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Submitted electronically to Michael.Cooke@phila.gov

Michael Reed, Esq.
Chair
Philadelphia Board of Ethics

Hon. Phyllis W. Beck
Vice-Chair
Philadelphia Board of Ethics

Dear Chair Reed, Vice-Chair Beck, and Members of the Board,

Campaign Legal Center (“CLC”) respectfully submits these written comments to the Philadelphia Board of Ethics in support of the Board’s proposed amendment to Regulation No. 1, Campaign Finance.¹ These comments primarily address the amendment to paragraph 1.33(f), regulating the practice known as “redboxing.”

CLC is a nonpartisan, nonprofit organization that advances democracy through law at the federal, state, and local levels of government. Since its founding in 2002, CLC has participated in every major campaign finance case before the U.S. Supreme Court, and in numerous other federal and state court cases. Our work promotes every American’s right to an accountable and transparent democratic system.

CLC supports the Board’s proposed regulation addressing redboxing, an illegal practice by which candidates coordinate their electoral activity with outside groups by communicating their preferred campaign messaging and strategy—often in an actual red box on the candidate’s campaign website—for use by outside groups to develop, run, and pay for ads that support the candidate. Federal law and the law of many states and localities prohibit coordination between campaigns and outside groups. These laws play a crucial role in our democratic process by helping prevent wealthy special interests from using their ability to engage in unlimited fundraising and spending to directly underwrite a candidate’s campaign expenses, a practice

¹ See Amendment to Phila. Bd. Ethics Reg. No. 1 (“Campaign Finance”) (filed July 24, 2022), <https://bit.ly/3A22CUZ>.

that raises obvious corruption concerns. At the federal level, redboxing is often used to evade federal regulations that prohibit such coordination between candidates and super PACs.

In these comments, we first describe the practice of redboxing and its key features, demonstrating how candidates signal illicit requests, hidden in plain sight, to outside spenders for specific advertising in support of their campaigns. Second, we provide an overview of the U.S. Supreme Court’s case law concerning coordination restrictions and explain how it applies to redboxing. Finally, we recommend further clarifying the proposed rule by identifying the most common features of redboxing, and we set out proposed rule language that would incorporate our recommendation.

I. Redboxing is used to circumvent coordination rules.

“Redboxing” is named for the tell-tale, red-outlined box on a candidate’s website that contains specific information detailing the campaign’s preferred messaging and strategy, which is then used by outside spenders—such as super PACs, *i.e.*, federal political committees that are permitted to raise and spend unlimited amounts to pay for independent expenditures provided such expenditures are not coordinated with any candidate or campaign committee—to make political ads in support of the candidate.

An example from the New Hampshire race for U.S. Senate in 2014 illustrates how redboxing works: In April 2014, Senator Jeanne Shaheen’s campaign updated a redbox on their campaign website to “assert that when Shaheen’s opponent Scott ‘Brown was the Senator from Massachusetts[,] he gave big oil billions in special breaks.’”² The Democratic Senatorial Campaign Committee tweeted out a message that linked directly to the redbox on Senator Shaheen’s campaign website and three days later “the super PAC Senate Majority PAC came out with an advertisement on Scott Brown’s ‘big oil baggage’ taking the Shaheen campaign’s redbox message point-by-point and incorporating it into the script of the ad.”³

At the federal level, redboxing exploits gaps in the Federal Election Commission’s (“FEC”) coordination regulations, which exclude from the definition of “coordinated communication” certain candidate-related information that is obtained from a publicly available source.⁴ Campaigns have increasingly abused the federal safe

² Kaveri Sharma, *Voters Need to Know: Assessing the Legality of Redboxing in Federal Elections*, 130 Yale L.J. 1898, 1917 (2022) <https://www.yalelawjournal.org/note/voters-need-to-know>.

³ *Id.*

⁴ Recently, the FEC appeared to endorse the idea that federal candidates may legally communicate instructions to super PACs through public-facing social media platforms like Twitter. *See* FEC MUR 7700 (VoteVets, et al.), Statement of Reasons of Chairman Allen J. Dickerson, Commissioner Sean J. Cooksey, Commissioner James E. “Trey” Trainor, III, and Commissioner Ellen L. Weintraub (Apr. 29, 2022), https://www.fec.gov/files/legal/murs/7700/7700_14.pdf.

harbor for “publicly available information” by publicly communicating their advertising requests to independent groups, and claiming the safe harbor as protection for their unlawful coordination activity.

Although redboxing tactics vary from one campaign to another, redboxing schemes tend to include commonly understood signals and phrasing that make it easy for outside groups to identify a candidate’s requests for desired communications, including who should be targeted with what messages, delivered via which media channels. A redbox generally includes a combination of two or more of these elements to get the attention of supportive super PACs:

A. Signals and repositories. Candidates typically signal their messaging and strategy to outside spenders by circumscribing the information within a discrete part of their campaign website, such as in a red box or on a separate web page. But despite the name, “redboxes” come in a variety of forms (and colors). Candidates may signal their redbox with specific phrases like, “Voters Need to Know” or “All Philadelphians Need to Know,” highlighting a section or page of the candidate’s website that contains messaging and strategy information directed at super PACs.⁵ Redboxes also signal how recently they have been updated, so that super PACs know they are using the latest message and strategy information from the candidate to create their political ads.⁶

Political parties also create and maintain their own online aggregated repositories of redboxes to support their party’s candidates.⁷ These websites streamline the process of communicating campaign strategy and messages to outside spenders, making it easy to find updated party messaging for specific elections across the country.

B. Targeted audience information. Redboxes often contain information telling outside spenders who the intended audience is for particular campaign messaging. This tactic ensures that their ads are more effective for the candidate because the campaign is sharing crucial targeting information, often based on their polling data.⁸ This information often includes specific demographic and location signals, like “voters in St. Louis over the age of 65” or “men who are Democrats under 50.”

⁵ See, e.g., Karin Norington-Reaves Democrat for Congress, *Voter Alert*, https://www.votekarin.com/?page_id=993 [<https://perma.cc/84KM-PNQK>].

⁶ *Id.*

⁷ See e.g., Nat’l Republican Senatorial Comm., *New Hampshire*, <https://www.nrsc.org/state-facts/new-hampshire/> [<https://perma.cc/W75E-QKU8>].

⁸ Chris Moody, *How the GOP Used Twitter to Stretch Election Laws*, CNN (NOV. 17, 2014) <https://www.cnn.com/2014/11/17/politics/twitter-republicans-outside-groups/index.html>.

- C. Communication methods.** In addition to providing targeting information, campaigns specify to outside spenders how to disseminate a communication using widely known code words. A redbox indicating that voters need “to see” means the outside group should run television ads; content that a voter needs “to read” should be sent via direct mail; and the phrasing “see on the go” is a request for digital ads.⁹
- D. Messaging content.** Candidates use redboxes to specify particular messages they want outside spenders to use in political ads, combining their signals for who to target and how with specific campaign messages. For example, when Karen Carter Peterson ran for Congress in a special election in Louisiana in 2021, her campaign website’s redbox signaled to super PACs that “[y]oung Black voters and White Women who are non-GOP voters need to **read** and **see on the go** that Karen Carter Petersen has been endorsed by Gary Chambers and Stacey Abrams.”¹⁰ This instruction to super PACs identified specific groups to target and called for direct mail and digital ads highlighting the candidate’s endorsements.

In Wisconsin, the website for Mandela Barnes’s 2022 campaign for the U.S. Senate instructs outside groups that “voters outside of the Madison and Milwaukee media markets need to read that Mandela Barnes grew up in middle-class Wisconsin, his mom a teacher and his dad a third shift worker.”¹¹ To a super PAC looking to support Barnes’s campaign, it’s a clear set of instructions for a direct mail campaign conveying a specific message about the candidate, targeted outside of the state’s two major cities where Barnes’s campaign thought that message would resonate most effectively.

In addition to providing specific messaging, candidates also make documents, photos, and videos available through their redboxes, allowing super PACs to use ready-made advertising production elements to quickly develop political ads, instead of spending time and resources producing their own materials.¹²

⁹ Shane Goldmacher, *The Little Red Boxes Making a Mockery of Campaign Finance Law*, N.Y. TIMES (May 16, 2022) <https://www.nytimes.com/2022/05/16/us/politics/red-boxes-campaign-finance-democrats.html>.

¹⁰ Karen Carter Peterson for Congress, *What Voters Need to Know*, <https://www.karencarterpeterson.com/what-voters-need-to-know/> [<https://perma.cc/W38U-XA7R>] (emphasis in original).

¹¹ Mandela Barnes for U.S. Senate, *Media*, <https://mandelabarnes.com/media/> [<https://perma.cc/273C-P3B8>].

¹² See, e.g., John Gibbs for United States Congress, *Media*, <https://www.votejohngibbs.com/media> [<https://perma.cc/XN4Q-C4EA>].

Putting these mechanisms together, candidates communicate their desired strategy and messaging to supportive outside spenders and quickly turn an effective redbox into large advertising buys in support of their candidacy. For example, in Matt Rosendale’s 2018 campaign for a U.S. Senate seat in Montana, Rosendale updated his campaign website to include points attacking his opponent, Jon Tester, “for his ‘D’ rating from the NRA and his votes for anti-Second Amendment judges.”¹³ In response and on the same day, “the NRA ordered a \$93,000 flight of radio ads to attack Rosendale’s opponent.”¹⁴

II. Redboxing enables quid pro quo corruption and the appearance of such corruption.

The Board’s proposed rule to specifically regulate redboxing as a form of coordination addresses a growing issue in contemporary elections: Ensuring that wealthy special interests are unable to underwrite candidates’ campaigns by coordinating their spending with their preferred candidates. As decades of U.S. Supreme Court precedent has established, regulating coordinated spending between candidates and outside spenders is constitutional, and essential for reducing political corruption.

Beginning with its seminal decision in *Buckley v. Valeo* (1976), the U.S. Supreme Court has consistently maintained that outside expenditures “controlled by or coordinated with a candidate” may be constitutionally limited in the same manner as direct contributions to the candidate’s campaign.¹⁵ Because coordinated expenditures are essentially indirect or in-kind contributions to candidates, limiting expenditures made in coordination with candidates furthers the same anti-corruption interests served by limits on direct campaign contributions and, critically, “prevent[s] attempts to circumvent the [limits] through prearranged or coordinated expenditures amounting to disguised contributions.”¹⁶

¹³ Sharma, *supra* note 2, at 1917.

¹⁴ *Id.*

¹⁵ 424 U.S. 1, 46-47 (1976).

¹⁶ *Id.* at 455.

In *McConnell v. FEC* (2003), the Supreme Court upheld part of the federal Bipartisan Campaign Reform Act requiring coordination rules to cover coordinated expenditures made in the absence of “an agreement or formal collaboration” with a candidate.¹⁷ *McConnell* noted that the existence of a formal agreement did not establish “the dividing line” between coordinated and independent spending, and explained that “expenditures made after a ‘wink or nod’ often will be ‘as useful to the candidate as cash.’”¹⁸ Moreover, the Court reiterated that only “wholly independent” spending is constitutionally distinguishable.¹⁹

Since the Supreme Court struck down the ban on corporate independent expenditures in *Citizens United v. FEC* (2010),²⁰ coordination rules have become especially critical to enforcing statutory restrictions and prohibitions on corporate contributions to candidates, such as Pennsylvania’s ban on corporate contributions to candidates and political committees.²¹ Indeed, the majority opinion in *Citizens United* relied on the assumption that *independent* expenditures, unlike direct campaign contributions, do not create a risk of “quid pro quo” corruption because they are made without “prearrangement and coordination” with candidates,²² making clear the importance of the distinction between coordinated and independent spending.

As the examples in Part I illustrate, redboxing belies any commonsense understanding of “independent” spending and undermines limits on campaign contributions that are key to maintaining accountability and preventing corruption in our democratic process. Instead, when an ostensibly “independent” outside spender pays to run advertisements following the explicit request and instructions from a candidate, those ads will plainly be “as useful to the candidate as cash.”²³ Ads run by outside spenders according to the express wishes of their preferred candidates are plainly not “wholly independent” spending, and such spending poses a clear risk of corruption and the appearance of the corruption.

¹⁷ 540 U.S. 93, 220-23 (2003).

¹⁸ *Id.* at 221 (quoting *FEC v. Colo. Republican Federal Campaign Committee*, 533 U.S. 421, 446 (2001)); *see also id.* at 222 (“A supporter could easily comply with a candidate’s request or suggestion without first agreeing to do so, and the resulting expenditure would be virtually indistinguishable from a simple contribution.” (internal quotation marks and brackets omitted)).

¹⁹ *Id.* at 221.

²⁰ 558 U.S. 310 (2010).

²¹ *See* 25 Pa. Cons. Stat. § 3253(a).

²² 558 U.S. at 357. The Court in *Citizens United* made a point to distinguish the challenge at hand from its precedent upholding prohibitions on corporate contributions to candidates, which, the Court noted, “have been an accepted means to prevent *quid pro quo* corruption.” *Id.* at 359 (emphasis in original).

²³ 540 U.S. 93, 221 (2003).

III. Recommendations for final rule.

Proposed paragraph 1.33(f) addresses redboxing as follows. First, the proposed rule would maintain the generally applicable exception to existing coordination rules that provides the provision of information by the candidate to the “general public” will not be considered a form of coordination. Second, the proposed rule provides that this exception would not apply where “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.”

We support the Board’s approach to addressing redboxing. While information provided to the general public for bona fide campaign purposes—such as a campaign speech or other communications aimed at influencing voters—is not indicative of coordination, the coordination of requested messaging and strategy direction between campaigns and outside spenders should not be permitted merely because it is done in public. Additionally, we support the inclusion of proposed Examples 2 and 3, which provide clear illustrations of redboxing.

To provide further clarity in the rule, we recommend specifying some of the “circumstances” that the Board will consider in determining whether a campaign has made information publicly available “so that another person may use [it] to make expenditures supporting the campaign” — including, *e.g.*, by identifying common redboxing tactics. CLC has prepared the following draft language (indicated by underline) for the Board to consider adding to the proposed paragraph 1.33(f).

Recommended full text for final rule:

The person making the expenditure uses information 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.

In determining whether this exception applies, the Board may consider any and all relevant circumstances. Examples of such circumstances include, but are not limited to:

- i. The manner in which the information is published, such as the placement of the information on a discrete webpage or portion of a webpage containing other indicators identified in this paragraph:

- ii. Whether the information includes language suggesting that the information be communicated to others, such as “voters need to know” or “Philadelphians need to know”;
- iii. Whether the information includes targeted audience information, such as specific demographics or the location of intended or suggested recipients; and
- iv. Whether the information includes suggested methods of communication, such as indicating that recipients need to “see,” “hear,” or “see on the go” the information.

Conclusion

We respectfully urge the Board to adopt the proposed rule regulating redboxing and to incorporate our recommendation. We would be happy to answer questions or provide additional information to assist the Board in promulgating the final rule for paragraph 1.33(f) of Regulation No. 1, Campaign Finance. Thank you for your time and consideration.

Respectfully submitted,

/s/ Aaron McKean

Aaron McKean

Legal Counsel

Campaign Legal Center
1101 14th St. NW, Suite 400
Washington, DC 20005