

# Coordination Regulations

Speech independent of candidates is crucially important to Americans' First Amendment rights. As the Supreme Court explained nearly 50 years ago, "the First Amendment right to speak one's mind . . . on all public institutions includes the right to engage in vigorous advocacy."<sup>161</sup> Further, as the Court has also found, "independent advocacy . . . does not presently appear to pose dangers of real or apparent corruption comparable to those identified with large campaign contributions."<sup>162</sup>

There is good reason for this judgment. Precisely because of their independence, independent expenditures are not always helpful to the campaign they support. As the *Buckley* Court recognized, independent speech "indeed may prove counterproductive" to a candidate's campaign strategy.<sup>163</sup> The over 100,000-page record in *McConnell* contained "only scant evidence that independent expenditures even ingratiate."<sup>164</sup> Even then, "[i]ngratiation and access, in any event, are not corruption."<sup>165</sup> With this in mind, the D.C. Circuit, in *SpeechNow.org v. FEC*, held that "the government has no anti-corruption interest in limiting contributions to an independent expenditure group."<sup>166</sup> As the opinion explained, "[b]y definition, independent expenditures are 'not made in concert or cooperation with or at the request or suggestion of [a] candidate, the candidate's authorized political committee, or their agents, or a political party committee or its agents.'"<sup>167</sup>

Citizens who want to engage in independent speech must be able to spend their money freely

on that speech. Whether through spending on electoral speech they publish themselves or through contributions to organizations that, in turn, buy TV ads, mailers, billboards, and all other forms of advocacy, speech independent of candidate campaigns cannot be restricted.

The Court, however, has also said that candidate contributions may be limited on the sole ground that these limits protect against *quid pro quo* corruption.<sup>168</sup> That is the only substantial state interest in limiting contributions. Speech, therefore, that is not independent, but done in coordination with candidates (or political parties) may be limited as an *in-kind* contribution to a campaign.

Laws defining "coordination" are meant to mark the line between *independent* expenditures (and, therefore, independent speech) and expenditures that are *controlled* by a candidate. This is a difficult task. For "the past 40 years, [the Supreme Court] ha[s] spelled out how to draw the constitutional line between the permissible goal of avoiding corruption in the political process and the impermissible desire simply to limit political speech."<sup>169</sup> Too often, badly drafted coordination laws fail to follow this guidance. They sweep up too much speech about candidates, leave speakers without coherent guidelines about what speech and behavior is coordinated, or both. The goal of coordination laws should be to give clear and reasonable direction to those who want to exercise their constitutional right to speak independently.

## ***First Amendment Dangers from Coordination Regulations***

Some states, however, maintain overly broad coordination laws that go beyond regulating activities that directly and unmistakably advocate for a candidate's election. Instead, they prevent advocacy and civic groups from discussing positive and negative developments in government or policy proposals with elected officials and candidates and then acting to raise the public's awareness of such developments or ideas. The wide dissemination of information about issues of public concern is essential to representative government. Precise and narrowly tailored coordination laws protect organizations' ability to inform the public of what their government is doing or should be doing.

If the rules on coordinated expenditures are not tailored to ensure independence and nothing more, they impermissibly restrict the First Amendment rights of those seeking to speak independently.

Like many other provisions of campaign finance law, coordination regulations can be quite complex. Rather than attempt to analyze every aspect of every state's coordination laws, we focused on two aspects that are particularly susceptible to harming independent speech. One, how does a state define the type of *speech* that triggers the coordination statute and, if coordinated with the candidate, transforms the speech from independent to an "in-kind" contribution? Two, does a state provide an explicit safe harbor for publicly available information, so that those using such information cannot be said to be coordinating with a candidate? To be sure, these are not the only coordination provisions that restrict speech, but a state that fails to take these basic

steps to protect speakers is unlikely to respect First Amendment concerns throughout their coordination laws.

## ***Defining Content That Triggers a Finding of Coordination***

Because independent expenditures are a special type of expenditure, the test of a properly tailored definition of speech that can trigger coordination limits is similar to our analysis of "expenditure" definitions on page XX. The Index places these state definitions into four categories, which go from most speech-friendly to least as follows:

- *Buckley's* "express advocacy" test,<sup>170</sup> which allows for the most independent speech and provides the easiest guidelines to follow.
- The Supreme Court's "functional equivalent of express advocacy" test.<sup>171</sup> This standard regulates more speech than express advocacy, but still provides some speech protection.
- Broader definitions of covered speech than those listed above that only sweep up such speech close in time to an election. Since speech about candidates is most important in election season, however, most independent speech is still at risk.
- Broader definitions not tied to any timeframe, which severely limit independent speakers. In such cases, any speech about candidates could run afoul of coordination rules.

Kansas' law follows a clear "express advocacy" standard. It defines "independent expenditure" as one "made without the cooperation or consent of the candidate or agent of such candidate intended to be benefited and which expressly advocates the election or defeat of a clearly identified candidate."<sup>172</sup>

Montana uses the “functional equivalent” test, as is seen by following a trail of definitions. An independent expenditure is defined in reference to an “election communication” that is not coordinated with a candidate or ballot issue committee.<sup>173</sup> An “election communication” is defined as:

the following forms of communication to support or oppose a candidate or ballot issue: (i) a paid advertisement broadcast over radio, television, cable, or satellite; (ii) paid placement of content on the internet or other electronic communication network; (iii) a paid advertisement published in a newspaper or periodical or on a billboard; (iv) a mailing; or (v) printed materials.<sup>174</sup>

And “support or oppose” is defined as both express advocacy and its functional equivalent.<sup>175</sup> Taken together, the start of a test for coordination in Montana depends on the functional equivalent test.

West Virginia is an example of a state that follow an express advocacy standard for “independent expenditures” except for near an election, when the much broader “electioneering definition” becomes the standard for potentially coordinated speech. In West Virginia, an “independent expenditure” is defined as:

- (A) Expressly advocating the election or defeat of a clearly identified candidate . . . ; and
- (B) That is not made in concert or cooperation with or at the request or suggestion of such candidate, his or her agents, the candidate’s authorized political committee, or a political party committee or its agents.<sup>176</sup>

But this definition alone is misleading. In a separate part of its law, West Virginia also sweeps

in issue speech close to an election (so-called “electioneering communications”) as an in-kind contribution, if coordinated.<sup>177</sup> An electioneering communication in West Virginia is (in relevant part):

- (A) “Electioneering communication” means any paid communication . . . that:
  - (i) Refers to a clearly identified candidate . . . ;
  - (ii) Is publicly disseminated within:
    - (I) Thirty days before a primary election . . . ; or
    - (II) Sixty days before a general or special election . . . .<sup>178</sup>

This captures far more speech in West Virginia than it will first appears to a layperson. And it does so at the most critical time for speakers to discuss issues and candidates.

New York’s law is an example of the poorest protection for speakers. Any communication is possibly coordinated if it “promotes, supports, attacks, or opposes” a candidate beginning on January 1 of the calendar year in which a candidate referenced in a communication is up for election.<sup>179</sup> This standard covers far too much speech and provides speakers with no guidance on how much speech is covered.

### ***Safe Harbor for Publicly Available Information***

The Index’s coordination analysis also looks to see if a state specifically exempts from its coordination statute any publicly available information. That is, if a speaker uses information available to everyone – candidate positions, experience, appearances in public, publicly available photographs, etc. – then it cannot trigger “coordination.”

The opposite of insider information, public information is available to all. It can be useful for a politically active speaker in communications about candidates. A safe harbor for such information maximizes the ability of people to speak without a presumption that they are in cahoots with a candidate. Public information should be just that, public, not viewed by regulators as evidence of corrupt political tactics.

Wisconsin's law is a good example of just such an exemption. It says, "[u]sing publicly available information to create, produce, or distribute a communication" is not coordination, provided that no other coordinating conduct is present.<sup>180</sup>

In contrast, states like Delaware do not have a public information exemption.<sup>181</sup> In these states,

citizens cannot take the information everyone knows about a candidate to help craft their speech without some concern about being alleged to have "coordinated" with the candidate's campaign. Hawaii's law suffers the same oversight.<sup>182</sup>

Without clear language and safe harbors for public information, coordination laws can prevent some advocacy and civic groups from using publicly available information to discuss candidates and public policy. The wide dissemination of information about governmental functions and issues of public concern is essential to representative government. Precise, clear, and narrowly tailored coordination laws protect organizations' ability to inform the public of what their government is doing or should be doing.