CHAPTER SIX
LIMITS ON INDEPENDENT EXPENDITURES

There are two conceptual components of "independent expenditures." "Expenditures" constitute the first element. Prior to the Supreme Court's decision in *McConnell v. FEC*, 540 U.S. 93 (2003), "expenditures" were understood to refer to disbursements made for "express advocacy" – communications advocating in express terms the election or defeat of a clearly identified candidate. The Bipartisan Campaign Reform Act of 2002 ("BCRA," also known as the McCain-Feingold Bill) preserved that conception of "expenditures" and introduced a new term, "electioneering communications," which also could be financed independently in an effort to influence federal elections. "Electioneering communications" were defined as targeted broadcast advertisements referring to a federal candidate and run in the period immediately before an election. Because the same constitutional rules apply to expenditures and electioneering communications that are the functional equivalent of express advocacy, *see FEC v. Wisconsin Right to Life*, 551 U.S. 449, 465 (2007), this chapter uses the term "expenditures" broadly to include disbursements for either express advocacy or its functional equivalent.[1]

The second concept embedded in the term "independent expenditure" is that of "independence." An expenditure is "independent" only if it is not in any way "coordinated" with a candidate, candidate committee, or political party (or an agent of the candidate or party). Coordinated expenditures are typically treated as contributions to the candidate or party, and they are subject to contribution limits.

I. The General Rule: No Monetary Limits on Independent Expenditures

Tips

***Tip**: The Supreme Court has struck down monetary limits on independent expenditures by individuals, corporation, unions and other organizations, and political parties.* There is little prospect that the Supreme Court will reconsider these rulings in the foreseeable future.

***Tip**: If you want to test the limits of the constitutional precedents, be sure to develop a strong factual record demonstrating the real or perceived corrupting influence of the expenditures on candidates and elected officials, the likelihood that the limits will help to alleviate those harms, and the generosity of the monetary ceiling.* The evidence you present will have to demonstrate that the ceilings afford ample opportunity for political expression. You will also have to overcome a strong presumption that independent expenditures, unlike contributions to candidates, do not carry a substantial risk of actual or perceived corruption.

[1] For further discussion of express advocacy and electioneering communications, *see* Chapter Seven ("Campaign Ads and Issue Advocacy").

***Tip**: Reporting and disclaimer requirements may be imposed on entities making independent expenditures. See* Chapter Eight for a discussion of these requirements.

***Tip**: A cap on contributions made to groups that make both contributions to candidates or parties and independent expenditures is permissible as a means of preventing the evasion of individual contribution limits.* The Supreme Court has not yet decided whether it is constitutional to impose limits on contributions to groups that make only independent expenditures.[2] *See* Chapter Four, section II, for further discussion of these issues.

Legal Analysis

Placing monetary limits on independent expenditures—campaign spending that is not coordinated with a candidate or political party—is not a promising regulatory strategy, however desirable it may seem in principle. The Supreme Court has repeatedly invalidated Federal Election Campaign Act ("FECA") provisions imposing monetary limits on independent expenditures. *Citizens United v. FEC*, 130 S. Ct. 876, 908 (2010) (striking down FECA's rules on independent expenditures by corporations, noting "chilling effect" of "[l]imits on independent expenditures"); *Colorado Republican Federal Campaign Committee v. FEC*, 518 U.S. 604, 618 (1996) ("*Colorado Republican I*") (plurality opinion) (striking down FECA's limits on independent expenditures by political parties); *FEC v. Nat'l Conservative Political Action Committee*, 470 U.S. 480, 501 (1985) ("*NCPAC*") (striking down limits on independent expenditures related to candidates who had accepted spending limits); *Buckley v. Valeo*, 424 U.S. 1, 45 (1976) (*per curiam*) (striking down FECA's limits on independent expenditures by individuals and groups). All other courts, state and federal, are bound by these precedents and therefore are likely to strike down any monetary limits on independent expenditures by individuals, political action committees ("PACs"), corporations, unions and other organizations, and political parties in support of or opposition to state or local candidate.

In *Buckley*, the Court invalidated a $1,000 limit on independent expenditures by individuals, associations, and PACs. 424 U.S. at 39-51. After narrowly construing "independent expenditures" to mean independently conducted "express advocacy," the Court determined that none of the proffered state interests was sufficient to satisfy "the exacting scrutiny applicable to limitations on core First Amendment rights of political expression."[3] *Id.* at 44-45. The expenditure limit could not be justified as a means of maximizing the effectiveness of the contribution limits, because anyone wishing to buy influence with a candidate could still sponsor advertising that did not expressly advocate the election or defeat of a candidate but clearly benefited the candidate's campaign. *Id.* at 45. Moreover, the Court reasoned, independent expenditures present a "substantially diminished potential for abuse," because the very fact that they are not coordinated in any way with candidates means that such expenditures "may well provide little assistance to the candidate's campaign and indeed may prove counterproductive." *Id.* at 47.

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[2] *But see*, *e.g.*, *SpeechNow.org v. Federal Election Com'n*, 599 F.3d 686, 695 (D.C. Cir. 2010) ("[T]he government has no anti-corruption interest in limiting contributions to an independent expenditure group"), *cert. denied*, *Keating v. FEC*, No. 10-145, 2010 WL 4272775 (U.S. Nov. 1, 2010); *North Carolina Right to Life, Inc. v. Leake*, 525 F.3d 274, 292-93 (4th Cir. 2008) (invalidating $4,000 contribution limit for independent expenditure political committees because not "closely drawn" to preventing corruption).

[3] For further discussion of the burden that expenditure limits place on rights of free speech and association, *see* Chapter Five, section II.

Buckley also rejected the government's asserted "interest in equalizing the relative ability of individuals and groups to influence the outcome of elections." *Id.* at 48. In a rousing defense of the rights of the rich, the Court stated:

> [T]he concept that government may restrict the speech of some elements of our society in order to enhance the relative voice of others is wholly foreign to the First Amendment . . . . The First Amendment's protection against governmental abridgement of free expression cannot properly be made to depend on a person's financial ability to engage in public discussion.

Id. at 48-49. The Court explicitly distinguished prior voting rights and ballot access cases that sought to eliminate economic barriers to participation in the electoral process. The principles that permitted the Court to invalidate restrictions on the franchise did not, so *Buckley* said, permit the Court to uphold restrictions on political expression. *Id.* at 49 n.55.

It is difficult to say whether the Court would have so vehemently opposed limits on independent expenditures if the limit imposed under FECA had been more generous. After all, as *Buckley* noted, $1,000 would not buy even a quarter-page ad in a major newspaper. *Id.* at 40. Under those circumstances, it was not unreasonable for the Court to conclude that the ceiling heavily burdened core First Amendment rights. *Id.* at 47-48. But the Court voiced its strong opposition to that limit in terms that reach much farther than the particular ceiling at issue in *Buckley*. The Court reaffirmed its antipathy to limits on independent expenditures in *NCPAC*. In that case, the Court struck down a separate $1,000 limit on independent expenditures by PACs seeking to further the election of presidential candidates who accepted public funding and voluntary spending limits. 470 U.S. 480. On the record of that case, the Court determined that the risk of corruption by such expenditures was "a hypothetical possibility and nothing more," *id.* at 498, and thus could not justify a "wholesale restriction of clearly protected conduct," *id.* at 501. [4] Under *NCPAC*, as under *Buckley*, there is a "fundamental constitutional difference between money spent to advertise one's views independently of the candidate's campaign and money contributed to the candidate to be spent on his campaign." 470 U.S. at 497.

The Supreme Court later invalidated limits on certain independent expenditures by political parties in *Colorado Republican I*. In that case the plurality invoked the constitutional distinction between contributions and independent expenditures and discounted the risk of corruption from the latter. 518 U.S. at 615-16. *Nixon v. Shrink Missouri Government PAC* also expressly reaffirmed that distinction. 528 U.S. 377, 386-87 (2000). The Court thus gives no sign of backing down from the analysis of independent expenditures it gave in *Buckley*. [5]

In reliance on *Buckley*, the Nebraska Supreme Court invalidated a provision requiring groups intending to spend more than $2,000 on independent expenditures to provide notice at least 45 days before the election of how much they intended to spend, and then to spend no more than 120% and no less than 80% of the announced amount.

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[4] The Court explained, "[T]hat candidates and elected officials may alter . . . their . . . positions . . . in response to political messages paid for by the PACs can hardly be called corruption." *NCPAC*, 470 U.S. at 498.

[5] Citing *Colorado Republican I*, two courts in New York – one federal, one state –struck down a state law forbidding political parties from spending money in aid of a party candidate in a primary election. *Kermani v. N.Y. State Bd. of Elections*, 487 F. Supp. 2d 101 (N.D.N.Y. 2006); *Avella v. Batt*, 820 N.Y.S.2d 332 (N.Y. App. Div. 2006).

State ex rel. Stenberg v. Moore, 605 N.W.2d 440, 449 (Neb. 2000). The court found that the provision was not narrowly tailored to advance either of the state's interests in preventing corruption or encouraging participation in its public financing system.

II. Independent Expenditures by Corporations and Unions

In *Citizens United*, the Supreme Court struck down an outright ban on independent expenditures funded by the general treasuries of corporations, even though the law provided an alternative mechanism for corporate political activity through separate segregated funds. The Court opined that corporate independent expenditures and the resultant "appearance of influence [over political candidates] . . . will not cause the electorate to lose faith in our democracy." 130 S. Ct. 876, 910 (2010). The decision in *Wisconsin Right to Life* recognized an as-applied exception to BCRA's ban for electioneering communications that did not qualify as the functional equivalent of express advocacy. *See* Chapter Seven.

Tips

***Tip**: Corporations and unions may not be banned from making independent expenditures.* The Supreme Court has held that such a ban unconstitutionally burdens the freedom of expression of associated individuals speaking through their expenditures in the corporate form, and has rejected various rationales for applying differential expenditure limits to corporations.

***Tip**: Restrictions that apply to corporations do not necessarily have to be applied to unions.* The Supreme Court has not expressly overruled case law that permits differential treatment of corporations and unions under state law.

Legal Analysis

In the recent *Citizens United* decision, the Supreme Court struck down FECA's age-old restrictions on independent expenditures by corporations. 130 S. Ct. at 897. The Court held that corporate "independent expenditures . . . do not give rise to corruption or the appearance of corruption" and are protected as "political speech." *Id.* at 909-10. Because independent expenditures do not entail any risk of "*quid pro quo* corruption," the Court explained, a ban on corporate independent expenditures could not withstand "rigorous First Amendment scrutiny." *Id.* The Court rejected the government's proffered interest in preventing the "distortion" of the electoral process through the expenditure of "immense aggregations of wealth" by corporations solely interested in maximizing their profits. *Id.* at 904-05. In response to arguments that corporations could already make expenditures through political action committees ("PACs"), the Court emphasized that PACs were excessively "burdensome alternatives." *Id.* at 897. PACs were "separate associations" and both "expensive to administer and subject to extensive regulations" requiring recordkeeping and reporting. *Id.* Importantly, the federal scheme required corporations to register PACs *before* they made independent expenditures, *id.* at 898, and the Court castigated the result that corporations must get "prior permission to speak." *Id.* at 895.

To fill this sudden gap in campaign finance regulations, states have swiftly passed less intrusive disclosure requirements.[6] These laws aim to deter corruption as effectively as possible while complying with the *Citizens*

[6] *See*, *e.g.*, Minn. Stat. §§ 10A.12(1)-(1a), 211B.15(3) (2010); Iowa Stat. Ann. §§ 68A.102(18), .402(9), .402B(3), .404(3)-(4)

United framework. One such disclosure requirement in Minnesota is currently under challenge. The relevant provisions require that corporations form registered and periodically reporting political funds after making independent expenditures beyond $100. Minn. Stat. § 10A.12(1)-(1a). The federal District Court of Minnesota upheld these provisions, distinguishing them from the more intrusive regime in *Citizens United*. Under the Minnesota system, corporations maintain control over the political funds they create, which may be merely corporate accounts for the purpose of independent expenditures. *Minnesota Citizens Concerned for Life, Inc. v. Swanson*, No. 0:10-cv-02938-DWF-JSM, at 18 (D. Minn. filed Sept. 29, 2010) (on file at Brennan Center). Corporations in Minnesota may also solicit contributions to political funds from anyone, and even contribute unlimited amounts to these funds themselves. *Id.* Critically, corporations are free to begin making independent expenditures *before* the registration of their political funds, so long as they register within fourteen days of their first donation. *Id.* [7] For all these reasons, the Court ruled, the Minnesota provisions amount merely to disclosure requirements, rather than a ban on speech, and thus warrant a lesser degree of scrutiny. *Id.* at 22. The Court upheld Minnesota's disclosure requirements because they have a "substantial relation" to "sufficiently important" government interests, including the public's interest in "knowing who is speaking about a candidate shortly before an election." *Id.* at 23 (quoting *Citizens United*, 130 S. Ct. at 915).

In addition to the old restrictions on corporate expenditures, *Citizens United* also abolished the historical distinction between media and non-media corporations for purposes of expenditure limits. Previously, in *Austin v. Michigan Chamber of Commerce*, 494 U.S. 652 (1990), the Court had sustained a "media exception" to Michigan's ban on corporate independent expenditures, due to "the unique role that the press plays in 'informing and educating the public, offering criticism, and providing a forum for discussion and debate.'" *Id.* at 667. Nevertheless, the *Citizens United* Court summarily rejected the reasoning of *Austin*, and held that "differential treatment [for media corporations] cannot be squared with the First Amendment." 130 S. Ct. at 905-06. The Court reasoned that many media corporations have "immense aggregations of wealth," and that "the views expressed by media corporations often 'have little or no correlation to the public's support.'" *Id.* at 905. [8]

According to case law that has not been expressly overruled, state law does not have to treat corporations and unincorporated unions the same. In *Austin v. Michigan Chamber of Commerce*, 494 U.S. 652 (1990), the

Supreme Court rejected a claim that Michigan's differential treatment of unincorporated labor unions and corporations was unconstitutional under the Equal Protection clause. The Court reasoned:

> Whereas unincorporated unions, and indeed individuals, may be able to amass large treasuries, they do so without the significant state-conferred advantages of the corporate structure . . . . The

(2010) (imposing disclosure requirements for independent expenditures above $750, as well as registration and ongoing reporting requirements for organizations that raise over $1,000).

[7] *See also* Minn. Stat. § 10A.14(1).

[8] The Court's reasoning that the views of media corporations are often out of line with those of the public borrows from the government's proffered anti-distortion rationale for the ban on corporate expenditures—a rationale that, peculiarly enough, the

> desire to counterbalance those advantages unique to the corporate form is the State's compelling interest in this case; thus, excluding from the statute's coverage unincorporated entities that also have the capacity to accumulate wealth does not undermine its justification for regulating corporations.

Id. at 665 (internal quotations and citations omitted). Moreover, workers had the right to benefit from collective bargaining by a union without contributing to the union's political activity, so "the funds available for a union's political activities more accurately reflects members' support for the organization's political views than does a corporation's general treasury." *Id.* at 666.

Notably, the *Citizens United* Court rejected *Austin*'s reasoning that the "corrosive and distorting effects of immense aggregations of [corporate] wealth" justified a ban on corporate independent expenditures. *Citizens United*, 130 S. Ct. at 903. The *Austin* Court had upheld the differential treatment of corporations and unions based partly on this same, later-rejected rationale. Nevertheless, *Citizens United* did not explicitly overrule *Austin*'s distinction between corporations and unions for Equal Protection purposes, and the Supreme Court has not yet revisited that portion of *Austin*. According to at least one federal court, *Austin*'s holding that corporations and unions are not similarly situated for Equal Protection purposes remains good law. *Minnesota Citizens Concerned for Life*, No. 0:10-cv-02938-DWF-JSM, at 32-33 ("[T]he Supreme Court in *Citizens United* did not address, and therefore did not overrule, the portion of the *Austin* decision that addressed the equal protection clause").

III. "Independent" vs. "Coordinated" Expenditures

Court had already rejected. *See* 130 S. Ct. at 904-05.

When an expenditure is coordinated with a candidate or party, it is usually treated as a contribution to the candidate or party. Under federal law, coordinated expenditures are thus subject to the amount and source limitations applicable to contributions. For example, an individual may not spend more than $2,400 per election in coordination with a federal candidate.[9] But if an expenditure is truly independent, that same individual may spend an unlimited amount to support the candidate. Whether an expenditure is genuinely independent is therefore a matter of considerable importance.

Tips

***Tip**: When defining "independent" expenditures, include clearly defined objective examples of activity that will defeat any claim of true independence.* For example, spending should not be considered independent if it is for communications directed at the voting public, and the person making the expenditure:

- retains a consultant who is also providing campaign-related services to the candidate whom the person is seeking to help by making the expenditure;
- simply replicates a candidate's own campaign materials;
- uses information provided by candidate, campaign workers, or consultants with an understanding that the person is considering making the expenditure;
- notifies the campaign about the advertising in advance; or
- is actually working for the campaign at a high level.

These types of coordination would have to be defined more clearly in actual legislation. But the basic point is that it is easier to characterize expenditures that are obviously not independent than it is to provide a comprehensive definition of coordinated expenditures.

***Tip**: Merely obtaining information from a campaign that is otherwise publicly available or lobbying an elected official on a policy issue should not defeat the independence of a subsequent expenditure.*

***Tip**: Any advertising coordinated with a candidate, even if not for narrowly defined "express advocacy" or its functional equivalent should be treated as a contribution to the candidate.*

Legal Analysis

In 2001, the Supreme Court for the first time considered the constitutionality of limits on coordinated expenditures. *FEC v. Colorado Republican Federal Campaign Committee*, 533 U.S. 431 (2001) ("*Colorado*

[9] The federal contribution limits are now indexed for inflation, thus they rise over time. Check with the Federal Election Commission for the present contribution limits.

Republican II") held that coordinated expenditures were the functional equivalent of contributions and that limits on them were a constitutionally permissible means of preventing evasion of individual contribution limits.[10] Because independent expenditures cannot be limited, see section I *supra*, it is crucially important to know whether an expenditure is properly categorized as independent.

In 2010, the Fifth Circuit reaffirmed the *Colorado Republican II* approach to party coordination limits. *Cao v. FEC*, 619 F.3d 410, 422 (5th Cir. 2010) ("the Supreme Court's analysis fully supports the Government's differential treatment of political parties-because of what *Colorado II* recognized as a political party's unique susceptibility to corruption."). The *Cao* court noted, "[t]he Court in *Colorado [Republican] II* expressly recognized that Congress has the power to regulate coordinated expenditures in order to combat circumvention of the contribution limits and political corruption." *Id*. at 428. The court then rejected the plaintiff's arguments noting that to rule in the plaintiffs favor would be in contradiction to the holdings in *Colorado Republican II*:

> The argument raised by the Plaintiffs in this case rests …on the same general principles rejected by the Court in *Colorado [Republican] II*, namely the broad position that coordinated expenditures may not be regulated. Finding for the Plaintiffs would require us to hold that Congress cannot limit a party's expenditures on a campaign ad, the content of which the party adopts, regardless of the degree of coordination with the candidate. Because such a conclusion would effectually overrule all restrictions on coordinated expenditures, the RNC's argument must fail in light of *Colorado II*.

Id. at 430.

The most influential case attempting to distinguish between "independent" and "coordinated" expenditures is *FEC v. Christian Coalition*, 52 F. Supp. 2d 45 (D.D.C. 1999). Because the Christian Coalition is a corporation, it is not permitted to make contributions to federal candidates. 2 U.S.C. § 441b(a). Because coordinated expenditures are treated as contributions under federal law, any coordination of Coalition spending with its favored candidates would violate the law.

The *Christian Coalition* case is important for two reasons. First, the court recognized that election-related spending coordinated by candidates and supporters counts as a contribution, even if the funds are not spent on "express advocacy." "The fact that the candidate has requested or suggested that a spender engage in certain speech indicates that the speech is valuable to the candidate, giving such expenditures sufficient contribution-like qualities to fall within the Act's prohibition on contributions." 52 F. Supp. 2d at 92. This holding is very important, because a ruling to the contrary would allow those seeking to influence elections to coordinate unlimited amounts of spending as long as they craftily avoided certain kinds of advertising and thus open a huge new loophole in federal campaign finance law.

The second point of significance made in *Christian Coalition* was its adoption of an exceedingly narrow definition of what would count as "coordination," opening the door unnecessarily to unregulated collusion between

[10] *See Cao v. FEC*, 619 F.3d 410 (5th Cir. 2010) (upholding the federal party coordination limits), *cert. petition filed*, No. 10-776 (Dec. 8, 2010).

candidates and big spenders. The court recognized that spending requested or suggested by a candidate counted as coordination, but determined that:

> In the absence of a request or suggestion from the campaign, an expressive expenditure becomes "coordinated;" where the candidate or her agents can exercise control over, or where there has been substantial discussion or negotiation between the campaign and the spender over, a communication's: (1) contents; (2) timing; (3) location, mode or intended audience (*e.g.*, choice between newspaper or radio advertisement); or (4) "volume" (*e.g.*, number of copies of printed materials or frequency of media spots). Substantial discussion or negotiation is such that the candidate and spender emerge as partners or joint venturers in the expressive expenditure, but the candidate and spender need not be equal partners.

Id. According to the court, this standard limits regulation to cases where the candidate shows enough interest in the expenditure to show that it is perceived as valuable for the campaign. *See id.*

This standard, if adopted more widely, would open a new loophole in the law. Although the control, discussions, or negotiations described above should certainly be *sufficient* to show coordination, they should not be *necessary*. This definition would not rule out highly beneficial exchanges of important information between spenders and key insiders in a campaign, as long as the contact did not reach the level of a "partnership." True independence should mean more than *Christian Coalition* suggests.

To date, no other court has expressly adopted this definition.[11] Unfortunately, the FEC declined to appeal the *Christian Coalition* decision and adopted regulations, based largely on the decision, which allowed a new range of coordinated activity to pass as independent. BCRA rejected those regulations and directed the FEC to adopt a more rigorous definition of coordination. In *McConnell*, the plaintiffs challenging the BCRA argued that the statutory requirement was unconstitutional because it specified that the regulations "'shall not require agreement or formal collaboration to establish coordination.'" *McConnell*, 540 U.S. at 219 (quoting BCRA § 214(c)). The Supreme Court rejected that argument, holding that an agreement is not necessary for expenditures to be coordinated. *Id.* at 221. But the Court deferred an as-applied analysis of the new regulations for a future case, *id.* at 223, thus providing little concrete guidance on what rules defining coordination are constitutional.

McConnell struck down a provision of BCRA that would have required political parties to choose between making independent expenditures and benefiting from a higher limit on coordinated expenditures. 540 U.S. at 213-19. The Court invalidated the provision on the ground that it could not serve a "meaningful governmental interest" because it limited only express advocacy. *Id.* at 702-03. The Court also rejected the defense that the choice simply offered parties a benefit, by allowing them to choose whether to retain the ability to make independent expenditures or to make larger coordinated expenditures than would be permitted for other political committees.

[11] One state court commented favorably upon the *Christian Coalition* discussion of coordination, when deciding that Wisconsin could pursue an enforcement action against a group alleged to have coordinated spending with a candidate for Supreme Court Justice. *Wis. Coalition for Voter Participation v. State Elections Bd.*, 605 N.W.2d 654, 686 n.10 (Wis. Ct. App. 1999). Another state court referred repeatedly to *Christian Coalition* while determining whether certain organized distributions of campaign literature were coordinated. *Rutt v. Poudre Educ. Ass'n*, 151 P.3d 585, 589-91 (Colo. Ct. App. 2006) (holding that distributions were coordinated). The state supreme court reversed this decision on other grounds, however, and expressly declined to define coordinated expenditures. *Colorado Educ. Ass'n v. Rutt*, 184 P.3d 65, 82 (Colo. 2008).

The Court concluded that this defense could not prevail because BCRA required all party committees to make the same choice, in effect allowing the first party committee in a given race to either make an independent expenditure or a coordinated expenditure to bind all other party committees. *Id.* at 703. It is impossible to judge from the Court's opinion whether it would uphold a similar provision that was more carefully tailored either to cover a broader category of expenditures or to allow each party committee to make an independent choice.

Since the enactment of BCRA, its congressional sponsors have twice successfully challenged FEC regulations defining "coordinated communications." *Shays v. FEC*, 528 F.3d 914, 925 (D.C. Cir. 2008) (invalidating coordination content and coordination conduct regulations regarding campaign vendors and former employees,[12] 11 C.F.R. § 109.21(c)-(d), and related definitions of "voter registration activity" and "get-out-the-vote activity," *id.* § 100.24(a)(2)-(3)); *Shays v. FEC*, 414 F.3d 76, 97-102 (D.C. Cir. 2005).

The FEC recently promulgated a third set of regulations defining coordinated communications. Effective December 1, 2010, coordinated communications additionally include any statement that is both coordinated[13] and the "functional equivalent of express advocacy." 11 C.F.R. § 109.21(c)(5). In other words, a communication that is "susceptible of no reasonable interpretation other than as an appeal to vote for or against a clearly identified Federal candidate" now triggers FEC regulations. *Id.* This provision appears to serve as a catch-all for equivalents of express advocacy that escape the more specific prohibitions of section 109.21(c)(1)-(4). It remains to be seen, however, whether this definition of "coordinated communications" will fare better in court.[14]

The meaning of "independent expenditures" has been litigated in only a few other cases. Before being reversed by the state supreme court, one state appellate court held that "coordination does not require a formal collaboration between the parties, or express approval of the [union's] activities by the [candidate's] campaign. [It] simply requires the parties 'to harmonize in a common action or effort' and to 'work together harmoniously.'" *Rutt v. Poudre Education Association*, 151 P.3d 585, 591 (Colo. Ct. App. 2006). Applying that reasoning, the court found coordination between two unions and a candidate's campaign when (1) the unions received "thousands of . . . flyers and numerous yard signs" from the campaign; (2) the candidate appeared at an event organized by the unions and thanked volunteers; (3) the executive director of one of the unions conversed several times with the candidate's campaign manager. *Id.* Though "[n]one of these activities, standing alone, may have been sufficient to constitute coordination," the court wrote, "viewed together, these activities constitute coordinated action by the various entities." *Id.* On appeal, the state supreme court reversed the appellate decision on unrelated grounds, and expressly declined to define "coordinated expenditures." *Colorado Educ. Ass'n v. Rutt*, 184 P.3d 65, 82 (Colo. 2008).

In *FEC v. Public Citizen*, the court properly concluded that obtaining publicly available information from a campaign was not alone sufficient for coordination. 64 F. Supp. 2d 1327, 1335 (N.D. Ga. 1999), *rev'd on other*

[12] The Court upheld the "firewall safe harbor" provisions of the conduct regulations, which aimed at "protect[ing] vendors and organizations in which some employees are working on a candidate's campaign and others—separated by a firewall—are working for outside groups making independent expenditures." *Shays*, 528 F.3d at 929.

[13] The definition of coordination itself remains unchanged. *See* 11 C.F.R. § 109.21(d).

[14] At the time this edition went to press, the new regulations had not been challenged.

grounds, 268 F.3d 1283 (11th Cir. 2001) ("Coordination . . . implies 'some measure of collaboration beyond a mere inquiry as to the position taken by a candidate on an issue.'") (quoting *Clifton v. FEC*, 114 F.3d 1309, 1311 (1st Cir. 1997)). Thus, campaign finance regulations may not bar such inquiries or insist that they be made in writing. *Clifton*, 114 F.3d at 1314, 1317.

The Kentucky Supreme Court narrowed its statute defining independent expenditures by construing the phrase "consultation involving a . . . candidate, slate of candidates . . . or agent" to have the same meaning as "consultation with a . . . candidate, slate of candidates . . . or agent regarding the content, timing, place, nature or volume of the communication for which the expenditure is made." *Martin v. Commonwealth,* 96 S.W.3d 38, 56 (Ky. 2003) (internal quotations omitted), *cert. denied*, 539 U.S. 928 (2003). The Kentucky Supreme Court upheld the statute as narrowed, rejecting arguments based on *Christian Coalition* that would have opened up enormous coordination loopholes.

Finally, a number of courts have found that the government may not *presume*, without actual evidence, that expenditures claimed to be independent are actually coordinated. In *Colorado Republican I*, the Supreme Court found no evidence of actual coordination between the state Republican Party and its not-yet-endorsed nominee and therefore refused to presume that coordination had occurred. 518 U.S. at 613-14, 619. *Republican Party of Minnesota v. Pauly* invalidated a presumption of coordination even after the party endorsed its candidate. 63 F. Supp. 2d 1008, 1019 (D. Minn. 1999).[15] And the Eighth Circuit invalidated a presumption that an independent expenditure on behalf of a candidate was actually coordinated if the candidate failed to file a "statement of disavowal" and "take corrective action" within 72 hours of receiving a required report of the expenditure. *Iowa Right to Life Committee v. Williams*, 187 F.3d 963, 967-68 (8th Cir. 1999). Some of the facts that ought to be considered evidence of coordination are set forth in the *TIPS* above.

[15] It is not clear, however, that *Pauly* is consistent with the Supreme Court's ruling in *Shrink Missouri* on the government's evidentiary burden.