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**Before the New York City Campaign Finance Board
RE: Proposed 2024 Campaign Finance Board Rule Amendments
September 27, 2024**

The Brennan Center for Justice appreciates the opportunity to provide testimony on the proposed amendments to the New York City Campaign Finance Board's (CFB) rules.² We commend the CFB for its continued work to strengthen New York City's democracy and serve its voters. In the more than 35 years since the CFB's inception, the City's campaign finance laws and regulations have been updated and modernized to adapt to new regulatory challenges. The result is a local campaign finance system that has served as a national model for effective and fair elections.

The proposed amendments continue that tradition and reflect the CFB's commitment to ensuring that New York City remains a national model going forward. We support the CFB's proposed rule changes in general, and especially the important and timely updates to strengthen coordination rules, modernize the definitions of electioneering communications and express advocacy, and address the rise of paid influencers. We also offer several suggestions below that would strengthen these rules even further.

I. Strengthening Coordination Rules (Proposed Amendment § 14)

Overall, we strongly support the CFB's proposed updates to further strengthen its coordination regulations. The proposed amendments add five new factors that the CFB may consider in determining whether an expenditure is truly independent of a candidate. These factors address scenarios in which the candidate is or has been affiliated with the entity making the expenditure, the spender has received strategic non-public information about the campaign, or a member of the candidate's family has funded

¹ The Brennan Center is a nonpartisan public policy and law institute that focuses on the fundamental issues of democracy and justice. The opinions expressed in this testimony are only those of the Brennan Center and do not necessarily reflect the opinions of the NYU School of Law.

² "Notice of Public Hearing and Opportunity to Comment on Proposed Rules," *New York City Campaign Finance Board*, <https://www.nyccfb.info/media/2118/notice-of-public-hearing-september-2024.pdf>. For nearly 30 years, the Brennan Center's nonpartisan expertise has informed policies that protect and expand democracy at the state, local, and federal levels. Since the Center's inception, our staff have studied, litigated, and drafted legislative solutions regarding money in politics and have advised on the development, implementation, and improvement of public campaign financing systems and transparency policies nationwide.

the spending entity or has a financial stake in it.³ These changes help to fill gaps in New York City’s existing regulations, and they are especially noteworthy in light of enforcement failures at the federal level. As we detail below, however, they could be tightened further by adding a presumption of coordination for certain expenditures and adjusting the applicable time frame for coordinated activity.

Effective coordination regulations are crucial to ensure the integrity of campaign finance systems. When the U.S. Supreme Court gave the green light to unfettered election spending in its infamous *Citizens United* decision, it reasoned that such spending would happen independently of candidates and therefore would not pose a corruption threat.⁴ But that has not been the case. Candidates across the country have found myriad ways to coordinate with purportedly “independent” spenders and thereby evade contribution limits. The best response is to enact strong coordination rules, which play a critical role in preventing corruption, promoting transparency, and ensuring fair elections.⁵

Many jurisdictions’ laws fall short in this regard, perhaps most notably at the federal level where the Federal Election Commission (FEC) has long been criticized for failing to enforce coordination limits between political campaigns and independent expenditure groups.⁶ Ambiguity in the FEC’s test for identifying coordination makes it difficult to apply, and the Commission’s gridlock has created a status quo in which even obvious violations go unenforced.⁷ The result is a free-for-all that allows outside groups funded by wealthy donors to operate as extensions of candidates’ campaigns, or “shadow campaigns.”⁸

Given the ineffective enforcement and backsliding at the federal level, the CFB’s current effort to update and strengthen New York City’s coordination rules is especially significant and has the potential to serve as a national model. The CFB’s existing rules provide clear guidance about types of conduct that can constitute coordination and rightly address scenarios involving candidates raising funds for outside spending groups and campaigns and outside groups sharing consultants, staff, vendors, or office space.⁹

³ Proposed Rules § 14, amending subdivision (a) of section 6-04 of chapter 6 of Title 52 of the Rules of the City of New York.

⁴ *Citizens United v. FEC*, 558 U.S. 310, 357 (2010); see also Chisun Lee, Brent Ferguson, and David Early, “After *Citizens United*: The Story in the States,” *Brennan Center for Justice*, October 9, 2014, <https://www.brennancenter.org/our-work/research-reports/after-citizens-united-story-states>.

⁵ See *Buckley v. Valeo*, 424 U.S. 1, 47 (1976); *Citizens United*, 558 U.S. at 356-61.

⁶ Daniel I. Weiner, “Fixing the FEC: An Agenda for Reform,” *Brennan Center for Justice*, April 30, 2019, <https://www.brennancenter.org/our-work/policy-solutions/fixing-fec-agenda-reform>.

⁷ See *id.* at 4 & n.49. For the FEC’s coordination rules, see 11 C.F.R. §§ 109.20, 109.21. To make matters worse, the FEC issued guidance earlier this year giving campaigns even greater license to coordinate with outside groups. See FEC Advisory Opinion 2024-01, March 20, 2024, <https://www.fec.gov/files/legal/aos/2024-01/2024-01.pdf>; FEC Advisory Opinion 2024-07, August 29, 2024, <https://www.fec.gov/files/legal/aos/2024-07/2024-07.pdf>.

⁸ See, e.g., Chisun Lee, Brent Ferguson, and David Early, “After *Citizens United*: The Story in the States,” *Brennan Center for Justice*, October 9, 2014, <https://www.brennancenter.org/our-work/research-reports/after-citizens-united-story-states>; “Strengthen Rules Preventing Candidate Coordination with Super PACs,” *Brennan Center for Justice*, February 4, 2016, <https://www.brennancenter.org/our-work/research-reports/strengthen-rules-preventing-candidate-coordination-super-pacs>.

⁹ The Brennan Center’s research has identified these factors as key components of an effective coordination regime. See Chisun Lee, Brent Ferguson, and David Early, “After *Citizens United*: The Story in the States,” *Brennan*

Even these rules contain gaps, however, and we commend the CFB for seeking to fill them. The proposed amendments do so by clarifying that the CFB may find coordination when an individual or entity has been “compensated, reimbursed, or retained” by the campaign and the outside group within the same election cycle. The changes also address outside groups’ use of “strategic information” from campaigns and instances in which members of the candidate’s family fund or control the outside group or have a financial stake in it.

We agree with the substance of these amendments, but respectfully offer several suggestions to tighten them further:

- Recharacterize the scenarios listed in section 6-04 from “[f]actors . . . the Board may consider” when evaluating the independence of expenditures to factors that trigger a presumption of coordination. For instance, California, Connecticut, and Washington all presume that expenditures are coordinated when they are “based on” information provided by candidates or their agents.¹⁰
- Indicate types of conduct that generate a *per se* finding of coordination (such as when the spender is also an agent of the candidate), and types of conduct that give rise to a rebuttable presumption of coordination (such as a scenario where the candidate has retained the professional services of an entity that has been retained as a vendor by the spender). Such a presumption could be rebutted by proof of an appropriate firewall, as is the case in other jurisdictions.¹¹
- Adjust the applicable time frame for finding coordination. Several of the coordination factors listed in section 6-04(a), such as the candidate fundraising on behalf of the spender, limit a finding of coordination to conduct occurring “during the same election cycle in which the

Center for Justice, October 9, 2014, <https://www.brennancenter.org/our-work/research-reports/after-citizens-united-story-states>.

¹⁰ See Cal. Code Regs. tit. 2, § 18225.7(d)(1) (applying a presumption of coordination to expenditures made “based on information about the candidate’s or committee’s campaign needs or plans that the candidate or committee provided to the expending person directly or indirectly, such as information concerning campaign messaging, planned expenditures or polling data”); Conn. Gen. Stat. § 9-601c(b)(7) (applying a presumption of coordination to any expenditure “made by a person based on information about a candidate’s campaign plans, projects or needs, that is directly or indirectly provided by a candidate, the candidate’s candidate committee, a political committee or a party committee, or a consultant or other agent acting on behalf of such candidate, candidate committee, political committee or party committee, to the person making the expenditure or such person’s agent, with an express or tacit understanding that such person is considering making the expenditure”); Wash. Admin. Code 390-05-210(3)-(6) (applying a presumption of coordination to expenditures “made based on information about . . . plans, projects, or needs provided to the expending person by” a candidate, candidate’s authorized committee or agent, caucus political committee, political party, or other political committee).

¹¹ See, e.g., Conn. Gen. Stat. § 9-601c(d) (“[T]he commission shall consider, as an effective rebuttal to the presumptions provided in subsection (b) of this section, the establishment by the person making the expenditure of a firewall policy designed and implemented to prohibit the flow of information between (1) employees, consultants or other individuals providing services to the person paying for the expenditure, and (2) the candidate or agents of the candidate.”).

expenditure is made.”¹² We recommend expanding this temporal range to “during the same election cycle in which the expenditure is made, or two years before the expenditure, whichever is longer.” This approach helps avoid a potential loophole that could allow coordinated activity to occur shortly before the beginning of a new election cycle.

II. Updating Electioneering Communications and Express Advocacy Definitions (Proposed Amendment § 23)

We also commend the CFB’s proposed updates to modernize the definitions of “electioneering communications” and “express advocacy communications.”¹³ We understand the intent of these updates to be to ensure that the campaign finance system has the flexibility necessary to adapt to emerging technology and new modes of communication. The Brennan Center supports these changes and the CFB’s reasoning for basing reporting and disclaimer requirements on the type of communication rather than the method of distribution. However, we respectfully offer two suggestions to further strengthen these rules.

First, we advise expanding the definition of “electioneering communication” to include communications made earlier in the election cycle. Currently, the CFB’s rules define an “electioneering communication” as one that is disseminated “within 60 days of a covered primary, general, or special election.”¹⁴ While this is more expansive than the federal definition — which covers a similar 60-day window for general elections but only 30 days before primaries¹⁵ — other jurisdictions provide a longer window of coverage. Alabama defines electioneering communications as communications “made within 120 days of an election in which the candidate will appear on the ballot,”¹⁶ while Connecticut, Massachusetts, and Puerto Rico define them as communications made within 90 days of an election.¹⁷

Disclosure requirements for expenditures made within the coverage period protect voters against last-minute political advertisements that contain sensational or misleading information. Expanding the coverage window to 90 or 120 days before an election would give voters, and the CFB, more time to evaluate the advertisement and the identity of the entity disseminating it, which will facilitate decisions based on more complete and accurate information.

Second, in conjunction with expanding these definitions, we recommend ensuring that there are appropriate exceptions to avoid sweeping in conduct that should not be subject to electioneering regulations. The CFB’s existing electioneering rules include a carveout for news media,¹⁸ and other exceptions appear elsewhere in the CFB rules, such as for commercially reasonable transactions and

¹² See CFB Rules §§ 6-04(a)(vi) and (vii); Proposed Rules §§ 14(a)(viii), (x), and (xiii).

¹³ Proposed Rules § 23, amending section 14-01 of chapter 14 of Title 52 of the Rules of the City of New York.

¹⁴ CFB Rules § 14-01.

¹⁵ 11 C.F.R. § 100.29; *see also* 11 C.F.R. § 104.20.

¹⁶ Ala. Code § 17-5-2(a)(6).

¹⁷ Conn. Gen. Stat. §§ 9-601d(i), 9-621(h); Mass. Gen. Laws ch. 55, § 1; 16 L.P.R.A. § 621(20).

¹⁸ CFB Rules § 14-01 (“An expenditure made during the ordinary conduct of business in connection with covering or carrying a news story, commentary, or editorial by any broadcasting station (including a cable television operator, programmer, or producer), website, newspaper, magazine, or other periodical publication, including any internet or electronic publication, is not a covered expenditure.”).

candidate endorsements.¹⁹ For clarity and administrability, we recommend either reiterating that these exemptions apply to electioneering communications or expanding their scope as necessary (to the extent they do not apply already). The CFB may also consider adding other exceptions. For example, among other things, Connecticut expressly exempts from its definition of “expenditure” all lawful communications from tax-exempt organizations and bona fide commercial speech — such as commercial advertisements run by a candidate who owns or operates a business.²⁰

III. Addressing Rise in Use of “Paid Influencers” (Proposed Amendment § 15)

Finally, we strongly support the CFB’s proposal to revise the definition of “paid for by” to include paid media influencers.²¹ Specifically, the revised definition would cover “paying an individual or entity to create, publish, or distribute favorable or unfavorable content about a candidate or ballot measure.”

The Brennan Center commends the CFB for taking action in response to the growing prevalence of online influencers engaging in election-related communications, an issue that federal regulators have notably failed to address.²² The CFB’s proposed rule change responds to an increasingly important and urgent problem, as online influencers have emerged as a new conduit for foreign election interference.²³ This issue is unfolding right here in the Southern District of New York: just weeks ago, federal prosecutors charged agents of RT, a Russian state-controlled media outlet, with funneling nearly \$10 million to Tenet Media, a platform linked to right-wing social media stars with millions of subscribers.²⁴ It is crucial for state, local, and federal regulators to address this risk, and the CFB’s proposed regulation on the issue is a step forward that can set an example for other jurisdictions to follow.

The Brennan Center applauds the CFB’s continued efforts to strengthen New York City’s democracy and advance timely and necessary reforms to the campaign finance system. We stand ready to assist as you continue your efforts to build a more inclusive democracy for all New Yorkers.

¹⁹ See, e.g., CRB Rules § 5-06(d) (providing that commercially reasonable loans are not in-kind contributions); CFB Rules § 6-03(d) (providing that endorsing a candidate does not, by itself, constitute a joint expenditure).

²⁰ See Conn. Gen. Stat. § 9-601b(b).

²¹ Proposed Rules § 15, amending subdivision (a) of section 6-06 of chapter 6 of Title 52 of the Rules of the City of New York.

²² See Daniel I. Weiner and Harry Isaiah Black, “Comment to FEC: Adopt updated rules requiring transparency for paid influencers and other nontraditional online political ads,” *Brennan Center for Justice*, January 9, 2023, <https://www.brennancenter.org/our-work/research-reports/comment-fec-adopt-updated-rules-requiring-transparency-paid-influencers>.

²³ See Shannon Bond, Jude Joffe-Block, and Caitlin Thompson, “How Russian operatives covertly hired U.S. influencers to create viral videos,” *NPR*, September 5, 2024, <https://www.npr.org/2024/09/05/nx-s1-5100829/russia-election-influencers-youtube>.

²⁴ Indictment, *United States v. Kalashnikov, et al.*, 24-cr-519 (S.D.N.Y. Sept. 3, 2024), <https://www.justice.gov/opa/media/1366266/dl>; Zachary Cohen, et al., “DOJ alleges Russia funded US media company linked to right-wing social media stars,” *CNN*, September 5, 2024, <https://www.cnn.com/2024/09/04/politics/doj-alleges-russia-funded-company-linked-social-media-stars/index.html>.