CENTER for COMPETITIVE POLITICS
Congress shall make no law...
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June 9, 2014

Chairman James A. Walsh
Chairman Douglas A. Kellner
New York State Board of Elections
40 North Pearl St., Ste. 5
Albany, NY 12207-2729

Via Electronic Mail: regcomments@elections.ny.gov

Dear Co-Chairman Kellner, Co-Chairman Walsh, and Members of the Board:

On behalf of the Center for Competitive Politics ("CCP"),[1] I write to respectfully comment on the Emergency Regulations Relative to Independent Expenditure Reporting, which the Board adopted at its May 22, 2014 meeting ("Regulations"). In particular, I direct the Board's attention to the potentially unforeseen constitutional and practical consequences of these changes to New York campaign finance law. Constitutionally problematic legislation or regulation may be of particular concern to the State, as it may trigger costly, time-consuming litigation.

CCP's most significant concern with the Regulations stems from their tendency to increase, rather than limit, vagueness regarding what speech qualifies as an independent expenditure. State law requires those making independent expenditures to register as political committees and file detailed campaign finance reports.[2] Given these burdens, the standard for determining what speech qualifies as an independent expenditure is particularly important.

But rather than clarifying what expressive activity will trigger these (not insubstantial) requirements, the Regulations make it significantly more difficult for speakers to determine, in advance, whether their desired speech will be an independent expenditure. Instead, they abandon the pre-Regulation law's crisp standard—which is firmly rooted in United States Supreme Court precedent—and replace it with a vague, amorphous test that chills speech and vests state bureaucrats with significant discretion to sanction speech after the fact.

[1] Founded in 2005 by Bradley A. Smith, former Chairman of the Federal Election Commission, CCP is a nonpartisan, nonprofit § 501(c)(3) organization that promotes and protects the First Amendment political rights of speech, assembly, and petition. In addition to scholarly and educational work, CCP is actively involved in targeted litigation against unconstitutional laws at both state and federal levels. For example, CCP presently represents nonprofit, incorporated associations in challenges to state campaign finance laws in Nevada, Colorado, and Delaware, and engages in litigation at all levels of the federal judiciary.
[2] N.Y. ELEC. LAW § 14-107 (3)(A) & (B).

I. The Historical Distinction Between Candidate and Issue Speech

In order to understand the gravity of the Regulations, one must begin with the United States Supreme Court's landmark campaign finance decision, *Buckley v. Valeo*,[3] which drew the crucial distinction between speech about candidates and speech about issues. *Buckley* was an early challenge to the Federal Election Campaign Act ("FECA"). The Court underscored the importance of safeguarding issue speech from the unconstitutional chill that can result from campaign finance regulation:

> [f]or the distinction between discussion of issues and candidates and advocacy of election or defeat of candidates may often dissolve in practical application. Candidates, especially incumbents, are intimately tied to public issues involving legislative proposals and governmental actions.[4]

Consequently, the Court limited registration and reporting requirements to those independent speakers whose communications contained "magic words"—"express words of advocacy of election or defeat, such as 'vote for,' 'elect,' 'support,' 'cast your ballot for,' 'Smith for Congress,' 'vote against,' 'defeat,' [and] 'reject.'"[5] "This reading," the Court reasoned, "is directed precisely to that spending that is unambiguously related to the campaign of a particular federal candidate."[6] This fundamental principle—that discussion of issues cannot be subject to the same government burdens as discussion of candidates ("express advocacy")—has guided campaign finance law for almost forty years, and rests at the core of every modern First Amendment campaign finance case.

The difficulty inherent in distinguishing between candidate and issue speech—and the constitutional requirement to err on the side of protecting rather than censoring speech—is elegantly demonstrated by another early challenge to FECA, one decided by the U.S. Court of Appeals for the Second Circuit. There, a group called the National Committee for Impeachment placed an ad in the *New York Times* calling for the president's impeachment, and listing members of Congress who had passed a resolution essentially calling for that same result. The government asserted that engaging in such speech rendered the National Committee for Impeachment a political committee, and thus sought to enjoin it from accepting contributions until it registered and filed reports under FECA. The Second Circuit disagreed, finding that the ad focused on the issues of impeachment and war policy, rather than electing or defeating candidates for Congress. It rejected the government's argument that the ad triggered political committee status—and the attendant reporting and disclosure requirements—because

> On this basis every position on any issue, major or minor, taken by anyone would be a campaign issue and any comment upon it in, say, a newspaper editorial or an advertisement would be subject to proscription unless the registration and disclosure regulations of the Act in question were complied with. *Such a result would, we think, be abhorrent*…Any organization would be wary of expressing any viewpoint lest under the Act it be required to register, file reports, disclose its contributors, or the like. On the Government's thesis every little Audubon Society chapter would be a "political committee," for "environment" is an issue in one

[3] 424 U.S. 1 (1976).
[4] 424 U.S. at 42.
[5] *Id*. at 44 n. 52.
[6] *Id.* at 80.

> campaign after another. On this basis, too, a Boy Scout troop advertising for membership to combat "juvenile delinquency" or a Golden Age Club promoting "senior citizens' rights" would fall under the Act. The dampening effect on first amendment rights and the potential for arbitrary administrative action that would result from such a situation would be intolerable.[7]

Myriad examples demonstrate that this distinction—crucial as it is—is often difficult to draw. In the decades of campaign finance litigation since *Buckley*, the Supreme Court has considered challenges to FECA and its successor, the Bipartisan Campaign Reform Act ("BCRA"). Such cases have explored at length the constitutionality of the burdens that campaign finance laws—including, for example, PAC-formation requirements and disclosure regimes—impose upon independent speakers.[8] These burdens, and the incidental chilling of speech that results, have remained a crucial consideration in distinguishing between candidate and issue speech. Throughout, the Court has consistently reiterated that—difficult as it may at times be to distinguish between candidate and issue speech—"[w]here the First Amendment is implicated, the tie goes to the speaker, not the censor."[9]

II. The Regulations' Impact on New York Law

Before the Regulations took effect, New York protected issue speech by hewing closely to the Supreme Court's guidance: independent expenditure reporting and disclosure was limited to speakers engaged in express advocacy.[10] The Board explicitly recognized express advocacy as "a standard created by the United States Supreme Court in *Buckley v. Valeo*," which defines the

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[7] *United States v. Nat'l Comm. for Impeachment*, 469 F.2d 1135, 1142 (2d Cir. 1972) (emphasis supplied).

[8] *See, e.g., FEC v. Mass. Citizens for Life, Inc.*, 479 U.S. 238, 243 (1986) ("*MCFL*"), where the Court concluded that a special edition newsletter produced by nonprofit corporation MCFL, bearing the headline "EVERYTHING YOU NEED TO KNOW TO VOTE PRO-LIFE," qualified as express advocacy under BCRA. Consequently, MCFL was required to form a PAC before spending corporate money to distribute that special edition newsletter. The Court considered that "the administrative costs of complying with such increased responsibilities may create a disincentive for the organization itself to speak." *MCFL,* 479 U.S. at 254, n. 7 (Brennan, J., plurality). As a result of this disincentive, "it would not be surprising if at least some groups decided that the contemplated political activity was simply not worth it." *Id*. at 255. "The fact that [a] statute's practical effect may be to discourage protected speech is sufficient to characterize [that statute] as an infringement on First Amendment activities." *Id.* (citing *Freedman v. Maryland*, 380 U.S. 51 (1965); *Speiser v. Randall*, 357 U.S. 513 (1958)). Thus, the *MCFL* Court invalidated the PAC-formation requirement as applied to MCFL, finding it unconstitutionally burdensome for the government to require a nonprofit corporation to form a separate entity before engaging in the type of express advocacy at issue there. In so doing, the Court established an exception to the prohibition on corporate independent expenditures. MCFL was still required to comply with the applicable reporting and disclosure requirements. In *Citizens United v. FEC*, 558 U.S. 310 (2010), the Court wholly invalidated the requirement that a corporation form a PAC before speaking, again considering the burden such requirements impose. Justice Kennedy's majority opinion focused specifically on the fact that "PACs are burdensome alternatives; they are expensive to administer and subject to extensive regulations." *Citizens United*, 558 U.S. at 337. Like MCFL, Citizens United was still required to comply with applicable reporting and disclosure obligations. The burden PAC formation requirements impose—in the context of the speaker's sophistication (or lack thereof)—was a pivotal consideration in assessing the constitutionality of the laws at issue in both *MCFL* and *Citizens United*.

[9] *FEC v. Wis. Right to Life, Inc.*, 551 U.S. 449, 474 (2007) (opinion of Roberts, C.J.).

[10] N.Y. COMP. CODES R. & REGS. tit. 9 § 6200.10(b)(1)(2012) (defining an independent expenditure as "an expenditure made in support or opposition of a candidate that expressly advocates for the election or defeat of a candidate and that the candidate or his/her agents or authorized political committee(s) did not authorize, request, suggest, foster or cooperate with in any way").

term as "a communication that contains express words such as vote, oppose, support, elect, defeat, or reject, which call for the election or defeat of a candidate."[11]

The Regulations, however, abandon this historical standard in favor of an ambiguous, multi-factor analysis. Effective May 22, an independent expenditure apparently occurs every time a state regulator says so.[12] The Regulations list some factors to consider in determining whether a communication qualifies as an independent expenditure, but note that those factors are not exhaustive. In addition to the ambiguous wording of the factors themselves—which is self-evident—regulators' newfound freedom to consider anything they choose in determining whether a communication is an independent expenditure vastly increases the law's vagueness.

The Supreme Court has long recognized the danger of vesting officials with excessive discretion in determining how far the First Amendment's protections extend,[13] as "[p]recision of regulation must be the touchstone in an area so closely touching our most precious freedoms."[14] Even more concerning than this unbridled discretion is the fact that vague laws—particularly in

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[11] N.Y. COMP. CODES R. & REGS. tit. 9 § 6200.10(b)(2)(2012).

[12] N.Y. COMP. CODES R. & REGS. tit. 9 § 6200.10(b)(1)(2014) provides

> For purposes of this regulation "Advocates for or Against" means—in the absence of explicit words of advocacy for or against a candidate…through the use of images, photos, or language which promotes, supports, attacks, or opposes for or against the Clearly Identified Candidate....
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> For purposes of determining whether or not a communication is advocating for or against a candidate…the following factors shall be considered, but shall not be limited to:
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> a. Whether it identifies a particular candidate by name or other means such as party affiliation or distinctive features of a candidate's platform or biography;
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> b. Whether it expresses approval or disapproval for said candidate's positions or actions;
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> c. Whether it is part of an ongoing series by the group on the same issue and the series is not timed to an election;
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> d. Has the issue raised in the communication been raised as a distinguishing characteristic amongst the candidates; and
>
> e. Whether its timing and the identification of the candidate are related to a non-electoral event (e.g.. [SIC] a vote on legislation by an officeholder who is also a candidate).

[13] *See, e.g., Forsyth County v. Nationalist Movement*, 505 U.S. 123, 129-130 (1992) (noting that

> the Court has permitted a party to challenge an ordinance under the overbreadth doctrine in cases where every application creates an impermissible risk of suppression of ideas, *such as an ordinance that delegates overly broad discretion to the decisionmaker*, and in cases where the ordinance sweeps too broadly, penalizing a substantial amount of speech that is constitutionally protected.

(citations omitted) (emphasis supplied). *See also, e.g., Saia v. New York*, 334 U.S. 558, 562 (1948) (invalidating under the First Amendment an ordinance that lacked any standard for obtaining a permit to use sound amplification devices, and noting, "[a]ny abuses which loud-speakers create can be controlled by narrowly drawn statutes. When a city allows an official to ban them in his uncontrolled discretion, it sanctions a device for suppression of free communication of ideas.").

[14] *NAACP v. Button*, 371 U.S. 415, 438 (1963).

the First Amendment context—chill speech. Thus, such laws have been consistently decried by the Supreme Court, because they

> put the speaker in these circumstances wholly at the mercy of the varied understanding of his hearers and consequently of whatever inference may be drawn as to his intent and meaning. Such a distinction offers no security for free discussion. In these conditions it blankets with uncertainty whatever may be said. It compels the speaker to hedge and trim.[15]

In other words, "vague laws chill speech" because "[p]eople 'of common intelligence must necessarily guess at [the law's] meaning and differ as to its application.'"[16] This cannot be reconciled with the First Amendment's protection of free expression.

Instead of ensuring that political speech is uniformly and constitutionally regulated, the Regulations muddy the waters, replacing a crisp and constitutional rule with a collection of amorphous considerations. This invites political gamesmanship and partisan polarization where messages should instead be judged on their merits by voters. Moreover, the confusing new rules will inevitably require speakers to hire expert attorneys in this highly specialized area of law, or—for the unprivileged small organizations that cannot afford such help—risk enforcement actions that can drive them from public debate.

Moreover, there is no discernable reason *why* changes with such problematic consequences are necessary, justified, or even rational. Indeed, the statute the Board relied upon in promulgating the Regulations does not require such a significant expansion of regulatory power or discretion. Subpart C does expand the scope of regulable activity regarding independent expenditures, but does so in a manner that could—with more careful regulation—easily comport with *Buckley*.

The new statute continues to regulate express advocacy whenever it occurs, and specifies that independent expenditures for communications which "refer[] to and advocate[] for or against a clearly identified candidate"[17] during a given time period also trigger reporting and disclosure.

Demonstrably, there are constitutionally problematic ways to administer such legislation. But it is also possible to regulate speech that lacks *Buckley*'s "magic words" of express advocacy while still respecting the crucial distinction between candidate and issue speech. In fact, such a standard appears to have been attempted by the Board, but is not reflected in the final Regulations adopted on May 22. Indeed, the Board's website displays a proposed version of the Regulations containing several safeguards for issue speech that appear to have been deleted during the editing process.[18] These included consideration of whether "[t]he electoral portion of the communication is unmistakable, unambiguous and suggestive of only one meaning,"[19] as well as the timing of the speech, and whether it referred to voting in an election.

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[15] *Buckley v. Valeo*, 424 U.S. at 43 (quoting *Thomas v. Collins,* 323 U.S. 516, 535 (1945)).
[16] *Citizens United v. FEC*, 558 U.S. at 324 (quoting *Connally v. General Constr. Co.*, 269 U.S. 385, 391 (1926) (alterations in original)).
[17] N.Y. ELEC. LAW § 14-107(a)(iii)(ii)(2014).
[18] Proposed § 6200.10(b)(1)(a)(ii), *IE draft regulation 5/21/14 4:36 pm v2*, NEW YORK STATE BOARD OF ELECTIONS, available at http://www.elections.ny.gov/NYSBOE/download/finance/EmergencyRegulation-IE.pdf (last accessed June 2, 2014).
[19] *Id.*

Though absent from the enacted Regulations, these limitations would have served the important purpose of creating a modest carve-out for issue speech. Such carve-outs are important first because they give speakers more notice of the type of activity that can trigger independent expenditure regulation, lessening the vagueness concerns considered above. Second, they at least somewhat cabin the state's regulatory reach, and hew a bit more closely to Supreme Court precedent, decreasing the risk of a legal challenge to the law. By contrast, the adopted Regulations reflect a significant power-grab by the Board, completely removing even the modest guidance for independent speakers present in the proposed draft.

The consequences of this could prove grave and regrettable in the event of litigation. In fact, consideration of whether a communication contained an "electoral portion," which "is unmistakable, unambiguous, and suggestive of only one meaning" echoes verbatim an analogous federal regulation.[20] The Federal Election Commission requires the presence of such an "unmistakable" electoral portion precisely because a federal court has upheld this interpretation of "express advocacy" as constitutional.[21] Thus, absent a similar limitation on what

[20] *Compare id.* ("For purposes of determining whether or not a communication is advocating for or against a candidate or ballot proposal, the following factors shall be considered, but shall not be limited to…the electoral portion of the communication is unmistakable, unambiguous and suggestive of only one meaning") *with* 11 CFR 100.22 ("Expressly advocating means any communication that

> (a) Uses phrases such as "vote for the President," "re-elect your Congressman," "support the Democratic nominee," "cast your ballot for the Republican challenger for U.S. Senate in Georgia," "Smith for Congress," "Bill McKay in 94," "vote Pro-Life" or "vote Pro-Choice" accompanied by a listing of clearly identified candidates described as Pro-Life or Pro-Choice, "vote against Old Hickory," "defeat" accompanied by a picture of one or more candidate(s), "reject the incumbent," or communications of campaign slogan(s) or individual word(s), which in context can have no other reasonable meaning than to urge the election or defeat of one or more clearly identified candidate(s), such as posters, bumper stickers, advertisements, etc. which say "Nixon's the One," "Carter '76," "Reagan/Bush" or "Mondale!"; or
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> (b) When taken as a whole and with limited reference to external events, such as the proximity to the election, could only be interpreted by a reasonable person as containing advocacy of the election or defeat of one or more clearly identified candidate(s) because –
>
> (1) The electoral portion of the communication is unmistakable, unambiguous, and suggestive of only one meaning; and
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> (2) Reasonable minds could not differ as to whether it encourages actions to elect or defeat one or more clearly identified candidate(s) or encourages some other kind of action.").

[21] *See FEC v. Furgatch*, 807 F.2d 857, 864 (9th Cir. 1987), which adopted

> a standard for "express advocacy" that will preserve the efficacy of the Act without treading upon the freedom of political expression. We conclude that speech need not include any of the words listed in Buckley to be express advocacy under the Act, but it must, when read as a whole, and with limited reference to external events, be susceptible of no other reasonable interpretation but as an exhortation to vote for or against a specific candidate. This standard can be broken into three main components. First, even if it is not presented in the clearest, most explicit language, speech is "express" for present purposes if its message is *unmistakable and unambiguous, suggestive of only one plausible meaning*. Second, speech may only be termed "advocacy" if it presents a clear plea for action, and thus speech that is merely informative is not covered by the Act. Finally, it must be clear what action is advocated. Speech cannot be "express advocacy of the election or defeat of a clearly identified candidate" when reasonable minds could differ as to whether it encourages a

communications qualify as independent expenditures, the Regulations likely lie on shaky constitutional ground.

* * *

Thank you for allowing me to submit these comments, and for your attention to this sensitive constitutional issue. I hope you will find this information helpful in issuing appropriate permanent regulations once the emergency regulations' 90-day applicability period has lapsed. Should you have any further questions regarding these issues or any other campaign finance proposals, I welcome you to contact me at (703) 894-6800 or by e-mail at adickerson@campaignfreedom.org

Respectfully submitted,

Allen Dickerson
Legal Director

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vote for or against a candidate or encourages the reader to take some other kind of action. We emphasize that if any reasonable alternative reading of speech can be suggested, it cannot be express advocacy subject to the Act's disclosure requirements.

(emphasis supplied).