

**BRENNAN
CENTER
FOR JUSTICE**

Brennan Center for Justice
at New York University School of Law

161 Avenue of the Americas
12th Floor
New York, NY 10013
646.292.8310 Fax 212.463.7308
www.brennancenter.org

Testimony of Daniel I. Weiner

Counsel, Brennan Center for Justice at NYU School of Law

Submitted to the Philadelphia Board of Ethics

September 17, 2014 Hearing

The Brennan Center for Justice at NYU School of Law appreciates the opportunity to discuss before the Board today the proposed amendments to Regulation No. 1's provisions governing coordinated expenditures.¹ The Supreme Court has made clear that Philadelphia has the right to guard against the dangers of real and apparent *quid pro quo* corruption by setting reasonable contribution limits. To prevent wholesale circumvention of such limits, it is essential that expenditures coordinated between candidates and outside groups be treated as contributions. Robust coordination rules have never been more important than they are now, given the exponential increase in outside election spending resulting from *Citizens United* and other recent court decisions. With City elections coming up in 2015 – including a wide open mayor's race – now is the time to make sure that Philadelphia has strong campaign finance laws. We applaud the Board for taking this step.

Regulation No. 1 already classifies some kinds of coordinated expenditures as contributions, but the proposed amendments provide much-needed enhancements. In our view, these changes are reasonable and appropriately tailored to the reality of how campaigns unfold. Accordingly, we believe the relevant provisions of Regulation No. 1 as amended would survive constitutional scrutiny. Adopting the proposed amendments regarding coordinated expenditures (with certain modest revisions) would be a positive step for democracy in this City.²

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 influence of large concentrations of private wealth in our democracy. The opinions expressed in this Testimony are only those of the Brennan Center and do not necessarily reflect the opinions of NYU School of Law, if any.

² Except for the proposed change to section 1.1(r) discussed below, the scope of this Testimony is limited to changes proposed to Regulation No. 1, Subpart H (Coordinated Expenditures). We express no view on the other substantive changes to Regulation No. 1 that have been proposed.

The Constitutionality of Regulating Coordinated Spending

In *Buckley v. Valeo*, the Supreme Court drew a clear line between limits on independent expenditures and limits on contributions to candidates. The Court reasoned that while limits on independent expenditures warrant strict constitutional scrutiny, contribution limits “entail[] only a marginal restriction” on First Amendment rights, and therefore merit less onerous judicial review.³ The *Buckley* Court further explained that third-party expenditures “coordinated” with a candidate could be “treated as contributions,” because “[t]he ultimate effect is the same as if the [spender] had contributed the dollar amount [of the expenditure] to the candidate.”⁴

In the years after *Buckley*, the Court made clear that coordination need not entail actual “agreement or formal collaboration” between a candidate and an outside group.⁵ “[E]xpenditures made after a ‘wink or nod,’” the Court repeatedly observed, “will be ‘as useful to the candidate as cash.’”⁶ Consistent with this reasoning, many jurisdictions presently consider a wide variety of conduct to be indicia of coordination, including sharing material information, employment of common staff or use of a common vendor, republication of campaign communications or materials and candidate fundraising for outside groups active in the candidate’s own race.⁷

Although *Citizens United v. FEC* overruled prior campaign finance jurisprudence in other respects, it left the Court’s longstanding approach to coordination undisturbed. *Citizens United*’s holding invalidating most limits on independent expenditures turned on the “absence of prearrangement and coordination” characteristic of such spending.⁸ It is that absence of coordination, in the Court’s view, which “undermines the value of the expenditure to the candidate” and alleviates the danger of *quid pro quo* corruption.⁹

If anything, the flood of outside spending unleashed by *Citizens United* and related cases necessitates a *more* robust regulatory approach to coordination than jurisdictions might previously have adopted. Because of these decisions, outside spending in U.S. elections has skyrocketed; at the federal level, it tripled between the 2008 and 2012 presidential elections, and quadrupled between the 2006 and 2012 midterm elections.¹⁰ Pennsylvania elections have not

³ 424 U.S. 1, 20, 23 (1976). The controlling plurality in the Court’s recent decision in *McCutcheon v. FEC* explicitly disclaimed “any need to revisit *Buckley*’s distinction between contributions and independent expenditures and the corollary distinction in the applicable standards of review.” 164 S.Ct. 1434, 1445 (2014) (plurality opinion).

⁴ 424 U.S. at 36-37.

⁵ *McConnell v. FEC*, 540 U.S. 93, 219 (2003).

⁶ *Id.* at 221 (quoting *FEC v. Colo. Republican Fed. Campaign Comm.*, 533 U.S. 431, 442, 446 (2001)).

⁷ See 11. C.F.R. § 109.21(d); Fla. St. Ann. § 106.011(12)(b); Ohio Admin. Code § 111-3-02; Conn. Gen. St. Ann. § 9-601c(b); Cal. Code Regs. tit. 2, § 18550.1(b); Minn. Campaign Fin. & Pub. Disclosure Bd. Advisory Op. No. 437, at 5.

⁸ *Citizens United v. FEC*, 558 U.S. 310, 360 (2010).

⁹ *Id.*

¹⁰ See Center for Responsive Politics, *Total Outside Spending by Election Cycle, Excluding Party Committees*, at http://opensecrets.org/outsidespending/cycle_tots.php.

been immune from this trend. The 2010 U.S. Senate race, for example, featured a level of outside spending more than five times that of the prior contest in 2006.¹¹ Moreover, such spending increasingly comes from groups devoted to electing a single candidate – often staffed by the candidate’s family, friends or former staffers.¹² These single-candidate groups allow maxed-out contributors to target particular races in exactly the same way as they can with direct contributions, resulting in exponentially greater corruption concerns.

In addition, more and more outside spending comes from “dark money” groups who are not required to disclose their donors.¹³ Without effective coordination laws, there is nothing to prevent such groups from spending large sums in cooperation with candidates, with little public scrutiny. Secrecy of this nature is a further breeding ground for corruption, and also undermines transparency rules essential for voters to make “informed decisions and give proper weight to different speakers and messages” – which the Supreme Court has wholeheartedly embraced.¹⁴

For all of these reasons, we believe that the enhancements to the coordinated spending provisions of Regulation No. 1 reflected in the proposed amendments would survive judicial review. We support these changes, with certain minor proposed revisions discussed below.

Proposed Subpart H, Section 1.39(e)

Proposed section 1.39(e) states that an expenditure is coordinated if the person who makes the expenditure “does so using funds solicited for or directed to that person by the candidate’s campaign.” We agree with the substance of this revision, but recommend clarifying its language.

¹¹ Total outside spending was approximately \$2.7 million in 2006 and approximately \$13.5 million in 2010. See Center for Responsive Politics, *2006 Outside Spending by Race, Excluding Party Committees*, at <http://www.opensecrets.org/outsidespending/summ.php?cycle=2006&disp=R&pty=N&type=A>; Center for Responsive Politics, *2010 Outside Spending by Race, Excluding Party Committees*, at <http://www.opensecrets.org/outsidespending/summ.php?cycle=2010&disp=R&pty=N&type=A>.

¹² PUBLIC CITIZEN, SUPER CONNECTED 10 (2013), available at <http://www.citizen.org/documents/super-connected-march-2013-update-candidate-super-pacs-not-independent-report.pdf> (estimating that 45% of super PAC spending in 2012 was by groups devoted to electing a single candidate).

¹³ See Trevor Potter & Bryson B. Morgan, *The History of Undisclosed Spending in U.S. Elections and How 2012 Became the “Dark Money” Election*, 27 NOTRE DAME J. L. ETHICS & PUB. POL’Y 383, 384 (2013) (noting “dark money “currently accounts for almost sixty percent of all outside spending at the federal level); Robert Maguire, *How 2014 Is Shaping Up To Be the Darkest Money Election To-Date*, OPENSECRETS.ORG, Apr. 30, 2014, <http://www.opensecrets.org/news/2014/04/how-2014-is-shaping-up-to-be-the-darkest-money-election-to-date/> (finding that the current cycle’s dark money total is on pace to exceed that of 2012 three-fold, notwithstanding the absence of a presidential race). Although the surge in dark money has been most documented at the federal level, dark money is also emerging as a major issue in Pennsylvania state politics. See, e.g., Mike Wereschagin, *Shadowy Group’s Advertisements Slap Pennsylvania Governor*, PITTSBURGH TRIBUNE REVIEW ONLINE, July 7, 2013, at <http://triblive.com/news/allegheeny/4237964-74/accountability-state-union#axzz3D7xigf8j>; Common Cause Pennsylvania, *Exposing Dark Money*, at <http://www.commoncause.org/states/pennsylvania/issues/money-in-politics/exposing-dark-money/> (noting dark money loopholes in Pennsylvania disclosure laws).

¹⁴ *Citizens United*, 558 U.S. at 371; see also *McCutcheon*, 134 S.Ct. at 1460 (plurality opinion) (transparency “arms the voting public with information” and prevents “abuse of the campaign finance system”).

Philadelphia would not be the first jurisdiction to enact a rule taking into account candidate fundraising for an outside group to determine whether that group's expenditures in the candidate's race are coordinated. Recently, for example, Minnesota's Campaign Finance and Public Disclosure Board determined that "fundraising for, or promotion of, an [independent expenditure committee] constitutes cooperation that destroys the independence of any subsequent expenditures made . . . to affect the Candidate's election."¹⁵ Similarly, under Connecticut law as interpreted by its State Elections Enforcement Commission, candidate fundraising for an outside group can be evidence of coordination.¹⁶ A similar rule has been proposed at the federal level, with the Brennan Center's support.¹⁷

We are unaware of any case law specifically determining the constitutionality of such rules, which is unsurprising, given that candidate fundraising for outside groups that can raise and spend unlimited funds is a relatively new phenomenon. Nevertheless, these rules are likely constitutional. As Professor Richard Hasen has observed, "a candidate who raises funds for a group by definition is coordinating fundraising strategy with that group."¹⁸ Especially where the group's stated objective is to work for the candidate's election (as is increasingly the case), candidate fundraising essentially "lets would-be donors and the world know that a donation to the [group] is just as good (or better, given the lack of contribution limits) as a donation to the candidate's campaign."¹⁹ Any notion that the group's spending in the candidate's race remains "independent" of the candidate under these circumstances simply is not credible. To address the inherent *quid pro quo* corruption concerns that arise in connection to such spending, it is appropriate to treat the group's expenditures in the candidate's race as coordinated.

While we agree with the substance of proposed section 1.39(e), we are concerned that its current language could be interpreted more narrowly than intended. According to the proposed language, an expenditure is coordinated if it "us[es] funds" raised by the candidate's campaign. Based on this language, some might argue that the provision applies only to expenditures funded by contributions actually raised by the candidate's campaign, and not to all expenditures by the outside group in the candidate's race. Since money is fungible, such an interpretation would allow easy circumvention of the regulation, as groups could simply deny that they were paying for particular expenditures with candidate-raised funds.

In light of the above concern, it would be preferable to make clear that any candidate fundraising for an outside group renders the group's subsequent expenditures in the candidate's race coordinated. To that end, we suggest altering the current language in proposed section 1.39(e) as follows:

¹⁵ Minn. Campaign Fin. & Pub. Disclosure Bd., Advisory Opinion No. 437, at 5.

¹⁶ Conn. St. Elections Enf. Com'n Decl. Ruling No. 2014-2, at 5.

¹⁷ See Empowering Citizens Act, H.R. 270, 114th Cong. (2014), § 324(c)(1)(B).

¹⁸ See Richard L. Hasen, *Super PAC Contributions, Corruption, and the Proxy War over Coordination*, DUKE J. OF CONST. L. & PUB. POL'Y 16, 20 (forthcoming 2014), at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2383452&download=yes.

¹⁹ *Id.*; accord Richard Briffault, *Coordination Reconsidered*, 113 COLUM. L. REV. SIDEBAR 88, 97 (2013).

The candidate's campaign has solicited funds for or directed funds to the person making the expenditure ~~does so using funds solicited for or directed to that person by the candidate's campaign.~~

Proposed Subpart H, Section 1.40

Proposed section 1.40 seeks to ensure that if an outside spender reproduces, republishes or disseminates campaign communications or materials, the money used to do so will be treated as a contribution. We also support these amendments, with relatively minor suggested edits.

Reproduction of campaign materials is one of the easiest ways for outside groups to circumvent contribution limits, and has thus long been treated as a type of contribution under federal law and the laws of many states.²⁰ Recently, however, many campaigns have sought to exploit what they consider to be a loophole in such laws, by producing professional video footage and other images of candidates and putting these materials online for use by outside groups in their own advertisements (a tactic the press has dubbed “McConnelling,” because it was pioneered by the campaign of Senate Minority Leader Mitch McConnell).²¹

Proposed section 1.40 appropriately treats such conduct and other outside efforts to disseminate campaign communications and materials as contributions. Republication of this sort provides a direct benefit to a candidate, no different than any other type of in-kind contribution. Moreover, by making stock footage and other images available online for use by outside groups, campaigns are engaging in exactly the sort of “wink or nod” that is the essence of most coordination.

Although we support enactment of proposed section 1.40, we do recommend certain relatively minor clarifications.

First, proposed section 1.40(b) discusses when an expenditure to republish campaign communications or materials “[s]hall be considered an in-kind contribution for the purposes of the contribution limits that apply to the candidate....” Some might read “contribution limits that apply to the candidate” to refer only to the candidate-specific limits set forth in Philadelphia Code § 20-1002(3), which we doubt is the Board’s intent. To clarify that this provision applies to all Philadelphia contribution limits, we propose the following edit, along with a conforming edit to proposed section 1.40(a):

- a. Shall be considered an in-kind contribution **made by** ~~for the purpose of the contribution limits that apply to~~ the person making the expenditure.

²⁰ See 11 C.F.R. § 109.23; Coordinated and Independent Expenditures, 68 Fed. Reg. 421. 441-42 (Fed. Election Com’n 2003); Ohio Admin. Code § 111-3-02; Fla. Stat. Ann. § 106.011(12)(b); Me. Rev. Stat. tit. 21-A, § 1015(5).

²¹ See Jaime Fuller, *The Fix: How ‘McConnelling’ Came To Be The Hottest Thing on the Political Web*, THE WASHINGTON POST ONLINE, Mar. 14, 2014, at <http://www.washingtonpost.com/blogs/the-fix/wp/2014/03/14/how-mcconnelling-came-to-be/>.

- b. Shall be considered an in-kind contribution **received by** ~~for the purposes of the contribution limits that apply to~~ the candidate if the person making the expenditure obtains the communication or materials directly from the candidate's campaign or from another source with the consent of the candidate's campaign...

Second, proposed section 1.40(c)(ii) provides that republished communications or materials do not constitute in-kind contributions if “[t]he news media reproduces, republishes, or disseminates the communication or material.” We believe that the Board’s intent is to create an exception only for news media, such that a media outlet’s republication of campaign communications or materials does not constitute a contribution. To clarify that purpose, we propose the following changes:

- c. Shall not be considered an in-kind contribution for the purposes of the contribution limits if:

...

- ii. **The expenditure is made by** ~~the news media reproduces, republishes, or disseminates the communication or materials~~ **for the cost of covering or carrying a news story, commentary or editorial.**

Section 1.1(r)

Finally, we note that use of the term “person” in several provisions of Regulation No. 1, including those discussed above, could create ambiguity because the term as defined in section 1.1(r) does not expressly include political committees (which are not otherwise named in the relevant provisions), and refers only to entities that are “business organizations.” While we doubt that a reasonable reader could interpret these provisions, read in context, not to apply to political committees or other entities making expenditures, for avoidance of doubt we suggest the following modifications to section 1.1(r):

- r. **Person.** An individual, or a partnership, sole proprietorship, other form of business **or nonprofit** organization, **or a political committee.**

If the Board makes this proposed change, it may also wish to replace the phrase “person or political committee” where it appears in Regulation No. 1 with the word “person” to avoid redundancy.

* * *

The proposed changes to Regulation No. 1’s provisions governing coordinated expenditures will help to protect the integrity of Philadelphia’s elections from the risks posed by real and apparent *quid pro quo* corruption. We applaud the Board’s efforts to improve the City’s campaign finance laws in this manner, and would be happy to provide any further assistance that may be required.