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COMMENTS OF SEIU LOCAL 32BJ REGARDING PROPOSED RULES OF THE NEW YORK CITY CAMPAIGN FINANCE BOARD

SEPTEMBER 14, 2016

SEIU Local 32BJ respectfully submits the following comments regarding the New York City Campaign Finance Board's ("CFB" or "Board") proposed new and amended rules set forth in the CFB's August 15, 2016 "Notice of Public Hearing and Opportunity to Comment on Proposed Rules" ("Notice"). We focus our comments on several of the proposals that directly concern the ability of Local 32BJ and its members to participate in New York City political and civic affairs. In sum, we recommend that the Board proceed as follows regarding its proposals to amend three rules:

- **Rule 1-08(f):** We recommend that the Board withdraw both its proposed changes to Rule 1-08(f) and Advisory Opinion 2016-1, and instead undertake a new notice-and-comment rulemaking that is aimed at articulating and integrating both the conduct and content aspects of coordinated activities, so that the scope of each aspect may be determined in their complete mutual context with full public participation. Alternatively, we recommend that the Board either not adopt the proposed presumption of coordination or, if it is adopted, to clarify that it imposes only a burden of production, and not of persuasion, and specify how that burden may be satisfied.

- **Rule 13-04(b):** We recommend that the Board adopt neither the proposed disclaimer "More information at nyc.gov/FollowTheMoney" nor the requirement that a disclaimer identify "top donors."

- **Rule 13-02(d):** We recommend that the Board not adopt its proposed subsection (ii) requiring an independent spender to disclose the contributors to the spender's own contributors.

SEIU Local 32BJ

SEIU Local 32BJ ("Local 32BJ") is a labor organization whose membership includes 75,000 residents of New York City. Local 32BJ's members work as doormen, maintenance employees, porters, cleaners, security officers and other positions for hundreds of employers, primarily in the private sector. Local 32BJ is party to thousands of collective bargaining agreements in approximately 10,000 distinct workplaces that guarantee fair terms and conditions of employment for these workers, and a level of security for their families. Local 32BJ's members voluntarily join the union, determine their dues levels, elect their officers by secret ballot and otherwise participate in the union's activities. They *are* Local 32BJ. And, they rely upon each other and their union both to protect and advance their livelihoods as workers and to become active participants in the City's civic affairs.

To that end, Local 32BJ maintains an active, year-round effort to involve its members in all aspects of City government that affect them, including the decisions of the Mayor, the Comptroller, the Public Advocate, borough presidents, and the Speaker and members of the City Council. Local 32BJ and its members are keenly interested in public decisions that affect their livelihoods, and they fully participate in City elections within the bounds of the law. For that reason, Local 32BJ and its members have a direct stake in the structure, operation and enforcement of the City's laws, importantly including the New York City Campaign Finance Act, that affect their participation in public affairs and their relationships with elected officials and candidates for public office.

Proposed Amendments to Rule-08(f): Independent Expenditures

We first address the CFB's proposed revisions to its Rule 1-08(f), which currently lists six non-exclusive "[f]actors for determining whether an expenditure [by a person, political committee or other entity] is independent [of a candidate]…." The proposal would add two more such factors and, more importantly, treat the presence of *any* of the eight as creating a mandatory "rebuttable presumption" that an "expenditure" by the "person or entity" is not "independent," by imposing on both the candidate and the person or entity "the burden of producing evidence to demonstrate that such expenditure was made independently."[1] Meanwhile, through advisory

[1] We assume in these comments that, as the CFB makes clear in its brief explanation, see Notice at 5, a "burden of production" is *all* that the proposed rule would impose, and not also the burden of *persuasion*. But the rule itself must make this clear. As written, however, proposed Rule 1-08(f)(2) is confusing because it uses the word "and" between its second and third clauses. In order to avoid such a misreading, and in order to take into account the CFB's limited authority over third parties, as we discuss below, the last clause instead should state as follows: "; accordingly, the candidate shall bear the burden of producing evidence to demonstrate that such expenditure was made independently." Otherwise, the amendment could be read to shift both the burden of production, which ordinarily concerns an early evidentiary stage of a proceeding, with the burden of persuasion, which concerns the

opinions and *not* rulemakings, the CFB has purported to define an "expenditure" in connection with an election in terms that are excessively broad and vague *and* that entail their own "presumption" of election-relatedness.

The combination of these standards and presumptions would unfairly, and unnecessarily and even unconstitutionally impair political activity, as we explain below. This matters greatly because the presence or absence of a group's "independen[ce]" from a candidate when making "expenditures" is central to the lawfulness of its political activities. If a group acts independently it may spend without limit, while subject, in the case of certain public communications that are defined as "independent expenditures," to substantial reporting and record-keeping requirements. See Rules Chapter 13. But if the group does not act independently – instead, it "coordinates" with a candidate – then only non-corporate groups may spend, and only up to (1) the contribution limits to all candidates prescribed by the New York City Campaign Finance Act ("CFA"), *see* Rule 1-04(g) and Campaign Handbook at 40, and (2) the expenditure limits of candidates who participate in the CFA's voluntary public funding matching program. *See id.*

The Proposed Changes to Rule 1-08(f)

The current six specifically identified "factors for determining whether an expenditure" by "a person, political committee or other entity" (together here, "entity"[2]) is "independent" are the following:

- Whether the entity is also an "agent" of a candidate;
- Whether any person "authorized to accept receipts or make expenditures" for the entity is also an "agent" of a candidate;
- Whether a candidate "has authorized, requested, suggested, fostered, or otherwise cooperated in any way in the formation or operation" of the entity;
- Whether the entity has been "established, financed, maintained, or controlled" by any of the same entities that have done so for a candidate's authorized political committee;

ultimate proof of a matter. *See generally People v. Robinson*, 97 Misc. 2d 47, 61-63 (N.Y. Sup. Ct. 1978). Even so, as also discussed below, if there is even a burden of production – and we oppose any burden-shifting with respect to proof of independence of political activity – the rule must specify what kind of showing would satisfy it.

[2] The current rule uses the phrase "person, political committee or entity"; the CFB proposes to shorten this to "person or entity" while retaining the same meaning. See Notice at 5. We use the shorthand "entity" in describing the current and proposed amended rule.

- Whether the candidate "shares or rents space for a campaign-related purpose with or from" the entity; and

- Whether the candidate and the entity have each retained, consulted or otherwise been in communication with the same third party or parties, if the candidate knew or should have known that the candidate's communication or relationship to [them] would inform or result in expenditures to benefit the candidate."

  As amended, Rule 1-08(f)(1) would add two more such factors:

- Whether the candidate "has solicited or collected funds on behalf" of the entity during the same election cycle; and

- Whether the candidate "or any public or private office held or entity controlled by the candidate" has "retained the professional services" of the entity or "a principal member or professional or managerial employee" of the entity during the same election cycle.

And, proposed new Rule 1-08(f)(2) would add the following mandatory "presumption" of non-independence with respect to all eight factors:

> Where one or more of the factors listed [above] is present, there shall be a rebuttable presumption that an expenditure made by the person or entity on behalf of the candidate is not independent, and the candidate and the person or entity making the expenditure shall each bear the burden of producing evidence to demonstrate that such expenditure was made independently.

The Necessity for a New Rulemaking to Consider Both Rule 1-08(f) and the Scope of "Expenditure" Addressed in Advisory Opinion 2016-1

The proposed amendments can only be evaluated with particular consideration of the scope of the term "expenditure" in proposed new Rule 1-08(f)(2). The word by itself is not defined in the CFA or the Rules, but in 2010 the New York City Charter ("Charter") defined it as follows, in the context of an "independent expenditure" that is subject to particular reporting requirements:

> "Independent expenditure" shall mean a monetary or in-kind expenditure made, or liability incurred, in support of or in opposition to a candidate in a covered election or municipal ballot proposal or referendum, where no candidate, nor any agent or political committee authorized by a candidate, has authorized, requested, suggested, fostered or cooperated in any such activity.

Charter § 1052(a)(15)(a)(i). And, through a subsequent rulemaking, the CFB in 2012 effectively relabeled as a "covered expenditure" the Charter phrase "expenditure made, or liability incurred, in support of or in opposition to a candidate," and defined "covered expenditure" to mean "an express advocacy communication or electioneering communication." Rule 13-01. "Express advocacy" in turn means advocacy of the election or defeat of a specific a candidate or "words that in context and with limited reference to external events, such as the proximity to the election, can have no reasonable meaning other than to advocate the election…or defeat of one or more clearly identified…candidates." *Id.* And, an "electioneering communication" means any other "refer[ence]" to a clearly identified candidate within either 30 days of a primary or special election or 60 days of a general election. *Id.*

However, the CFB has not taken the harmonizing step of applying its classifications of public communications content in its independent expenditure reporting and disclosure rules to the public communications content that the CFB subjects to its current and proposed coordination rules. Nor has the CFB ever engaged in a rulemaking to define that content with the precision and public input that it deserves. Instead, the CFB has used advisory opinions (AOs) and enforcement actions to address what it has usually called an "expenditure in connection with [an] election." *See, e.g.*, AOs 2003-2, 2000-1, 1997-6, 1993-10, 1993-9. Most recently, the CFB *sua sponte* issued AO 2016-1 to describe, differently and more expansively than before, the kinds of activities that are subject to the coordination standard, and the CFB simultaneously applied that new standard in its final disposition of a pending enforcement action. See Final Determination 2016-1, *In the Matter of Campaign for One New York and United for Affordable NYC*.

AO 2016-1 states that the CFB "will consider the totality of the circumstances, including a number of factors," to determine whether a coordinated expenditure is made "in connection with a covered election." These factors "include, but are not limited to" the following (we italicize terms whose meaning is arguable, subjective and – like virtually all the terms used in the AO – undefined):

1. whether the content *focuses* on the candidate, his/her opponent, or otherwise *promotes* the candidate and/or *denigrates* his/her opponent;

2. whether, in cases where the communication refers to more than one individual, the content references the candidate in a manner that *overshadows* references to the other individuals, or otherwise *promotes* the candidate and/or *denigrates* his/her opponent;

3. whether the distribution of a communication *appears designed* to reach the candidate's electorate;

4. whether the communications are *focused* on the candidate's *past accomplishments or positions*, rather than *focusing* on issues *being discussed* by a governmental body;

5. whether there is *consistent and repeated overlap* between campaign staff, the organization's staff, and/or their consultants' staff, or the candidate or his/her *agent* has raised funds for the organization;

6. whether the organization *lacks a history of advocacy* on issues or other work that is separate from a candidate or campaign; or

7. whether the timing coincides with the candidate's campaign.

Moreover, AO 2016-1 states that the CFB "will consider the timing of the expenditure of particular importance" when making this determination, including imposing an important "presumption": if the activity occurs during an election year (that is, on or after January 1), "the Board will presume that such expenditures are made in connection with the election where some of the factors . . . are present." And, if the activity occurs prior to the election year, "such expenditures often will be found not to have been made in connection with the election," except that "where numerous or substantial factors are present such that those expenditures closely overlap with election activity, including by focusing on the candidate's past accomplishments or otherwise promoting the candidate and/or denigrating his/her opponent, the Board may consider activity…to be in connection with a covered election, particularly if it occurs closer to the election year." This presumption and these timing considerations are both subjective and confusing: what does "some" mean, how "often" and under what circumstances is pre-election year activity "in connection with an election," and what is meant by all of the terminology in the clause "where numerous or substantial factors are present such that those expenditures closely overlap with election activity"?

AO 2016-1 does not say. But AO 2016-1 self-evidently is absolutely rule-like in text and intent, and the scope of its term "expenditure" is integral to the meaning of that same term in Rule 1-08(f), both currently and as the Board proposes to amend it. However, the critical legal question of what *is* an "expenditure" for purposes of application of the CFB's "independence" standard has not been included in the current rulemaking. The CFB should not amend that rule, including by introducing a novel "presumption" of coordination for a range of actions, without also subjecting to public comment and rulemaking the scope of the term "expenditure" itself. That is especially warranted in light of the vagueness and arbitrariness of so much of the key

language in AO 2016-1, as highlighted above. And, it is warranted because factor number 5 in the AO, unlike the other AO factors, is not even a communications content standard, but is instead a conduct standard that would more appropriately be set forth (if at all) in Rule 1-08(f)(1) itself. Indeed, one of factor 5's clauses – "the candidate or his/her agent has raised funds for the organization" – closely resembles one of the two new "factors" proposed for Rule 1-08(f), yet the AO attaches a different "presumption" to it; and, the AO does not explain what that "presumption" means as a practical evidentiary matter, so it may not even be the same kind of "presumption" that the CFB proposes for Rule 1-08(f). Perhaps an amended Rule 1-08(f) would supersede the AO on this point, but given the CFB's apparent policy that rules and advisory opinions are interchangeable procedural vehicles for announcing enforceable standards under the Charter and the CFA, there is no way for the public to know.

We recommend, then, that the CFB withdraw both its proposed changes to Rule 1-08(f) and AO 2016-1, and that it instead undertake a notice-and-comment rulemaking that is aimed at articulating and integrating both the conduct and content aspects of coordinated activities, so that the scope of each aspect may be determined in their complete mutual context and with full public participation.

Leaving aside the basic inadequacy of a rulemaking that addresses only the conduct prong of coordination, we next explain why the proposal to amend Rule 1-08(f) is ill-advised for other reasons.

The Proposed Presumption of Coordination Lacks a Basis in the CFA and Cannot Be Imposed on Third Parties Such as Local 32BJ

The proposed presumption of coordination lacks basis in the CFA. Again, proposed new Rule 1-08(f)(2) states that if any of the Rule 1-08(f)(1) factors is present, "there shall be a rebuttable presumption that an expenditure made by the person or entity on behalf of the candidate is not independent, and the candidate and the person or entity making the expenditure shall each bear the burden of producing evidence to demonstrate that such expenditure was made independently." The CFB explains that this language "clarif[ies] that the presence of any of the listed factors shifts the burden of production of evidence to candidates and spenders, who then have an affirmative obligation to provide evidence indicating that coordination did not occur, consistent with [CFA] 3-703(1)(d) and CFB Advisory Opinion 2009-7." In fact, however, there is no presumption of any kind in § 3-703(1)(d), which instead predicates a candidate's "eligib[ility]" to participate in the City's public matching fund program on his or her providing the Board with "any information the Board *may request* relating to his or her campaign expenditures or contributions and furnish such documentation and other proof of compliance with this chapter *as may be requested* by the Board" (emphasis added). And, AO 2009-7 relies *solely* upon that CFA provision for its assertion that "each campaign bears the burden of

demonstrating that any third party activity conducted on the campaign's behalf is indeed independent" (footnote omitted).

Moreover, not only is the cited CFA authority inapt to the asserted "consistent" presumption and burden of production that the CFB now proposes, but that authority *applies only to the obligations of candidates, not third parties such as the "persons and entities" that the proposed presumption explicitly would also directly regulate*. That is because the CFB has no authority to penalize third parties that make excessive contributions to candidates; it may treat third parties as respondents only with respect to their independent expenditure *reporting* obligations under Chapter 13. And, the CFB has no authority to impose *any* kind of presumption or evidentiary burden of production on third parties; rather, it enjoys only the power to compel the production of evidence from third parties that is afforded by the CFA. *See* §3-708(5); Rules 701(f), 7-02(f) and Chapter 12. Accordingly, it is unclear how this burden would apply to a third party entity. Is the CFB suggesting that there are now circumstances where third parties are directly subject to CFB penalties if they make unlawful coordinated in-kind contributions to candidates? Or would a candidate fail to meet its own (newly imposed) burden of production in a proceeding where the candidate but not a relevant third party came forward with particular evidence? The Notice does not say.

The Apparent Rationale for the Presumption Does Not Justify
Its Application to Independent Expenditures

The Board's assumed rationale for the presumption – assumed because the Board's Notice does not explain it – proves too much. The Notice cites AO 2009-7, which stated in relevant part as follows:

> The determination of whether a particular expenditure is independent or non-independent is necessarily fact-specific. Of course, the Board is not privy to the communications that campaigns have with third parties. Thus, the information about whether campaign-related activity has been discussed or otherwise coordinated between a campaign and a third party is uniquely within the campaign's possession. For this reason, each campaign bears the burden of demonstrating that any third party activity conducted on the campaign's behalf is indeed independent. [Footnote omitted.]

It seems plain that such burden-shifting does not follow from the common evidentiary fact that a party is most likely to possess relevant evidence about itself. For, the same may be said about virtually everything else that is done in connection with a candidate's campaign: the candidate is in a better position than the CFB to know whether the campaign complied with the CFA absent the CFB's use of its substantial investigative powers to find out. Yet the CFA does *not* require

campaigns (or anyone else) affirmatively to come forward on their own to disprove anything of the sort; nor do the civil or criminal justice systems generally. There is nothing about the issue of independence of third-party expenditures that warrants a different approach to the usual rules of evidence.

The Mandatory Presumption Would Rigidly, Inappropriately and Burdensomely Link Unrelated Facts and Chill Associational, Political and Civic Activities

The shifting of any kind of evidentiary burden away from the CFB or a complainant is inappropriate and would chill the political and associational behavior of unions and other third parties lest their activities be deemed to be unlawfully coordinated in-kind contributions. Indeed, the presumption would not aid the Board's employment of its investigatory powers; rather, it would make it unwarrantedly easier for the CFB to prove particular cases while intimidating ordinary dealings among candidates, incumbents and organizations. The presumptions accomplish little more than creating the threat of an investigation that will deter a wide range of lawful, independent activity.

It is one thing for Rule 1-08(f), as it does now, to list non-exclusive "factors" that the CFB may consider and weigh together in determining whether or not third-party expenditures were independent. That at least sets the stage for an inquiry in which the CFB properly bears all evidentiary burdens to prove that coordination occurred. Indeed, in doing so the Board has long acknowledged that the presence of any single one of the Rule 1-08(f) factors by itself does *not* suffice to prove coordination of a particular expenditure; as stated in AO 2009-7, "[t]he determination of whether a particular expenditure is independent or non-independent is necessarily fact-specific," and "[e]vidence of non-independent activity is usually largely circumstantial and must be evaluated based on the totality of circumstances." So, for the CFB instead, by force of law, to automatically "presume" that the presence of a *single* such factor in fact *proves* that coordination occurred, unless a party involved in the matter demonstrates otherwise, would dramatically change the enforcement calculus. Yet, the Board has proffered no explanation to justify doing so, and instead points only to an inapposite CFA provision.

Those factors provide ample examples why such a presumption would be an unjustified and oppressive departure from the current "facts-and-circumstances" analysis:

- Two factors rely on the actions of a common "agent." But neither the CFA nor the Rules defines that term, and one can be an "agent" of two different entities for substantially different purposes and with substantially different kinds of contacts and information. There are many circumstances where one's agency for a candidate (including an incumbent in an official capacity) has no campaign significance. Yet the presumption takes no account of such facts or nuances. Moreover, if an agent is merely "authorized to

accept receipts" for a campaign – one of the fact patterns in the second Rule 1-08(f) factor – there is no evident connection with his or her third-party expenditure to warrant such a presumption.

- That a candidate had some connection with the "formation or operation" of a third party is insufficient as well. The candidate's role may have preceded the candidacy or the expenditure – perhaps by a long time – or consisted of an operational-related act that on its face is plainly irrelevant to the entity's campaign expenditures. Again, however, the presumption ignores such important distinctions and requires an affirmative showing of non-coordination in all such circumstances.

- It is likewise overreaching to presume coordination because of an overlap between people or groups that established, financed, maintained, *or* controlled both the entity and an authorized candidate committee. Does "financed" mean making a contribution? Was either entity "established" long ago? What activity amounts to "maintain[ing]" an entity or committee? When these terms are included within an explicit facts-and-circumstances analysis as to which the CFB bears all evidentiary burdens, their imprecision may be ameliorated by the eventual need for specifics and context that connect them in fact to particular expenditures in relevant ways. But, when any of these terms instead is converted into a mandatory presumption of coordination, that is a very different and unjustified matter, and, at the very least, these terms merit clear and appropriate definition.

- The factor concerning any contacts with "third parties" that the candidate "should have known…would inform or result in expenditures to benefit the candidate" also has a broad and uncertain reach, particularly if it will trigger an evidentiary presumption. If it does, this factor overregulates normal social and professional contacts and entails expectations of candidate knowledge that are both subjective and inappropriate.

- The proposed new Rule 1-08(f)(1) factor of whether the candidate has solicited or collected funds on behalf of the entity during the same 4-year election cycle is singularly inappropriate for a presumption of coordination. For example, any or all of the following might be the case: the individual might not have become a candidate until later in the cycle; the candidate may have asked a friend to contribute $10.00 to the entity years before; and the candidate and the entity may have had no idea at the time that the entity would ever become politically active. None of these circumstances warrants a presumption that a subsequent expenditure was coordinated.

- There are similar flaws in attaching the presumption to the other proposed new factor: whether the candidate, or any public or private office held or entity controlled by the

candidate, has retained the professional services of the entity or a principal member or professional or managerial employee of the entity during the same election cycle. That retention could have been fleeting, occurred years previously, and lacked any conceivable relevance to candidacy. Yet in all circumstances the mandatory presumption would attach.

Of course, as we discussed earlier, even this point-by-point critique is incomplete, because the "*expenditures*" to which any of these unwarranted "presumptions" would apply are themselves ill-defined and laden with their own "presumption" by virtue of AO 2016-1. To take just one mix-and-match combination from the Rule 1-08(f) conduct list and the AO 2016-1 expenditure list: a 2017 candidate who in February 2014 was a private citizen without any political aspirations and asked a friend to contribute $10.00 to a union's strike fund will be presumed to have coordinated with the union's August 2017 membership newsletter that mentions the now-candidate's history of support for workers' rights, thereby shifting the burden to the candidate and the union to demonstrate that they did not coordinate that newsletter. If it seems unreasonable to connect these two events at all, let alone to inscribe in law that the first act presumptively demonstrates coordination of the second, then the Board should not adopt the proposed presumption.

The Proposed Mandatory Presumption Would Unduly Impair
Due Process and First Amendment Protections

Finally, and relatedly, the combination of AO 2016-1's definition of "expenditures" and proposed new Rule 1-08(f)(2)'s "rebuttable presumption" raises serious constitutional concerns. Because the Board's definition of "expenditure" is so vague, and because so many of the factors that each alone would trigger Rule 1-08(f)(2)'s "presumption" are themselves so ill-defined, the proposed Rule "fails to provide a person of ordinary intelligence fair notice of what is prohibited, [and] is so standardless that it authorizes or encourages seriously discriminatory enforcement." *Federal Communications Commission v. Fox Television Stations, Inc.*, 132 S. Ct. 2307, 2317 (2012). *See also Buckley v. Valeo*, 424 U.S. 1, 77 (1976) ("Due process requires that a criminal statute provide adequate notice to a person of ordinary intelligence that his contemplated conduct is illegal, for 'no man shall be held criminally responsible for conduct which he could not reasonably understand to be proscribed.' Where First Amendment rights are involved, an even 'greater degree of specificity' is required." (quoting *United States v. Harriss*, 347, U.S. 612, 617 (1954), and *Smith v. Goguen*, 415 US. 566, 573 (1974)). Here, it is unclear both what conduct the proposed Rule will cover and how the Board could avoid enforcing the Rule in an arbitrary and discriminatory manner. Only a unitary rulemaking that establishes both clearly defined conduct and expenditure standards can cure this constitutional deficiency.

The proposed Rule's burden-shifting presumption also does not sufficiently protect First Amendment interests. It is well established that, because procedural burdens allocate the risks of prevailing or losing in litigation, they must protect the exercise of substantive First Amendment speech and association rights and not unduly chill their exercise. *Waters v. Churchill*, 511 U.S. 661, 669 (1994) ("[I]t is important to ensure not only that . . . substantive First Amendment standards are sound, but that they are applied through reliable procedures. This is why . . . some procedures – a particular allocation of the burden of proof, a particular quantum of proof, a particular type of appellate review, and so on – [are] constitutionally required in proceedings that may penalize protected speech."); *Speiser v. Randall*, 357 U.S. 513, 520-21 (1958) ("The procedures by which the facts of [a] case are determined assume an importance fully as great as the validity of the substantive rule applied," and "the more important the rights at stake, the more important must be the procedural safeguards surrounding those rights.").

The Supreme Court accordingly has invalidated special evidentiary burdens that legislatures and regulators have imposed to compel private parties to prove that protection was due them rather than required the government to prove that it was not. For instance, the Court invalidated under the First and Fourteenth Amendments a jury instruction that a defendant's public burning of a cross was "prima facie evidence of [the defendant's] intent to intimidate a person or group of persons." *Virginia v. Black*, 538 U.S. 343, 348 (2003). The Court did so because the rule "makes no effort to distinguish among . . . different types of cross burnings," including those that reflect "core political speech," and because it "ignores all of the contextual factors that are necessary to decide whether a particular cross burning is intended to intimidate, it permits the jury to convict in every cross-burning case in which defendants exercise their constitutional right not to put on a defense." *Id.* at 365-67. The Court determined that the prospect of such a prosecution "chills constitutionally protected speech," and "[t]he First Amendment does not permit such a shortcut." *Id.* As we described earlier, the very same kind of shortcut, *per se* treatment of particular conduct marks the proposed Rule 1-08(f)(2) presumption because it would attach to every distinct action and situation that is listed in Rule 1-08(f)(1), without consideration of context or nuance.[3]

[3] The Court has often invalidated statutes and rules that imposed similar evidentiary burdens on private parties rather than the government. *See, e.g.*, *Healy v. James*, 408 U.S. 169, 172-77, 185 (1972) (state-supported college that disapproved application for official recognition of, and resulting meeting and other privileges for campus chapter of Students for a Democratic Society ("SDS"), in part because chapter did not demonstrate that it was unaffiliated with national SDS "misplac[ed] the burden of proof"; in light of the First Amendment associational rights that hinged on approval, once the group completed the application the college must bear the burdens to demonstrate both the SDS affiliation and what consequences that warrants); *Dombrowski v. Pfister*, 380 U.S. 479, 494-96 (1965) (state law requiring members of "communist-front organizations" to register as such rests on unconstitutional rebuttable presumption that groups that are so designated by various federal authorities are such organizations); *Cf. Colorado Republican Federal Campaign Committee v. Federal Election Commission*, 518 U.S. 604 (1996) (rejecting conclusive presumption that a state political party's independent expenditures were

It is particularly concerning that the proposed presumption would directly affect the relationships between private parties and City candidates by predicating the shift of burden on an indiscriminate variety of both direct and indirect contacts between them as we have described. Coordination disputes often concern "the very heart of the organism which the First Amendment was intended to nurture and protect: political expression and association concerning…elections and office holding." *AFL-CIO v. Federal Election Commission*, 333 F. 3d 168, 170 (D.C. Cir. 2003) (interior quotation marks omitted). Even though third party entities are not subject to the Board's jurisdiction, the proposed new Rule would still chill their speech and associational rights because of the threat that their political activities may subject favored candidates to significant potential penalties, including fines and the loss of public matching funds.

The proposed rule exacerbates these constitutional infirmities further because it provides no guidance at all as to what information would be required to rebut the presumption of coordination. If the Board does not withdraw its proposed changes, as we recommend, the rule at the very least must explain what kind of an evidentiary showing would satisfy the burden of production. We submit that, for example, a simple statement that denies coordination should suffice, as should demonstration that a relevant entity had in place an internal "firewall" to separate its candidate contacts from its relevant expenditures. To date, the Board has suggested, but not affirmatively stated, that such a firewall may preclude a finding of coordination. *See, e.g*, "Statement of the NYC Campaign Finance Board" (Sept. 2, 2009) (presuming activity was not independent in part because there were "no apparent firewalls between" two entities). The Federal Election Commission ("FEC") formally recognizes the utility and legal significance of firewalls in its coordination rules. See 11 C.F.R. § 109.21(h); FEC, Final Rule, "Coordinated Communications," 71 Fed. Reg. 33190, 33206-07 (June 8, 2006). The CFB should do the same if it proceeds here, and preferably in the broader rulemaking we recommend that it undertake.

Proposed Amendments to Rule 13-04: Disclaimers by Independent Spenders

Current Rules 13-04(a) & (b) require an independent spender such as SEIU Local 32BJ's independent-expenditure committee to state "Paid for by Empire State 32BJ SEIU PAC" in either a written or spoken format, or both, depending on the form of communication. The CFB's proposed amendments would require significant additional language and would extend the requirements to Internet video and audio. The proposed expanded disclaimers for broadcast and Internet video directly and substantially diminish the amount of time available to the speaker for its actual message, and in all media the additional requirements are both excessive and distracting.

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coordinated with its candidate for the United States Senate; "[a]n agency's simply calling an independent expenditure a 'coordinated expenditure' cannot (for constitutional purposes) make it one").

Under the proposed rule, the following disclaimer rules would apply (new disclaimer language is italicized):

Printed materials:

- "Paid for by" [name of independent spender]
- *The name of the independent spender's chief executive or equivalent, and principal (>50%) owner, if one exists*
- *"Top Three Donors:" [names of the spender's top three donors[4] in descending order;]*
- *"Not authorized by any candidate or candidate committee. More information at nyc.gov/FollowTheMoney."*

Video communications (both broadcast and Internet):

(Spoken)

- "Paid for by" [name of independent spender]

(Written)

- "Paid for by" [name of independent spender]
- *"The top three donors to the organization responsible for this advertisement are" [names of the spender's top three donors in descending order]*
- *"Not authorized by any candidate or candidate committee. More information at nyc.gov/FollowTheMoney."*

Radio and Internet audio ads of more than 30 seconds, and automated phone calls:

- "Paid for by" [name of independent spender]
- *"...with funding provided by" [names of the spender's top three donors in descending order]*
- *"Not authorized by any candidate or candidate committee. More information at nyc.gov/FollowTheMoney."*

Radio or Internet audio lasting 30 seconds or less:

- "Paid for by" [name of independent spender]
- *"...and not authorized by any candidate or candidate committee. More information at nyc.gov/FollowTheMoney."*

Live phone calls (non-automated) of more than ten seconds:

- "This call is paid for by" [name of independent spender]

[4] "Top donors" are the three contributors that have made aggregate contributions of at least $5,000 in the period starting 12 months preceding the election. If there are only one or two such contributors, they are identified. If there are no such contributors, then the top-donors statement is omitted. If two or more contributors are tied for third, the spender must decide which to disclose.

- *"…and is not authorized by any candidate or candidate committee. More information at nyc.gov/FollowTheMoney."*

The current Rule 13-04 disclaimer requirement was adopted just four years ago after a protracted and fully informed rulemaking. The CFB has provided no reason why that rule has proven inadequate or ought to be changed as now proposed. See Notice at 11-12. Yet the current requirement is easy to comply with and easy for the viewer or listener to understand. The simple declaration identifying who paid for a covered communication is clearly stated, and, in the Internet age, that is all that a viewer or listener needs in order to instantly research additional information about the identified spender, both on the CFB's website and elsewhere.

The Board does not enjoy legal carte blanche to require independent spenders to say more than this in their public communications, as the First Amendment imposes important constraints. The government may impose a disclaimer requirement only where there the government satisfies a burden to demonstrate that there is "a 'substantial relation' between the disclosure requirement and a 'sufficiently important' governmental interest" – a standard of review known as "exacting scrutiny." *See Citizens United v. Federal Election Commission*, 558 U.S. 310, 366-67 (2010) (citing *Buckley v. Valeo*, 424 U.S. 1, 64 (1976)). Disclaimer laws "'insure that the voters are fully informed' about the person or group who is speaking," *id.* (citing *Buckley*, 424 U.S. at 66), and may be justified "based on a governmental interest in 'provid[ing] the electorate with information." *Id. See also McConnell v. FEC*, 540 U.S. 93, 196 (2003); *First Nat. Bank of Boston v. Bellotti*, 435 U.S. 765, 792, n. 32 (1978). But not every disclaimer requirement will satisfy judicial muster.

In 2014 the U.S. Court of Appeals for the Seventh Circuit invalidated on First Amendment grounds a Wisconsin administrative rule requiring extensive new disclaimer language for 30-second advertisements. *See Wisconsin Right to Life, Inc. v. Barland ("WRTL")*, 751 F.3d 804, 832 (2014). The challenged rule required independent spenders to include 50 extra words that elaborated on the then-extant statutory requirement that the communication state it was "not authorized by any candidate or candidate's agent or committee."[5] The state conceded the plaintiff's claim against the "wordy regulatory disclaimer" as applied to 30-second radio ads, *id*. at 832, and while the court limited its ruling to those ads, it observed that "frankly we can't see the point of requiring it in ads of *any* length" (emphasis in original).

[5] The rule required independent spenders to also include the following language in its political disclaimers: "The committee (individual) is the sole source of this communication and the committee (individual) did not act in cooperation or consultation with, and in concert with, or at the request or suggestion of any candidate or any agent or authorized committee of a candidate who is supported or opposed by this communication."
Wis. Admin. Code GAB § 1.42(5), quoted in *WRTL*, 751 F. 3d at 816.

The CFB's proposed amendments substantially increase the time required to state the disclaimer on ads of any length, albeit with some tailoring for 10-second and 30-second ads. But video and audio ads in any medium generally are priced on the basis of their duration, so any content that is governmentally required both increases the cost of a message and diminishes what the speaker actually wishes to say. And, the fact that the proposed rule allows a shorter disclaimer in certain instances suggests that the additional disclaimer language may provide minimal added value. Does the CFB have any evidence demonstrating that the additional language provides a significant informational benefit to voters, or is it simply assumed to be so beneficial as to warrant the independent speaker's extra cost and diminution of political speech? The CFB has not tried to meet its constitutionally required burden to demonstrate that the additional language has a "substantial relation" to a "sufficiently important" governmental interest that is not already served by the existing disclaimer, or that could not be served by a shorter disclaimer.

That said, we would not oppose the language "is not authorized by any candidate or candidate committee" upon a proper showing of need, as this language is common for federal and state independent expenditures. But for several reasons we do take issue with the proposed requirement that an independent spender say "More information at nyc.gov/FollowTheMoney."

First, this requires the independent spender to subsidize the CFB's own costs to educate the public about the CFB's existence. For that reason the federal court in Maine invalidated a similar disclaimer requirement in *Yes for Life PAC v. Webster*, 84 F. Supp. 2d 150 (D. Me. 2000). The challenged Maine law required that political action committees include a disclaimer in certain communications stating that "[a] copy of our report is available from and may be viewed at the office of the Commission on Governmental Ethics and Election Practices." The court explained: "Essentially what the State is doing here is using broadcast media to advertise the role of the Commission on Governmental Ethics and Election Practices, but making PACs pay for the advertising and making them do so each time a political message is broadcast." *Id*. at 153. As a result, and in the absence of a sufficient justification, the court concluded that "the requirement is not narrowly tailored, but overbroad. If the State has a need to make the public aware of the existence of its Commission on Governmental Ethics and Election Practices as a repository of PAC reports, it should do so directly, not as part of a PAC's political broadcast." *Id.* The same analysis applies to the CFB's proposal that all speakers refer viewers and listeners to the CFB's website.

Second, this required language comprises a form of compelled speech, as it conveys a message of substance that may contradict the speaker's beliefs. The phrase "follow the money" implicitly casts aspersions on the speaker itself, unlike even the Maine language, which at least had the virtue of neutrality. It undermines the speaker's ability to have its communications evaluated only on their content, the speaker's identity and its professed independence of any

candidate, rather than on the basis of how much money the speaker spent. The First Amendment does not abide governmental-compelled speech that expresses views that the speaker rejects. *See, e.g., Wooley v. Maynard*, 430 U. S. 705 (1977) (striking down requirement that drivers not conceal the state motto, "Live Free or Die," on their mandatory license plates, which required them to act as a "mobile billboard" for the state's "ideological message").

We also urge the CFB not to adopt the requirement in proposed new Rule 13-04(b) that a speaker identify its "top donors." For an organization like Local 32BJ, which self-finances its independent expenditure PAC and includes its name in the PAC's name, such a requirement is entirely superfluous. Even if Local 32BJ itself were the independent spender, it is unclear what kind of disclosure would be required. The proposed language does not define the term "donor," but appears to be broader than the CFA § 3-702(8) term "contribution." On occasion Local 32BJ does receive transfers from affiliated union bodies. Would 32BJ be required to name them, including where the transfer had nothing to do with Local 32BJ's independent spending? If so, providing that information in Local 32BJ's public political message would be grossly misleading to viewers and listeners regarding whose message was being conveyed.

Indeed, that is a fundamental flaw with the top-donor disclosure requirement. By requiring disclosure not just of contributions made for the purpose of furthering the speaker's independent expenditure activity, any donor of at least $5,000/yr. to an entity is subject to misidentification with the speaker's particular political message, even if that message were wholly unanticipated, the donor disagrees with it, or, as an accounting matter, it can be demonstrated that the donor's funds were not used for the communication. The actual effect of such a requirement may be to chill donations at or above the $5,000/yr. disclosure threshold, or to cause donors to prohibit their donees from using their funds for *all* political messages despite the donors' general support for the group's political activities, lest the organization publicly announce the donors' name with a message that the donor opposes.

And, as with its other disclaimer proposals, the CFB has failed to identify a single reason for the top-donor request, let alone a substantial relation to a sufficiently important governmental interest. See Notice at 11. As a result, Local 32BJ and other commenters are left to guess at the CFB's rationale and denied access to any empirical findings and evidence that the CFB may have amassed in City elections that it believes warrants the changes proposed.

Proposed Amendment to Rule 13-02(d): Contribution Disclosure

The CFB proposes to amend Rule 13-02(d) by adding a new subsection (ii) that would require an independent spender to disclose about its own contributors aggregating at least $50,000 in the 12 months preceding the election (a so-called "major contributor"), information about every entity that contributed at least $25,000 *to that $50,000+ contributor* during the same

period. But this rule would impose no corresponding requirement on those "major contributors" to disclose their $25,000+ contributors *to* the disclosing spender or anyone else. Yet no kind of organization is required by law to make its incoming contributors public at a time and in a manner that would enable the spender to comply, except for registered political committees that are subject to frequent public disclosure requirements anyway. Nonetheless, the requirement here is absolute, it is not conditioned on the availability to the disclosing entity of the information that it is required to disclose, and it is not even tempered with a "best efforts"-type standard for compliance.

Accordingly, the purpose of the proposal appears to be to deter large donations to organizations that are or may become politically active, or to force groups to require all prospective donors of $50,000 or more during the year preceding an election to publicly disclose *all* of their *own* $25,000+ donors – and that, regardless of how many such donors there are, and regardless how the total of the $25,000+ donations to the "major contributor" compare to its own $50,000+ donations to the disclosing entity whose CFB reporting obligations triggered the cascading disclosures. True, this proposed amendment does use the term "contribution", which CFA § 3-702(8) defines as anything of value that is "made in connection with the nomination for election, or election, of any candidate…." But even if that term confines the disclosures to that subset of donations – the CFB does not say, see Notice at 11 – this does not ameliorate the fact that the regulated entity would be compelled to provide information that is not in its possession and whose acquisition it has no compulsory means to secure.

Conclusion

The Board's rules and advisory opinions significantly influence the ability and means of innumerable organizations and millions of city residents to participate in City elections and civic life generally. The proposals that we address would effectuate highly consequential changes in the law on the eve of a City election year. We respectfully suggest that any such process to revise these rules would have been better undertaken closer to the beginning of this election cycle, and the matters addressed in AO 2016-1 should have been included in such an earlier rulemaking instead of determined by a rare exercise of the Board's authority to issue an advisory opinion at its own initiative. Instead, the Board is proceeding both suddenly and quickly during the peak period of a national and New York State election to which Local 32BJ and others must commit substantial attention and resources. At this time, the most appropriate course would be to undertake a new rulemaking that covers both Rule 1-08(f) and the subject matter of AO 2016-1. Meanwhile, we respectfully request that the Board modify its proposed amendments to Rules 13-04(d) and 13-02(b) as we explain above.

We appreciate the Board's consideration of these comments.