BRENNAN
CENTER
FOR JUSTICE

Brennan Center for Justice
*at New York University School of Law*

161 Avenue of the Americas
12th Floor
New York, New York 10013
212.998.6730 Fax 212.995.4550
www.brennancenter.org

**Testimony of**

**MARK LADOV**
**Counsel, Democracy Program,**
**Brennan Center for Justice at NYU School of Law**

**Before the**
**NEW YORK CITY**
**CAMPAIGN FINANCE BOARD**

**For the hearing on**
**PROPOSED RULES FOR THE**
**DISCLOSURE OF INDEPENDENT EXPENDITURES**

**October 27, 2011**

Mr. Chairman and Members of the Committee:

On behalf of the Brennan Center for Justice, I want to thank you for holding this important hearing, and for the chance to speak with you once more regarding the proposed rules for the disclosure of independent expenditures.

As the Brennan Center testified previously, we applaud the Board for its efforts to encourage transparency in politics. The disclosure of independent spending is necessary to ensure that voters have the information they need to carefully evaluate candidates and ballot measures on Election Day. Independent spending has become an increasingly important part of the electoral landscape since the Supreme Court's ruling in *Citizens United v. FEC*,[1] which permitted unrestricted corporate spending—and also set the stage for many of the new issues we're seeing around the country, such as massive "independent" Super PAC campaigns and secretive spending practices by certain types of non-profit corporations.

It is difficult to pick up the newspaper without reading a new report about a Super PAC being formed to run an "independent" campaign in support of one of the current crop of presidential candidates.[2] And the phenomenon is not limited to presidential or national

[1] 130 S. Ct. 876 (2010).

[2] *See, e.g.,* Richard L. Hasen, "Super-Soft Money: How Justice Kennedy paved the way for SuperPACS and the return of soft money," *Slate* (Oct. 25, 2011),

politics: in a recent and extremely contentious race for Wisconsin Supreme Court, for example, the two candidates were heavily outspent by well-funded independent organizations, which occasionally made the candidates look like bystanders in their own campaigns.[3]

In short, independent spending is becoming as important as candidate spending when it comes to electoral campaigns and the voters' evaluation of political candidates.[4] Moreover, Public Advocate Bill DeBlasio has documented that outside groups are more likely than the candidates themselves to run negative ads—throwing mud while leaving the candidates' hands clean—meaning that secrecy in independent spending only encourages negative and misleading campaigns.[5]

We do not note these concerns, of course, to suggest independent electioneering should be discouraged. Independent political activity is protected by the First Amendment, and should be encouraged as part of the rough and tumble of a participatory democracy. But transparency is a necessary ingredient in this mix: in the context of an election campaign, disclosure serves at least two critical goals. *First,* disclosure ensures that voters know who is behind electoral communications. *Second,* disclosure informs voters about how much is being spent on certain candidates and issues, so that they can "follow the money" in the political process. We strongly support the Board's efforts to further those interests in a valuable and meaningful way.

We also recognize that the Board is engaged in a very difficult task. The Board must implement the City Charter in a manner that captures meaningful information for voters, and does not create loopholes for secretive political spending. At the same time, the rules must be sufficiently clear to allow individuals and organizations to comply with the law and easily report the required information. We recognize the difficulty of maintaining that balance. And we applaud the Board and its staff members for the extremely thoughtful and diligent effort they have made so far—as well as for their efforts to solicit input and receive comments from various stakeholders in this discussion.

In that spirit, we would like to provide the following recommendations to the Board. Our testimony today is focused on the definition of "express advocacy" and "electioneering communications," although we would be happy to discuss other questions today or with the Board in the future.

---

http://www.slate.com/articles/news_and_politics/jurisprudence/2011/10/citizens_united_how_justice_kennedy_has_paved_the_way_for_the_re.html.

[3] *See* Adam Skaggs, Maria da Silva, Linda Casey & Charles Hall, *The New Politics of Judicial Elections 2009-2010* 11 (Oct. 2011), *available at* http://www.brennancenter.org/new_politics_2010.

[4] *See* Adam Skaggs, "On Moneyball and Super PACs," *Politico* (Oct. 13, 2011), http://www.politico.com/news/stories/1011/65893.html

[5] *See* Bill De Blasio, Public Advocate for the City of New York, *Citizens United and the 2010 Midterm Elections* 2 (Dec. 2010), *available at* http://advocate.nyc.gov/files/12-06-10CitizensUnitedReport.pdf.

## I. The Board Should Apply a Robust and Objective Definition of "Express Advocacy"

The City Charter instructs the Board to issue rules for disclosure of independent spending "in support of or in opposition to a candidate in a covered election or municipal ballot proposal or referendum." N.Y.C. Charter Sec. 1052(a)(15)(a)(i). We agree with the Board's efforts to avoid an overly narrow reading of this language, and to avoid opening a loophole that would permit political spenders to evade disclosure merely by eschewing so-called "magic words" (such as "vote for" or "vote against") in an advertisement that encourages voters to support or oppose a candidate. In other words, the Board should not exempt "sham issue ads," which masquerade as issue advocacy but are plainly designed to influence elections.

In part, the Board has addressed this issue by providing a definition of "express advocacy" that incorporates the definition promulgated by the Federal Election Commission.[6] Although this definition is somewhat lengthy, its point is to ensure that communications that *objectively* can reasonably be interpreted only as appeals to vote for or against a candidate or ballot measure are treated as election-related advocacy.

The definition used by the Board stands on firm constitutional ground: courts have upheld and appropriately applied this definition in the federal context beyond the so-called "magic words" test. For example, a Virginia district court recently found that this same definition, when used to determine whether or not communications should be subject to disclosure, was consistent with the First Amendment and not impermissibly vague.[7] The court easily applied the definition to find that two advertisements (which sharply criticized then-candidate Obama's record on abortion in the days before the 2008 presidential election) were the "functional equivalent of express advocacy," even though neither ad directly instructed listeners to vote against Obama.[8] The Supreme Court in *Citizens United* similarly found that a feature-length film attacking Hillary Clinton's qualification for office was the functional equivalent of express advocacy, even though Citizens United (which distributed the film) argued that the movie was "just 'a documentary film that examines certain historical events.'"[9]

We urge the Board to apply this definition of "express advocacy" in a way that is objective but prevents opponents of disclosure from creating a formalistic barrier to transparency. We believe that much of what gets described as "sham issue advertising" ought to be recognized as the functional equivalent of express advocacy, based on reasonable and objective criteria that could be applied by any member of the voting public. We urge the Board not to take an overly narrow approach to what constitutes express advocacy as it implements these rules—

---

[6] *Compare* Proposed Rules § 13-01(g) (proposed definition of express advocacy) *with* 11 C.F.R § 100.22 (federal definition of express advocacy).

[7] *See Real Truth About Obama, Inc. v. FEC*, 3:08-CV-483, ___ F. Supp. 2d ___, 2011 WL 2457730, at *9 (E.D. Va. June 16, 2011).

[8] *Id.* at *12.

[9] 130 S. Ct. 876, 889-90 (2010); *see also Real Truth About Obama*, 2011 WL 2457730, at *11.

and to help steer the debate about what is "electioneering" and what is "issue advocacy" back to a conversation that makes sense to average voters and not just election law lawyers.

## II. Recommendations for Defining "Electioneering Communications" and "Public Communications"

The Board's draft rules recognize that the other approach federal law takes to close the "sham issue ad" loophole is through an "electioneering communication" definition. Such a definition relies on bright-line rules (concerning the timing of the communication, its audience, and whether it promotes or disparages a candidate's record) to determine whether a communication is intended to influence voters on Election Day. The Supreme Court has repeatedly upheld the federal electioneering communication definition as applied to disclosure, finding that it provides valuable information to voters in full compliance with the First Amendment.[10]

The federal definition is limited to broadcast advertising, because that is the medium most commonly used to reach voters in presidential and congressional elections.[11] The Brennan Center has encouraged lawmakers importing the electioneering communications definition into the context of state and local elections to consider how such a definition may need to be expanded beyond federal law to address the communications most relevant in the specific jurisdiction. We fully agree that the Board should apply this definition to the types of communications most common in City elections— and that the Board is not constitutionally limited to requiring disclosure only of the types of advertising prevalent in federal campaigns.

Nonetheless, we would urge the Board to draw these lines carefully so as not to require disclosure of genuine issue advocacy— such as advocacy around the City budget or union contract negotiations. We believe that such communications, when they objectively and unambiguously do *not* support or oppose a candidate or ballot measure, should not be subject to disclosure.

In order to avoid capturing such issue advocacy, we would recommend the following changes:

1) Limiting the period in which communications are captured as electioneering communications.

The Board's draft rules expand the time period in the definition of electioneering communications from the federal definition to 90 days before a primary or general election (in contrast to the federal rule's 30- and 60-day windows for primary and general elections). We see no reason to believe that City election campaigns take place over a longer time-span than federal campaigns, however— and we have heard specific concerns about the overlap

[10] *See Citizens United*, 130 S. Ct. at 913-14; *McConnell v. FEC*, 540 U.S. 93, 194 (2003).

[11] *See* 2 U.S.C.A. § 434(f)(3) (defining "electioneering communication").

between a 90-day lead-up to Election Day and the timing of the City Council's budget debates.

Based on these concerns, we believe that a shorter window of 30 or 60 days is appropriate. This shorter time window would avoid inadvertently capturing legislative advocacy that is not intended to influence an election.

2) Exempting 501(c)(3) non-profits from the disclosure rules for "electioneering communications."

We are concerned that the draft rules would require 501(c)(3) non-profits to disclose some of their advocacy efforts as "electioneering communications"— even though such groups are barred by their tax status from supporting or opposing candidates for public office. This would create a reporting dilemma for these groups, given that the Board's proposal would require independent spenders to report "[t]he names of the candidates and/or ballot proposals for which the public communication is in support of or opposition to."[12]

We would urge the Board to include an explicit exemption for 501(c)(3) non-profits in the final rules. As noted, these groups may not electioneer due to federal tax code restrictions, and so their advocacy efforts are not the target of these disclosure rules. If a 501(c)(3) *is* electioneering, that raises substantial legal concerns as well— but groups that are risking their non-profit tax status in this manner can be subject to special enforcement proceedings, beyond the ordinary scope of these rules.

3) Setting a higher audience threshold for defining "public communications" and "electioneering communications," and considering other ways to narrow these definitions to avoid disclosure of non-election-related advocacy.

As noted above, we agree that the Board can and should expand the federal "electioneering communications" definition to address the communications that are actually prevalent in New York City elections. Before promulgating final rules, however, the Board should explain fully why the additional types of non-broadcast communications covered by the City's disclosure rules pose a "sham issue ad" problem. Providing such specificity, rather than defining "public communication" to include "any . . . form of communication to the general public,"[13] will help the public and independent spenders understand the basis for the Board's proposal— and will also ensure that these lines are being drawn in an appropriate manner.

[12] Proposed Rules § 13-04(a).

[13] Proposed Rules § 13-01(l).

The draft rules define "electioneering communications" and "public communications" in a very expansive manner. We understand why the Board has taken this approach. We know from experience that many political spenders will tailor their election advocacy in order to avoid disclosure or other campaign finance laws. And we agree with the Board that narrowing these rules could reduce the amount of information about political spending that is reported to the public. But we believe that it may make sense for the Board to accept some trade-offs— by drawing narrower lines— to improve public support for this process, and to ease compliance for the majority of political organizations that will make a good faith effort to report their electoral spending to the public.

We agree with the Board's decision in the draft rules to define "public communication" to include paid newspaper ads, magazine ads and billboards. These paid communications are analogous to the broadcast ads covered by federal rules. But we are concerned with the Board's decision to expand the proposed definition further to capture all "other printed material." We recognize that some types of printed material (such as flyers) can be vehicles for "sham issue advocacy." But setting the threshold *too* low will also risk capturing communications that are not going to have a significant impact on an election, or that will not influence the opinion of the public at large.

Several revisions could narrow this aspect of the draft "electioneering communications" definition so that it more closely hews to the intent and substance of the federal rule.

First, the Board could include a definitional prong comparable to the federal requirement that "electioneering communications" be targeted to 50,000 members of the relevant electorate. While a 50,000 threshold may be too high for City Council elections, and a lower number may be appropriate, it is important that the Board focus on truly *public* communications, rather than communications aimed at a much smaller or private audience.

Second, the Board could consider expanding its exemptions for member communications. We recognize that the Board (like the City of Los Angeles, and as under the federal rules)[14] wants to capture information about member communications that seek to influence an election, in order to provide voters with a full portrait of the spending in an election. But as a line-drawing matter, we are concerned that applying an "electioneering communication" definition to certain types of member communications may create inadvertent problems. An organization that spends thousands of dollars on an advertising campaign about a candidate shortly before an election ought to disclose that spending to the public, as part of the information voters can evaluate on Election Day. But member-to-member communications within an organization may address elected officials and candidates in a variety of contexts without necessarily seeking to affect an election.

[14] *See* L.A. Municipal Code §§ 49.7.1.1, 49.7.26; 2 U.S.C.A. § 431(9)(B)(iii).

In stating that member communications can differ from public communications, we are largely agreeing with the Board's existing approach. For example, the Board has already suggested exempting from disclosure an organization's internal deliberations, as well as certain types of membership communications, such as routine newsletters or telephone calls. Additional exemptions could be appropriate.

We have previously testified in favor of a blanket exemption for member communications, but recognize that there are reasonable arguments on both sides of this issue. Nonetheless, if the Board decides to require disclosure of member communications, it may be preferable to define what is *reportable* (e.g., flyers or leaflets that are sent to both members and non-members, or mass mailings that support or oppose a candidate's election and target a certain threshold number of members), rather than trying to define what is *exempted.* A list of covered communications may be easier for membership groups to follow; the current approach of assuming that member communications are covered, and then carving out certain types of communications, appears to have resulted in unnecessary complexity and ambiguity. The fact that the Board's plain-language guide to the rules includes exemptions (such the dissemination of statements from elected officials as part of a contract mobilization or lobby day statement) that are not clearly reflected in the legal language of the rules suggests the difficulty of this approach.

In making this suggestion, we recognize that all of these line-drawing efforts involve trade-offs, and we understand why the Board has tried to avoid the types of loopholes that have plagued other disclosure regimes. We would urge the Board to take heed of today's testimony, however— particularly from those organizations that will be required to file disclosure reports under these rules— and to consider further exemptions or clarifications as appropriate. In cases where the Board believes that certain types of communications must be disclosed in order to prevent a proliferation of "sham issue ads," we urge the Board to provide illustrations to explain its decisions in a way that will ensure public support and assist with public compliance.

*****

In sum, we commend the Board for encouraging transparency in New York City politics. And we support the Board's efforts to avoid loopholes, while creating bright-line rules for reporting election-related political spending. We urge the Board to continue refining and streamlining these rules to ensure a clear line between electioneering communications (which should be disclosed) and non-election-related advocacy (which should be exempted). Finally, we ask the Board to review this process periodically so that these rules remain both clear and effective. We trust and applaud the Board's commitment to political transparency. We hope the Board will continue to work carefully over the coming months and years to provide voters the information they need to make educated decisions— and to provide advocates with clarity and support in following these roles, to encourage robust participation in New York City politics.