payments for duplication of candidate campaign materials to the City’s candidate contribution limits as proposed, because notwithstanding the Supreme Court’s pronouncement in *Citizens United v. FEC* that independent expenditures cannot be constitutionally limited because they “do not give rise to corruption or the appearance of corruption,”<sup>9</sup> *non-independent*—i.e., coordinated—expenditures are not so immunized. While no court has directly considered the federal regulation that provided the model for the Board’s proposed law, 11 C.F.R. § 109.23, the Supreme Court has maintained a broad view of coordination in general, and has spoken expansively about the degree of independence that is necessary to prevent outside spending from “undermin[ing] contribution limits.”<sup>10</sup> Only “totally independent,” “wholly independent,” and “truly independent” expenditures qualify.

Since the Supreme Court’s decision in *Buckley*, the Court has distinguished for constitutional purposes between limitations on “contributions” to a candidate’s campaign, and limitations on “expenditures” to influence an election made independently of candidates. The *Buckley* Court therefore upheld candidate contribution limits as constitutionally permissible, but struck down limits on individual independent expenditures.<sup>11</sup> The Court also recognized, however, that any limitations on campaign contributions, in order to be effective, must apply to expenditures made in coordination with a candidate, so as to “prevent attempts to circumvent the [campaign finance laws] through prearranged or coordinated expenditures amounting to disguised contributions.”<sup>12</sup> The *Buckley* Court further explained that there was a difference between expenditures “made *totally* independently of the candidate and his

---

<http://www.washingtonpost.com/blogs/post-politics/wp/2014/09/15/how-campaigns-and-outside-groups-communicate-silently-revisited>.

<sup>9</sup> 558 U.S. 310, 357 (2010).

<sup>10</sup> *FEC v. Colorado Republican Federal Campaign Committee*, 533 U.S. 431, 464 (2001) (“*Colorado IP*”).

<sup>11</sup> *Buckley*, 424 U.S. at 29, 51.

<sup>12</sup> *Id.* at 47.

campaign,”<sup>13</sup> and “coordinated expenditures,” and construed the contribution limits to include not only contributions made directly to a candidate, but also “all expenditures placed in cooperation with or with the consent of a candidate” or the candidate’s campaign committee.<sup>14</sup>

Unlike contributions, the *Buckley* Court explained, *totally* independent expenditures “may well provide little assistance to the candidate’s campaign and indeed may prove counterproductive.”<sup>15</sup> The Court explained further that the absence of coordination “undermines the value of the expenditure to the candidate” and “alleviates the danger that expenditures will be given as a quid pro quo for improper commitments from the candidate.”<sup>16</sup> By contrast, a committee’s duplication and republication of a candidate’s campaign materials is undoubtedly of great assistance to the candidate’s campaign and runs no risk of being counterproductive. If the candidate did not view the materials as valuable to her campaign, she would not have produced them in the first instance. For this reason, payments to duplicate and distribute campaign materials pose precisely the same threat of corruption as a contributions given directly to a candidate—and such contributions may be limited under *Buckley*.

The Court echoed *Buckley*’s broad language regarding coordination in later decisions on the same topic. In *Colorado Republican Federal Campaign Committee v. FEC* (“*Colorado I*”), the Court held that a radio advertisement aired by the Republican Party attacking the Democratic Party’s presumptive nominee to the U.S. Senate would not be treated as coordinated because the ad was developed “*independently* and not pursuant to any general or particular understanding with a candidate . . . .”<sup>17</sup> Shortly thereafter, the Court—again in the context of party spending—noted that independent expenditures are only those “without any candidate’s approval (or *wink or nod*) . . . .”<sup>18</sup> Finally, in *McConnell v. FEC*, the Court again noted that the relevant “dividing line” was “between expenditures that are coordinated—and therefore may be regulated as indirect contributions—and expenditures that *truly* are independent.”<sup>19</sup>

In the course of striking down spending limits, the *Buckley* Court specifically considered the possibility that the federal contribution limits could be evaded by “the simple expedient of paying directly for media advertisements or for other portions of the candidate’s campaign activities” using “independent” expenditures.<sup>20</sup> The Court explained that there was no such risk, because those direct payments were to be treated as contributions subject to the limits and prohibitions of the Act. The Court later repeated this straightforward conclusion—that paying a campaign’s media bills is “virtually indistinguishable” from making a contribution—in *Colorado I*.<sup>21</sup> Paying to reproduce and disseminate a candidate’s own campaign materials likewise amounts to “paying directly for [a candidate’s] media advertisements,” and such payments can be constitutionally regulated as in-kind contributions. As the district court explained in *FEC v. Christian Coalition*, “[a] mere expenditure to increase the volume of the candidate’s speech

---

<sup>13</sup> *Id.* (emphasis added)

<sup>14</sup> *Id.* at 46–47 n.53; *see also id.* at 78.

<sup>15</sup> *Id.* at 47.

<sup>16</sup> *Id.*

<sup>17</sup> 518 U.S. 604, 614 (1996).

<sup>18</sup> *Colorado II*, 533 U.S. at 442, 447 (emphasis added).

<sup>19</sup> 540 U.S. 93, 221 (2003) (emphasis added).

<sup>20</sup> *Buckley*, 424 U.S. at 46.

<sup>21</sup> *Colorado I*, 518 U.S. at 624.

by funding additional purchases of campaign materials . . . does not raise the same type of First Amendment concerns” as might other forms of coordination rules.<sup>22</sup>

*c. A public domain exception is not required and would “swallow the rule.”*

The proposed amendment does not exclude from regulation the duplication of materials already available in the public domain. Paragraph 1.39(f) provides that using “information obtained from the candidate’s campaign to design, prepare or pay for” a particular expenditure constitutes coordination *unless* the information is “obtained from a public source or from a communication the candidate made to the general public.” However, this general “public domain” carve-out, by its explicit terms, “*does not apply to the republication of campaign communications or materials.*” *Id.* ¶ 1.39(f) (emphasis added). Excluding such material would remove from the provision’s coverage the very concern it was likely drafted to address: candidates posting b-roll footage online and relying on outside groups to bankroll its distribution as part of a candidate ad.<sup>23</sup>

As the history of the federal republication provision further demonstrates, a public domain exception would neuter the law. In a 2002 FEC rulemaking proceeding, one commenter proposed an exception from the coordination/republication rule “to cover republication and distribution of original campaign material that already exists in the public domain, such as presentations made by candidates, biographies, positions on issues or voting records.”<sup>24</sup> The FEC, however, “decline[d] to promulgate a ‘public domain’ exception because such an exception could ‘swallow the rule,’ given that *virtually all campaign material that could be republished could be considered to be ‘in the public domain.’*”<sup>25</sup>

Moreover, a public domain exception is not constitutionally required. In *McConnell*, the plaintiffs argued that any definition of coordination that did not “hinge on the presence of an agreement” failed to provide the “‘precise guidance’ that the First Amendment demands.”<sup>26</sup> But the Supreme Court concluded otherwise: in particular, the Court was “not persuaded that the presence of an agreement marks the dividing line between expenditures that are coordinated—and therefore may be regulated as indirect contributions—and expenditures that truly are independent.”<sup>27</sup> In short, “the rationale for affording special protection to wholly independent expenditures”—i.e., that their independence “alleviates the danger” of quid pro quo corruption and may even make them “counterproductive” to the candidate’s campaign—does not extend to something as obviously beneficial as outright duplication of

---

<sup>22</sup> 52 F. Supp. 2d 45, 85 n.45 (D.D.C. 1999) (distinguishing the federal republication provisions from the standard for conduct constituting coordination, and narrowing the latter as overbroad).

<sup>23</sup> A recent FEC enforcement matter demonstrates, in stark terms, how a candidate might benefit from republication. There, a purportedly “independent expenditure-only” group, American Crossroads, spent \$440,000 to broadcast an ad featuring footage that the candidate had spent a mere \$14,000 to produce. As three FEC Commissioners put it, “[o]ne can easily see what a boon this could become to candidates if they need only incur the low cost of producing video and posting it to the internet, and then [independent expenditure-only political committees] could download the images and spend hundreds of thousands of dollars broadcasting them to a wider audience, magnifying the impact of the campaign’s spending many times over.” Statement of Reasons (Weintraub, Bauerly, Walther), FEC Matter Under Review 6357 (Feb. 27, 2012).

<sup>24</sup> *Coordinated and Independent Expenditures*, Final Rules & Explanation & Justification, 68 Fed. Reg. 421, 442–43 (Jan. 3, 2003).

<sup>25</sup> *Id.* (emphasis added).

<sup>26</sup> 540 U.S. at 221.

<sup>27</sup> *Id.*

the candidate’s campaign materials.<sup>28</sup> Instead, when a supposedly “independent” committee pays to reproduce and disseminate all or part of something specifically prepared by a candidate—even if acquired from a publicly available source—it will plainly be “as useful to the candidate as cash.”<sup>29</sup> Such a scenario, unlike “truly” or “wholly” independent spending, poses a clear risk of corruption and the appearance of corruption.

## 2. Solicitation by candidates for “independent” expenditures (proposed ¶ 1.39(e))

Proposed paragraph 1.39(e) provides that an expenditure made “using funds solicited for or directed to” the person making the expenditure by a candidate’s committee is coordinated with such candidate. This provision clarifies that an outside group’s expenditures are not truly “independent” of a candidate—and thus are not devoid of any corruptive potential—if the candidate is soliciting the very contributions used to make the expenditure. Placing reasonable limits on the degree of cooperation that may occur between a candidate and an ostensibly “independent” group is a practical and entirely constitutional way to demarcate the boundary between “independence” and “coordination.”

*a. Solicitation by candidates poses a serious threat of corruption and circumvention—even when the funds are solicited for and spent by another entity.*

The Supreme Court has never held that the expenditure of funds raised by a candidate to directly benefit that candidate cannot be regulated as a coordinated expenditure. Indeed, the Court has specifically recognized a serious threat of corruption or its appearance inherent in the act of candidate solicitation itself, in the context of upholding federal law restrictions on candidate solicitation of “soft money” (i.e., money raised outside of contribution amount limits and corporate/union source prohibitions) in connection with any election.<sup>30</sup> The federal solicitation restrictions, which were enacted as part of the Bipartisan Campaign Reform Act of 2002 (BCRA), were challenged and upheld in *McConnell*,<sup>31</sup> including with the vote of Justice Kennedy, who otherwise dissented in the case.<sup>32</sup> In so holding, the Court emphasized “the substantial threat of corruption or its appearance posed by donations to or at the behest of federal candidates and officeholders,” noting that “the value of the donation to the candidate or officeholder is evident from the fact of the solicitation itself.”<sup>33</sup>

The Court’s reasoning in *McConnell* makes clear that permitting a candidate to directly solicit funds on behalf a purportedly independent committee, which will then use the funds for ads that directly benefit that same candidate, poses “a substantial threat of corruption.” If a candidate can solicit unlimited contributions to an “independent” committee—precisely the “quid” that Justice Kennedy identified as toxic—it poses just as serious a threat of a return “quo” to the donor from the grateful candidate who

---

<sup>28</sup> *Id.*

<sup>29</sup> *Id.*

<sup>30</sup> The federal law prohibition on “soft money” fundraising provides: “A candidate ... shall not ... solicit, receive, direct, transfer, or spend funds in connection” with any election unless the funds are subject to the contribution limitations and prohibitions of the Federal Election Campaign Act. *See* 2 U.S.C. § 441i(e)(1)(A) (prohibiting such activity in connection with federal elections) and (B) (prohibiting such activity in connection with nonfederal elections).

<sup>31</sup> 540 U.S. at 142–54, 181–84.

<sup>32</sup> *See id.* at 308 (Kennedy, J. dissenting in part and concurring in part).

<sup>33</sup> *Id.* at 182–84.

solicited the funds (and who will benefit from the spending of them) as a large contribution made directly to the candidate.

The approach to defining coordination reflected in proposed paragraph 1.39(e) would ensure that a donor cannot gain undue influence over a candidate by routing funds through another person or committee for the candidate's direct benefit, and thus effectuates the City's interest in preventing corruption and its appearance. Permitting a candidate to participate in, and solicit unlimited contributions for, "independent" fundraising efforts—when the fundraising proceeds will be used to benefit that very candidate—undeniably presents a "danger that expenditures will be given as a quid pro quo for improper commitments from the candidate."<sup>34</sup> Similarly, such an arrangement would also give rise to "the appearance of improper influence," which must be prevented "if confidence in the system of representative Government is not to be eroded to a disastrous extent."<sup>35</sup>

In short, a candidate's assistance with fundraising, whether accomplished by steering potential contributors to the spender or by making direct solicitations on the spender's behalf, means that the spender's later expenditure for the candidate's benefit is not "independent" in any meaningful sense. Under such circumstances, it can be reasonably inferred that the solicitation is undertaken with an expectation or understanding that the person receiving those funds will use them in ads to benefit the soliciting candidate—and indeed, the risk of a more explicit arrangement, going beyond a "wink or nod" or "general agreement," cannot be realistically denied.

\*\*\*\*\*

For all of the above-stated reasons, I respectfully urge the Board to adopt these amendments. Thank you for the opportunity to testify before you today.

---

<sup>34</sup> *Buckley*, 424 U.S. at 47.

<sup>35</sup> *Id.* at 27 (citation omitted).