



August 17, 2022

Michael H. Reed, Esq.
Chair
Philadelphia Board of Ethics
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Dear Mr. Reed:

Regulation No.1 raises serious free speech concerns in its proposed treatment of publicly available information in defining coordinated expenditures. The measure, if adopted, would likely be unconstitutional and would lead to self-censorship.

The proposed change in Subpart I (on pp. 20-21) would provide as follows:

An expenditure is coordinated with a candidate's campaign if it is made in cooperation, consultation or concert with the candidate's campaign, including the following...

f. The person making the expenditure uses information obtained from the campaign, unless the campaign provided that information to the general public.

Information is not provided to the general public if the circumstances indicate that the campaign has made the information available so that another person may use that information to make expenditures supporting the campaign in a manner suggested by the campaign.

To avoid infringing on the First Amendment to the U.S. Constitution, the Board of Ethics should delete the second paragraph of Subpart I(f). This would make the proposed rule consistent with the federal exception for publicly available information in defining coordinated communications.¹

In 2003, the year that the revised federal coordinated communications regulation took effect, the Federal Election Commission (FEC) provided a detailed explanation of how to interpret its rule.² In its Explanation and Justification, the FEC noted that the provision defining requests or suggestions as coordinated communications "is intended to cover

¹ 11 C.F.R. §109.21.

² Coordinated and Independent Expenditures, 68 Fed. Reg. 421 (Jan. 3, 2003).

requests or suggestions made to a select audience, but not those offered to the public generally.”³ It went on to state that “a request that is posted on a web page that is available to the general public is a request to the general public and does not trigger the conduct standard...but a request posted through an intranet service or sent via electronic mail directly to a discrete group of recipients constitutes a request to a select audience and thereby satisfies the conduct standard.”⁴

When the FEC recently dismissed the complaint filed against VoteVets (Matter Under Review 7700), the bipartisan Statement of Reasons explained the rationale for dismissal. There, “the complaint alleged that” Pete Buttigieg’s presidential election committee “requested or suggested that VoteVets create and air pro-Buttigieg television advertisements” after a senior official for the committee tweeted, “Pete’s military experience and closing message from Iowa work everywhere especially in Nevada where it’s critical they see this on the air through the caucus.”⁵ The complaint claimed that this communication was coordinated and VoteVets “responded to the tweet by spending \$639,0000 to produce and air television advertisements, which it reported as independent expenditures.”⁶

The FEC noted that the tweet was ambiguous, as “it could have been a generalized call for independent Buttigieg supporters to get off the sidelines and full-throatedly support the candidate ahead of the Nevada caucuses.”⁷ The FEC continued, “It could also be interpreted as a statement forecasting the Committee’s intentions for its own advertising in Nevada, rather than a request for someone else’s spending.”⁸

Additionally, VoteVets already paid for communications “highlight[ing] Buttigieg’s military service.”⁹ After the tweet, VoteVets aired another advertisement “prais[ing] Buttigieg’s military service.”¹⁰ The complaint interpreted this history to show that VoteVets was “the only super PAC...that could reasonably be expected to follow through on the request or suggestion,” indicating coordination.¹¹

The FEC found that the consistent advertising supported VoteVet’s autonomy. Additionally, the fact that a *Politico* article from the same day as the tweet quoted Buttigieg’s committee spokesperson stating, “[Buttigieg] is the only candidate who isn’t a millionaire or billionaire. And if the largest progressive veterans group wants to help spread the word about his service, we welcome it,” did not add a coordination inference.¹²

More importantly, the Supreme Court’s ruling in *Federal Election Commission v. Ted Cruz for Senate* is instructive. There, the Court stated that “the First Amendment requires

³ *Id.* at 432

⁴ *Id.*

⁵ [FEC MUR 7700, at 3 \(2022\)](#).

⁶ *Id.* at 1.

⁷ *Id.* at 3.

⁸ *Id.*

⁹ *Id.*

¹⁰ *Id.*

¹¹ *Id.*

¹² *Id.*

us to err on the side of protecting political speech rather than suppressing it.”¹³ The Court also noted, “The First Amendment has its fullest and most urgent application precisely to the conduct of campaigns for political office.... This broad protection, we have explained, reflects our profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open.”¹⁴

The second paragraph of Subpart I(f) cannot withstand judicial scrutiny. In the Supreme Court’s words:

This Court has recognized only one permissible ground for restricting political speech: the prevention of “quid pro quo” corruption or its appearance. See *id.*, at 207; see also *Federal Election Comm’n v. National Conservative Political Action Comm.*, 470 U. S. 480, 497 (1985). We have consistently rejected attempts to restrict campaign speech based on other legislative aims. For example, we have denied attempts to ... limit the general influence a contributor may have over an elected official, see *Citizens United v. Federal Election Comm’n*, 558 U. S. 310, 359–360 (2010). However well intentioned such proposals may be, the First Amendment—as this Court has repeatedly emphasized—prohibits such attempts to tamper with the “right of citizens to choose who shall govern them.” *McCutcheon*, 572 U. S., at 227; see also *Davis*, 554 U. S., at 742; *Bennett*, 564 U. S., at 750.¹⁵

In the opinion, the Supreme Court also notes that conclusive evidence is required:

Because the Government is defending a restriction on speech as necessary to prevent an anticipated harm, it must do more than simply posit the existence of the disease sought to be cured. It must instead point to record evidence or legislative findings demonstrating the need to address a special problem. We have never accepted mere conjecture as adequate to carry a First Amendment burden.¹⁶

The Board presents no such evidence that would justify this proposed regulation. It fails to offer proof of quid pro quo corruption or its appearance where a candidate releases information to the public and a group later makes independent expenditures. Without the connection between expenditures and an exchange by the candidate, none of the dangers that contribution laws aim to alleviate are present.¹⁷

It is implausible that publicly available information could be used to effectuate a quid pro quo exchange. If the information is readily available to everyone, it is not, as the FEC noted, “a request to a select audience” to provide the necessary quid, much less the quo.

Indeed, such public information could just as easily be used by supporters of another candidate. Example 2 of the proposed regulation states that Candidate A “says that voters in South Philadelphia need to know the information contained in the red box.” Yet

¹³ [FEC v. Cruz](#), slip op., at 16 quoting, [McCutcheon v. FEC](#), 572 U.S. 185, 209 (2014).

¹⁴ *Id.* at 12–13.

¹⁵ *Id.* at 13–14.

¹⁶ *Id.* at 15 (citations and internal quotation marks omitted).

¹⁷ See *Citizens United v. SEC*, 558 U.S. 310 (2011); *McConnell v. FEC*, 540 U.S. 93 (2003).

supporters of Candidate B could use the same information to design communications to undermine the message explained in the red box. To allow supporters of Candidate B to use the information to design communications while prohibiting supporters of Candidate A from doing the same thing unless it bears the additional burdens of the proposed coordination regulation resembles textbook viewpoint discrimination.

Worse, the plain text of the proposed regulation would appear to apply to any publicly available information, such as news articles or blog posts on the candidate's strategy that quote the candidate or campaign officials.

The media and blogs routinely report on this subject. Of course, these news sources are not clairvoyant. Presumably, they reported on the candidate's needs through interviews of the candidate or campaign agents or review of public statements. Thus, any independent speaker who is informed by these publicly available reports would – in the language of the proposal – have received information “so that another person may use that information to make expenditures supporting the campaign in a manner suggested by the campaign.”

Any such public information would appear to create at least a danger of a presumption that the expenditure is coordinated. Given the sheer breadth of the proposed rule, independent speakers would have to hermetically isolate themselves from the rest of the world lest their speech be considered “coordinated” with a candidate. They could not use the internet, read social media, a newspaper or a blog, listen to the radio, or talk to anyone who may have done so. And even then, they might have to prove a negative.

Surely, an independent expenditure cannot be coordinated simply because it is informed by a candidate's desire to see voters given certain information. In short, the proposal is wildly unrealistic.

The U.S. Supreme Court has held clearly that independent political speech must be protected¹⁸, and municipalities are not free to disregard the Court's holding¹⁹, no matter how difficult it may be to grapple with the challenge of limiting quid pro quo corruption or its appearance.

The language of Subpart I(f)'s second paragraph is too broad, too vague, and contrary to Supreme Court rulings. It should be removed from the final version of the proposed regulation.

Respectfully submitted,

David Keating
President

¹⁸ See, e.g., *Citizens United v. Fed. Election Comm'n*, 558 U.S. 310 (2010).

¹⁹ See *Amer. Tradition Partnership v. Bullock*, 132 S. Ct. 2490 (2012).