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FOR JUSTICE

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July 15, 2014

James A. Walsh, Co-Chair
Douglas A. Kellner, Co-Chair
New York State Board of Elections
40 North Pearl Street, Suite 5
Albany, New York 12207-2729

Re: N.Y. Comp. Codes R. & Regs. tit. 9, § 6200.10 – Disclosure of Independent Expenditures

Dear Co-Chairs Walsh and Kellner:

We write on behalf of the Brennan Center for Justice at NYU School of Law[1] to comment on N.Y. Comp. Codes R. & Regs. tit. 9, § 6200.10, which relates to the disclosure of independent expenditures in New York State elections, and specifically to ask you to make important modifications to this rule before making it permanent.[2]

The rule is the result of a new law passed by the New York State Legislature to require better disclosure of independent political spending in the state.[3] Prompted by the fact that the new law would "take effect June 1, 2014 provided that the board of elections may promulgate such regulations as may be necessary to effectuate this act immediately,"[4] the Board promulgated § 6200.10 on an emergency basis on May 22, 2014.

In our comments, we first examine New York's statutory requirements related to the disclosure of independent expenditures. Second, we recommend that the Board promulgate rules that utilize bright-line standards for determining which communications count as independent expenditures and are therefore subject to disclosure, instead of the multi-pronged test currently embodied in the emergency rule. Finally, we show how the

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[1] The Brennan Center is a non-partisan public policy and law institute that focuses on the fundamental issues of democracy and justice. The Center's Money and Politics project works to reduce the real and perceived influence of money on our democratic values. The opinions expressed in this letter are only those of the Brennan Center and do not necessarily reflect the opinions of NYU School of Law, if any.
[2] N.Y. COMP. CODES R. & REGS. tit. 9, § 6200.10.
[3] 2014 N.Y. Sess. Laws Ch. 55 (A. 8555-D), part H, subpart C, *available at* http://www.elections.ny.gov/NYSBOE/PublicFinancePilot/SubpartC.pdf (enacting N.Y. ELEC. LAW § 14-107).
[4] *Id.* § 7.

modifications we suggest fall squarely within the kind of robust disclosure provisions the Supreme Court and Second Circuit have endorsed.

1. The Board Should Adopt Rules that Require the Disclosure of All Independent Expenditures, As Defined by New York State Statutory Law.

a. New York State statutory law requires the robust disclosure of independent spending.

According to New York State statutory law, whenever an independent expenditure of more than $5,000 is made in New York, the independent spender must disclose certain information related to that expenditure, including the spender's identity and the spender's underlying donors.[5] Hence, the definition of "independent expenditure" determines what information will be disclosed and who will be subject to the disclosure requirements.

The statute defines "independent expenditure" to include two types of communications. First, independent expenditures include most communications which contain express advocacy.[6] This provision is easily applied, but only regulates a fraction of spending in New York State elections.

Second, an independent expenditure includes a communication that "refers to and advocates for or against a clearly identified candidate or ballot proposal on or after January first of the year of the election in which such candidate is seeking office or such proposal shall appear on the ballot."[7] This second provision requires that disclosure extend to communications that go beyond express advocacy. In order to achieve effective disclosure in New York State elections, the Board must promulgate rules that implement this crucial second part of the definition to the fullest extent required by statute.

b. The Board of Elections should require the disclosure of communications that reflect a view on a candidate.

With respect to the second part of the independent expenditure definition, the Board should adopt a rule which specifies that communications which "reflect a view" on a candidate (while satisfying the other statutory criteria) are considered independent expenditures and are therefore subject to disclosure. By adopting such a rule, the Board will implement a bright-line standard that provides clear guidance to spenders and will ensure that the full ambit of communications the New York State Legislature intended to be subject to disclosure will in fact be disclosed.

This rule is derived from a proposal of the Bright Lines Project, "a broad diverse coalition of nonprofit leaders, organizations, and tax law experts" that seeks to clarify the IRS's rules on

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[5] N.Y. ELEC. LAW § 14-107(3)-(4).
[6] *Id.* § 14-107(1)(a)(i).
[7] *Id.* § 14-107(1)(a)(ii). The statute contains a few exemptions from the definition of independent expenditure, including exemptions for certain communications related to news stories, candidate debates, internal communications of membership organizations, and Internet communications that are not paid advertisements. *Id.* § 14-107(1)(b).

political intervention.[8] As the proposal explains, this rule goes "beyond express advocacy, but uses a logical word formula limited to speech that favors or disfavors a candidate."[9] As the Bright Lines Project articulates this standard, "A reference [to a candidate] will be considered to reflect a view if a reasonable, independent reader/listener/viewer could discern the speaker's view based on the contents of the communication with limited reference to the context in which it is made."[10] Note that "This standard does not require that the communication reflect a view about the candidate as a candidate, either explicitly or implicitly. The rule will cover speech that reflects a view about a candidate, e.g., as an incumbent legislator, as a human being, as a parent, as an orator, or in any other former or current profession or capacity."[11] If a regulated communication falls within this definition, unless it is subject to an exception,[12] it will be considered an independent expenditure and be subject to disclosure.[13]

By using this bright-line standard for determining whether a communication is considered an independent expenditure, both spenders and regulators will have clear guidance regarding how the law will be enforced. This will reduce the discretion and confusion that may accompany less precise standards.

For this reason, we prefer our proposed standard to the Board's current standard under the emergency rules. The current standard uses a nonexhaustive, multi-prong test to determine which communications count as independent expenditures and which do not.[14] Though the chosen criteria are suggestive of whether any particular communication is intended to influence an election, our proposal is easier to apply and gives spenders better guidance in helping them determine whether any particular communication that mentions a candidate counts as an independent expenditure. The Bright-Lines Project sought a "definition . . . that is clear and predictable, most of the time,"[15] and we believe this definition achieves that goal.

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[8] *About Us,* BRIGHT LINES PROJECT, http://www.brightlinesproject.org/about-us/ (last visited July 10, 2014). Though, the Bright Lines Project seeks to provide clear rules for defining political intervention in the context of tax law, there is no reason their proposal could not similarly apply in this context. *See* BRIGHT LINES PROJECT, THE BRIGHT LINES PROJECT: CLARIFYING IRS RULES ON POLITICAL INTERVENTION – DRAFTING COMMITTEE EXPLANATION 12-24 (2013) [hereinafter BRIGHT LINES PROJECT PROPOSAL], *available at* http://www.citizen.org/documents/Bright%20Lines%20Project%20Explanation.pdf. "Built upon four years of discussion and feedback, [the proposal was developed by] a committee of nine tax law experts, chaired by Greg Colvin (with Beth Kingsley as vice chair) . . . ." *About Us*, *supra.*

[9] BRIGHT LINES PROJECT PROPOSAL, *supra* note 8, at 12.

[10] *Id.* at 13.

[11] *Id.* at 13 (emphasis and footnote omitted).

[12] The Bright Lines Project further discusses the nuances of the standard we propose, along with its possible exceptions, in its proposal. *See id.* at 12-24.

[13] Note that simply making a communication that reflects a view on a candidate will not be sufficient, by itself, to trigger disclosure obligations. In order to be subject to disclosure, the communication will need to satisfy the other statutory criteria as well, such as being made on or after January 1 of an election year, being made through a regulated medium, clearly identifying the candidate, and not falling within one of the statutory exceptions or such exceptions as the Board might promulgate. N.Y. ELEC. LAW § 14-107(1). These additional requirements ensure that non-electoral communications remains unregulated.

[14] *See* N.Y. COMP. CODES R. & REGS. tit. 9, § 6200.10(b)(1)(a).

[15] BRIGHT LINES PROJECT PROPOSAL, *supra* note 8, at 2.

The "reflect a view" standard best encapsulates the New York State Legislature's statutory command and gives New Yorkers the greatest amount of information about election spending possible. This standard will also be easy to apply to the vast majority of communications. We therefore recommend that the Board adopt the "reflect a view" standard to implement the second provision of the independent expenditure definition.

2. The U.S. Supreme Court and the Second Circuit Have Endorsed Similarly Robust Disclosure Provisions.

Recent U.S. Supreme Court and Second Circuit precedents are clear that disclosure of political spending is generally constitutional, including disclosure provisions similar to the one we have proposed. Contrary to what has been implied by others,[16] the Board is not constitutionally required to utilize the false dichotomy of looking at each communication as constituting either express advocacy or issue advocacy. There is a much broader range of communications that the Board can and must consider in regulating the disclosure of independent spending. Indeed, as explained above, the statute passed by the New York State Legislature requires the Board to go far beyond express advocacy.

a. The U.S. Supreme Court has endorsed strong disclosure provisions, including those that go beyond express advocacy.

The U.S. Supreme Court has made clear that the disclosure of spending in elections is generally constitutional. In *Citizens United*, an 8-1 majority explained that "Disclaimer and disclosure requirements may burden the ability to speak, but they impose no ceiling on campaign-related activities and do not prevent anyone from speaking."[17] Disclosure of election-related spending informs voters about who is trying to influence their votes and helps prevent corruption by exposing large contributions and expenditures to public scrutiny.[18] The Court recently reaffirmed the importance of disclosure in *McCutcheon v. FEC*, explaining that it helps prevent "abuse of the campaign finance system."[19]

Crucially, disclosure requirements can and must extend beyond express advocacy if they are to be effective in capturing all of the money being spent in elections.

The history of disclosure begins with the Supreme Court's 1976 *Buckley v. Valeo* decision. In that case, the Court was tasked with construing an expenditure limitation found in the Federal Election Campaign Act, which provided that "[n]o person may make any expenditure . . . *relative to* a clearly identified candidate during a calendar year which, when

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[16] Comments of the Center for Competitive Politics on Emergency Regulations Relative to Independent Expenditure Reporting (June 9, 2014), *available at* http://www.campaignfreedom.org/2014/06/10/comment-on-the-new-york-emergency-regulations-relative-to-independent-expenditure-reporting/.

[17] Citizens United v. FEC, 558 U.S. 310, 366 (2010) (internal citations and quotation marks omitted). *See also* McCutcheon v. FEC, 134 S. Ct. 1434, 1459 (2014) ("Disclosure requirements burden speech, but . . . they do not impose a ceiling on speech.").

[18] *McCutcheon*, 134 S. Ct. at 1459. Disclosure also furthers the anti-circumvention interest, electoral integrity interest, and due process interest in disclosure in judicial elections. *See* CIARA TORRES-SPELLISCY, BRENNAN CTR. FOR JUSTICE, TRANSPARENT ELECTIONS AFTER *CITIZENS UNITED* 10-12 (2011), *available at* http://www.brennancenter.org/publication/transparent-elections-after-citizens-united.

[19] *McCutcheon*, 134 S. Ct. at 1459.

added to all other expenditures made by such person during the year advocating the election or defeat of such candidate, exceeds $1,000."[20] Determining that the phrase "relative to" was vague, the Court, in an act of statutory interpretation, narrowed the term to only apply to expenditures that contained express advocacy.[21] The Court listed some examples in a footnote which have since become known as the *Buckley* magic words of express advocacy.[22]

However, the story did not end there. In subsequent cases, the Supreme Court has explained that disclosure may constitutionally extend to speech which does not contain the *Buckley* magic words of express advocacy yet nonetheless has sufficient indicia of being intended to influence an election.

In *McConnell v. FEC*, decided in 2003, the Court explained that not only could disclosure provisions extend to speech that went beyond express advocacy, but also that doing so was prudent in order to account for all of the money in our elections. "[T]he unmistakable lesson from the record . . . is that *Buckley*'s magic-words requirement is functionally meaningless," the Court explained.[23] In *McConnell*, the Court recounted a purported issue ad that described how a candidate "took a swing at his wife" and urged viewers to call the candidate and "tell him to support family values." As the Supreme Court correctly explained, "[t]he notion that this advertisement was designed purely to discuss the issue of family values strains credulity."[24]

Most importantly, the Court strongly endorsed broad disclosure in *Citizens United*. In upholding the Bipartisan Campaign Reform Act's electioneering communications disclosure requirements,[25] the Court expressly "reject[ed] th[e] contention" that disclosure requirements must be limited to express advocacy or even "the functional equivalent of express advocacy."[26] Indeed, the disclosure of political ads that mention a candidate close to an election is constitutional "even if the ads only pertain to a commercial transaction [because] the public has an interest in knowing who is speaking about a candidate shortly before an election."[27]

Ultimately, as we explained in our comments submitted to the Board in 2012, "The *Buckley* magic words standard, found in a footnote of an opinion from nearly four decades ago, is not constitutionally required. Using such a standard will thwart any efforts at achieving effective disclosure, and will open a loophole in disclosure that is readily exploited,

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[20] Buckley v. Valeo, 424 U.S. 1, 39 (1976) (emphasis added).
[21] *Id.* at 44. *See also* McConnell v. FEC, 540 U.S. 93, 190 (2003).
[22] "This construction would restrict the application of § 608(e)(1) to communications containing express words of advocacy of election or defeat, such as 'vote for,' 'elect,' 'support,' 'cast your ballot for,' 'Smith for Congress,' 'vote against,' 'defeat,' 'reject.'" *Buckley*, 424 U.S. at 44 n.52.
[23] *McConnell*, 540 U.S. at 193.
[24] *Id.* at 193 n.78.
[25] At the federal level, electioneering communications are most broadcast, cable, or satellite communications (primarily radio and television broadcasts) that identify a candidate by name within 30 days of a primary election or 60 days of a general election. 2 U.S.C. § 434(f)(3)(A)(i). The advertisement must also be "targeted to the relevant electorate" and a few communications are excepted, such as news stories. *Id.* § 434(f)(3)(A)(i)(III), (f)(3)(B)(i).
[26] Citizens United v. FEC, 558 U.S. 310, 368-69 (2010).
[27] *Id.* at 369. *See also* Vt. Right to Life Comm., Inc. v. Sorrell (*VRTL*), No. 12-2904-cv, 2014 WL 2958565, at *10 (2d Cir. July 2, 2014).

dramatically undermining the ability to promote political transparency."[28] Nothing has changed at the U.S. Supreme Court with respect to the constitutionality of extending disclosure beyond express advocacy since that time.

b. The Second Circuit very recently reaffirmed the constitutionality of broad disclosure, including disclosure that extends beyond express advocacy.

Just this month, in *Vermont Right to Life Committee, Inc. v. Sorrell*, the Second Circuit reaffirmed the constitutionality of strong disclosure provisions. In the case, the court upheld the constitutionality of Vermont's disclosure provisions, which include provisions similar to the federal electioneering communications disclosure requirements.[29] In doing so, the Court explained the relative unimportance of the express advocacy line, saying:

> Subsequent Supreme Court decisions clarified that when *Buckley* construed the federal statute to reach express advocacy but exclude issue advocacy, it did not hold that a statute that was neither vague nor overbroad would be required to toe the same express advocacy line. In *Citizens United v. Federal Election Commission*, the Supreme Court clarified that disclosure regimes could sweep more broadly than speech that is the functional equivalent of express advocacy.[30]

In short, under current legal precedents, there is a broad range of speech beyond express advocacy that may constitutionally be subject to disclosure. Consequently, the Board can implement a rule of the kind that we propose.

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With outside spending reaching record highs, the disclosure of who is spending in our elections is more important than ever. Disclosure allows voters to make informed decisions at the ballot box and to guard against improper relationships that might form between candidates and their political benefactors. Therefore, we recommend that the Board implement robust disclosure provisions that cover the full range of communications that are defined as independent expenditures under New York State statutory law.

Respectfully submitted,

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[28] Comments of the Brennan Center for Justice at NYU School of Law on Draft Regulation § 6200.10, Relating to the Disclosure of Independent Expenditures (Apr. 9, 2012), *available at* http://www.brennancenter.org/analysis/comment-nys-board-elections-draft-independent-expenditure-regulations. *See also* Follow-Up Letter to NYS Board of Elections on Draft Independent Expenditure Regulations (June 14, 2012), *available at* http://www.brennancenter.org/analysis/follow-letter-nys-board-elections-draft-independent-expenditure-regulations (bringing then-new Fourth Circuit precedent to the Board's attention); *VRTL*, 2014 WL 2958565, at *9-10 (recounting the Supreme Court's precedents regarding extending disclosure beyond express advocacy).

[29] *See VRTL*, 2014 WL 2958565, at *2-3, *7-12.

[30] *Id.* at *4 n.5 (internal citations and quotation marks omitted).