

BRENNAN CENTER FOR JUSTICE

at New York University School of Law

AFTER *CITIZENS UNITED*: THE STORY IN THE STATES

APPENDIX: HOW SELECTED STATES GUARD AGAINST COORDINATION OF UNLIMITED ELECTION SPENDING

Ensuring the independence of outside election spending has never been more urgent. Since the 2010 *Citizens United* decision, outside spending in elections at all levels has skyrocketed. At the same time, outside spenders and the candidates they support have developed numerous ways to work in sync, appearing to flout the Supreme Court’s admonition that unlimited spending must stay independent of campaigns to avoid corrupting future officeholders.

In recent years suspicions of coordination in federal elections — and the failure of federal regulators to do anything about it — have garnered wide attention. In search of other models, the Brennan Center decided to look at how a number of states have grappled with the problem. We selected 15 states, not by any statistical metric, but with the goal of identifying the most interesting developments. The selection includes those states that are hosting contested elections for top statewide offices this year and a few states that, reacting to trends after *Citizens United*, recently implemented reforms. We used the more commonly known federal approach, described below, as the baseline for analyzing the states’ approaches. For each state, we offer: (1) a general summary of the law of coordination, including statutory commands, any regulations, and any important legal opinions issued by authorities and (2) accounts of different scenarios, drawn from the state’s enforcement records and court decisions, where regulators have applied the state’s coordination law.

THE FEDERAL APPROACH

The federal standard begins with the rule that spending is independent, and therefore cannot be limited, only if it “is not made in concert or cooperation with or at the request or suggestion” of a candidate.¹ Based on this language from the Bipartisan Campaign Reform Act of 2002, the Federal Election Commission (FEC), the agency charged with enforcing the law,² regulates communications as coordinated if a three-part test is met.³ First, the test asks if the communication was paid for by an outside spender — not the candidate, her campaign, or her party.

Second, the so-called content part of the federal test asks if the spending in question concerns a type of communication that is subject to coordination regulation in the first place — if it is closely enough related to a pending election. An expenditure is subject to regulation if it expressly advocates the election or defeat of a clearly identified candidate,⁴ is the “functional equivalent” of such express advocacy,⁵ republishes campaign material, or refers to a candidate and occurs within certain time periods before the election.⁶

Third, the test asks if the conduct in question is of a type that could lead to a finding of illegal coordination. Such conduct includes:

- The candidate requested or suggested that the communication be created or distributed.⁷
- The candidate had “material involvement” in or “substantial discussion” about strategic planning of the communication.⁸
- The candidate and spender used the same vendor within a short window of the communication’s distribution and the vendor used or conveyed to the spender nonpublic information about the campaign’s plans (unless the vendor implemented a firewall policy to separate services to the two clients).⁹
- A person who recently worked for the candidate is involved in the outside group’s spending and the former employee used or conveyed to the spender nonpublic information about the campaign’s plans (unless the spender implemented a firewall policy to separate the candidate’s former employee from work on the communication).¹⁰
- The spender disseminates or republishes the candidate’s campaign material.¹¹

ARIZONA¹²

Summary of the Law

Arizona's coordination law is, like the federal version, moderately strict, sharing many of the same features. Yet certain differences in Arizona's approach — such as not restricting unlimited spenders from employing former campaign staffers of candidates they support or from using the same consultants as those candidates are significant. The state has often dismissed allegations of coordination without much investigation.

Like the federal standard, Arizona law defines an outside advertisement as coordinated if it is made in “cooperation or consultation with any candidate” or “in concert with or at the request or suggestion of a candidate.”¹³ Spending on coordinated advertisements counts as a contribution, and is therefore limited to \$2,000 to \$2,500 per election depending on the office.¹⁴ Violations of contribution limits may result in penalties as high as three times the amount of the donation.¹⁵ Arizona bans corporations from contributing directly to candidates.¹⁶

Also like the federal approach, Arizona considers spending directed by anyone who works for the relevant candidate's campaign to be coordinated.¹⁷ Yet the state standard appears to be more strict, prohibiting *any* arrangement or coordination between the candidate and spender, unlike the federal prohibition against “substantial” discussion.¹⁸ But in a potentially more significant, and weakening, divergence from federal law, Arizona election law enforcement has indicated that it will investigate only communications that contain express advocacy — explicit messages to elect or defeat a candidate — even though state law does not foreclose regulation of subtler, more common election-season issue advocacy.¹⁹

Four different authorities — the Citizens Clean Elections Commission (CCEC), the Secretary of State, the Attorney General, and local prosecutors — divide responsibility for enforcing Arizona's coordination law.²⁰ The CCEC has received a number of coordination complaints comparable to that of other states, but in most cases has declined to investigate.

Efforts to Enforce Coordination Rules

- **Communications with same spokesperson and similar messages; sufficiency of evidence.** This August the CCEC dismissed a complaint accusing a gubernatorial candidate and an outside group of coordinating to produce communications featuring the same spokesperson and similar messages.²¹ A month earlier, a group called Better Leaders for Arizona (BLA) had released an advertisement attacking gubernatorial candidate Doug Ducey.²² The ad featured an individual who criticized Ducey's work as the former CEO of Cold Stone Creamery. Soon after the ad aired, Ducey's opponent, Scott Smith, issued a press release citing the same individual and discussing the same issues as in the in the BLA ad.²³
A Ducey supporter complained to the CCEC, but the agency declined to proceed. It said there was no evidence of communication between Smith and BLA or of any questionable overlap by the individual featured in the two communications.²⁴
- **Extent of candidate's involvement in outside advertising decisions.** In an ongoing case, Yavapai County's prosecution of Attorney General Tom Horne for allegedly coordinating with an

outside group in his 2010 campaign hinges on the unsettled question of how much candidate involvement with outside advertising strategy is too much. The county prosecutor has alleged that Horne impermissibly coordinated with a group called Business Leaders for Arizona (BLA), which ran advertisements attacking his opponent.²⁵

BLA's chair, Kathleen Winn, had quit working for Horne's campaign only a few weeks after the primary election and three days before BLA received its first contribution.²⁶ She swore that she exercised sole control over BLA and took no direction from Horne, but other evidence showed that Horne sent emails discussing advertising strategy to Winn, and that she forwarded these emails to BLA's advertisement production company.²⁷ The evidence also showed that Horne and Winn spoke numerous times by telephone while Winn was exchanging emails with the producer of BLA's ads.²⁸ The county attorney concluded that Horne "was substantially involved with the creation of the BLA television commercial," and that "all of BLA's expenditures must be deemed in-kind contributions to the Horne campaign."²⁹

Horne, Winn, and BLA appealed the county attorney's decision, and an administrative law judge recommended a reversal.³⁰ The judge, stating that Arizona laws "do not provide a great deal of specificity with how to interpret coordination activities," turned to the federal guidelines.³¹ The federal standard, the judge wrote, required that the government prove that the candidate have material involvement in the decision-making process — in other words, important in relation to the specific advertisement.³² The judge concluded that the evidence did not prove Horne's input had been material.³³ The county attorney rejected the ALJ's recommendation, and Horne filed an appeal before the Maricopa County Superior Court, where a decision is pending.³⁴

- **Timing of candidate's approval of outside group's message.** This year the five-member CCEC unanimously rejected a complaint alleging that gubernatorial candidate Ken Bennett had coordinated with a super PAC by displaying its signs supporting his election in his car window.³⁵

The candidate's display of the signs showed he assented to the group's advertising, but he took that step only after the advertisement had already been produced.³⁶ The CCEC chair said that it would "def[y] his] logical abilities" to rule that a candidate's broadcast of being supported by a group would be "somehow a violation of the independent expenditure provisions."³⁷

- **Candidate's role as officer of outside group.** In 2012, the CCEC concluded that a state senate candidate had coordinated supportive spending in the election with an outside group by remaining its treasurer of record until two months after beginning her own campaign for office.³⁸ The candidate argued that her role as treasurer for the group ended before the primary election season technically began, and thus her role in the group should not trigger a finding coordination relative to outside spending that occurred during the primary election.³⁹ The CCEC rejected that reasoning, explaining that strictly defining the term "election" could incentivize campaign workers and outside group employees to switch roles between the primary and general election campaigns, to get the benefits of coordination without having to pay the price.⁴⁰ The CCEC ultimately agreed to a settlement with the candidate, where she admitted no wrongdoing.⁴¹

- **Express advocacy requirement; fundraising for outside group.** In 2010 the CCEC reviewed a complaint alleging that gubernatorial candidate Jan Brewer had improperly coordinated with the Republican Governors Association (RGA).⁴² The issue arose because the Brewer campaign sent emails to supporters suggesting that recipients go to the RGA’s “Stand with Jan” website and donate money. One email contained a link to the RGA’s website.⁴³ The website suggested that the reader donate \$5 to the RGA, which also is the per-contributor amount that candidates using Arizona’s public financing system must raise to qualify to receive public money.⁴⁴

At the Commission’s hearing on the matter, the CCEC Executive Director explained that “folks would be hard-pressed to argue that that doesn’t constitute coordination,” but that there was no in-kind contribution because the RGA website could be interpreted as something other than a call to elect Brewer.⁴⁵ The Commission voted unanimously not to investigate the matter further.⁴⁶

- **Consultant working for candidate and party on voter turnout efforts.** In 2006 the CCEC rejected allegations that a political party committee had coordinated with a candidate’s campaign by sharing voter-turnout consulting services with the campaign.⁴⁷ The CCEC’s decision explained that “get out the vote” activities do not constitute contributions under Arizona law.⁴⁸
- **Consultant working for candidate and outside group.** During the 2006 election for governor, the CCEC declined to investigate an allegation that candidate Janet Napolitano’s campaign had coordinated with a purportedly independent group called Arizona Together by sharing a consultant.⁴⁹ The Napolitano campaign said it was unaware of the overlap.⁵⁰ Even so, the CCEC decision explained, such an overlap establishes a presumption of coordination, requiring that Arizona Together’s costs be treated as in-kind contributions to the campaign.⁵¹ But the agency dropped the case, explaining that “prudential considerations advise against” finding a violation, in part because there was no evidence that the consultant shared information from the Napolitano campaign to assist in production of the advertisement in question.⁵²
- **Minor connections between candidate and outside groups.** The CCEC declined to pursue another 2006 allegation of coordination involving gubernatorial candidate Janet Napolitano and several outside groups.⁵³ Napolitano had raised funds for a nonprofit called Project for Arizona’s Future (PAF), but the CCEC found that PAF had spent only on issue advocacy.⁵⁴ While the membership and employees of PAF allegedly overlapped with those of two other groups that advocated against Napolitano’s opponent, the CCEC decided these overlaps alone did not amount to improper coordination.⁵⁵

ARKANSAS⁵⁶

Summary of the Law

Arkansas permits more cooperation between candidates and outside spenders than the federal government does, because it more narrowly defines political speech that can be subject to coordination rules and thus dollar limits. The state regulates only advertisements that blatantly call for the election or defeat of a candidate, — say, “Vote for John Smith!” — which are also known as “express advocacy” ads.⁵⁷ Federal coordination rules also apply to so-called issue ads, which mention a known candidate close to Election Day without explicitly asking for votes — say, “John Smith always stands up for working families.”⁵⁸ But in Arkansas such ads go entirely unregulated, even if outside spenders and candidates work hand in hand to produce them.⁵⁹

For ads that can be regulated, the state considers outside ad spending to be coordinated with a candidate if it is made with “arrangement, cooperation, or consultation between a candidate . . . and the person making the expenditure” or if the ad was made “in concert with or at the request or suggestion of a candidate.”⁶⁰ A coordinated expenditure counts as a contribution and is subject to the contribution limit of \$2,000.⁶¹ The Arkansas Ethics Commission enforces the state’s coordination rules.⁶²

Efforts to Enforce Coordination Rules

- **Individual pays for ad after discussing content with candidate.** In 2009 the Ethics Commission issued a letter of caution to a judicial candidate who failed to report a newspaper advertisement as an in-kind contribution to his campaign. An individual had paid to publish the ad after “cooperation or consultation” between the candidate and the individual “concerning its content.”⁶³
- **PAC provides research or polling data to candidate.** The Commission in 2008 issued a legal notice that it would view PACs that shared research or polling with a candidate to be making an in-kind contribution to the candidate subject to the contribution cap.⁶⁴
- **Outside entity publishes ad without consulting candidate.** In 2007 the Commission dismissed a complaint against a candidate alleging that she had failed to report an outside spender’s supportive newspaper advertisement as a coordinated expenditure. The Commission found that the spender had placed the advertisement “without any cooperation or consultation on the part of” the candidate and without the candidate’s knowledge, and that therefore the expenditure had not been coordinated.⁶⁵

CALIFORNIA⁶⁶

Summary of the Law

California's coordination law is stricter than the federal rules in several ways. Its elections enforcement agency, the Fair Political Practices Commission (FPPC), has been very active in publishing interpretations of the law, providing detailed guidance to spenders and candidates.

Like most jurisdictions, California law treats a coordinated expenditure as a contribution subject to the state's contribution limits of \$4,100 to \$27,200, depending on the office.⁶⁷ Violation of the contribution limitations can result in a fine of up to the greater of either \$10,000 or three times the amount of the illegal contribution.⁶⁸ The coordination regulations apply to any expenditure used to pay for advertisements that are election-related, not just those that expressly advocate for the election or defeat of a candidate.⁶⁹

California's standard for regulating coordinated conduct reaches somewhat further than the federal government's standard. The state presumes that spending is coordinated if it is done with the involvement of someone who has provided professional services to the candidate for the same election,⁷⁰ while the federal government requires a wait of only 120 days.⁷¹ Further, California will deem an advertisement coordinated if a spender and the relevant candidate engaged in *any* discussion about communication strategy,⁷² not just if there was, as under the federal standard, "substantial discussion" or "material involvement."⁷³ The FPPC has clarified that an outside group may not make independent expenditures supporting a candidate who has assisted the committee in its fundraising, and that an outside group may not spend independently if it holds joint media events with a candidate.⁷⁴ Like the federal government, California treats spending as coordinated if it replicates or disseminates a candidate's advertisement.⁷⁵

Unlike the enforcement agencies of many states, the FPPC has been active in considering coordination complaints and in providing clarification of the law to candidates and spenders who request advice letters.

Efforts to Enforce Coordination Rules

- **Shared campaign plans.** This year the FPPC issued a warning, though no penalty, to campaign consultant for a local candidate who had shared campaign information with an outside group, which then distributed mailers in 2013 promoting the candidate's election based on that information.⁷⁶

The consultant had appeared at a meeting of the political committee of a local chamber of commerce.⁷⁷ He provided details of campaign strategy, indicating that the candidate would target specific ethnic groups through mailing campaigns.⁷⁸ Soon after, the PAC sent mailers in support of the candidate, which the Commission later decided should count as contributions.⁷⁹ Due to several mitigating factors, such as a lack of previous violations, however, the Commission assessed no monetary penalty.⁸⁰

- **Coordinated planning between campaign and outside group; role of candidate's agent.** In 2013, the Commission accepted a settlement fine of \$3,500 after it found that a Lynwood city council

candidate and her campaign treasurer had coordinated with an outside group on advertisements supporting her campaign.⁸¹

The agency reviewed email exchanges between the campaign treasurer and a consultant for the outside group that showed that both had significantly influenced spending decisions by the campaign and the outside group.⁸² The candidate protested that she personally had played no role, but the FPPC said that the campaign treasurer was her agent and that his involvement therefore established coordination on her part.⁸³

The outside group had reported its spending as independent, when the spending had actually been coordinated and therefore should have been reported as a contribution. For this wrongdoing, the candidate, treasurer, and her committee agreed to collectively pay a fine of \$3,500.⁸⁴

- **Campaign worker involvement with outside group.** In 2013, the FPPC fined a candidate's campaign manager \$6,500 for also working for an outside group that made purportedly independent expenditures in support of the candidate's election.⁸⁵

The campaign manager of a 2010 state assembly candidate also served as a principal officer for the outside group.⁸⁶ The group spent nearly \$29,000 on three mailings to promote the candidate.⁸⁷ The campaign manager approved the mailings.⁸⁸ The FPPC explained that the campaign manager's "dual role" created a rebuttable presumption that the mailings were not independent but rather coordinated and therefore to be counted as in-kind contributions to the campaign.⁸⁹ The Commission also uncovered e-mail exchanges between the candidate and his campaign manager about the activities of the outside group.⁹⁰

The FPPC concluded that the mailer expenses were contributions exceeding the \$3,900 limit, and that the group's report of an independent expenditure was false. The campaign manager and the group incurred fines of \$6,500 in total.⁹¹ The candidate had to return the excess amount of the in-kind contribution of \$21,092 to the group.⁹²

- **Endorsements by outside groups.** The FPPC clarified in 2011 that an outside group's endorsement does not count as a contribution to the relevant candidate, and that the candidate may freely advertise the endorsement.⁹³ But, the agency cautioned, if the group distributes flyers announcing the endorsement at the request of the candidate, spending related to the mailer would count as a contribution.⁹⁴
- **Candidate involvement with independent committee.** In 2010, the FPPC specified a number of ways a candidate may be involved with an independent expenditure committee without going so far as to exert "significant influence" and endanger the group's ability to make independent expenditures.⁹⁵ Under California law, if a candidate has significant influence on a committee, it becomes a "controlled committee," which is prohibited from making independent expenditures in support of any candidate.⁹⁶

The list of generally permissible activities includes, serving as an honorary chairperson of the outside committee and influencing others to support the committee.⁹⁷

The agency also described types of candidate involvement that could, depending on the particular circumstances, alone or together indicate enough influence to compromise the outside group's independence: advising the outside group, sharing talking points and position papers with the group, signing a letter from the group that expressly advocates the election of another candidate, and being quoted on the outside group's fundraising mailers.⁹⁸ The FPPC clarified that a candidate may not vote on the group's board, hold media events with the group, or distribute materials prepared by the group, without affecting the group's ability to spend unlimited amounts.⁹⁹

- **Outside group's hyperlink to candidate's website.** The FPPC declared that “a [hyper]link alone is insufficient to establish cooperation, consultation, [or] coordination,” referring to online advertisements, placed in 2010 by an independent expenditure committee, that linked to a candidate's campaign web site.¹⁰⁰ However, the agency noted that coordination could be found if there were “other factors present such as reciprocal links, shared direction and control of messages, common financial ties, or other evidence of coordination.”¹⁰¹
- **Relationship between candidate and supportive PAC.** In 2009, the FPPC responded to a request for advice by cautioning a business group's PAC—which sought to spend unlimited amounts to promote the candidacy of one of their members—that the relationship could trigger coordination restrictions.¹⁰² The agency's concern focused on the candidate's membership on the business group's governmental affairs committee, which worked closely with the group's PAC. The FPPC recommended that the candidate step down from the committee to make it less likely that the PAC's planned spending would be coordinated.¹⁰³
- **Use of a common vendor.** The FPPC in 2004 told a direct mail consultant that its merely doing work at the same time for both a candidate and an outside group advocating the candidate's election likely would not lead to a determination that the group's mailer expenditures were coordinated.¹⁰⁴ However, the agency cautioned that a consultant's specific actions could constitute evidence that it was helping the two clients coordinate their strategy—for instance, if the consultant using campaign funds created a mailer promoting the candidate to one community, then used outside group funds to create another promotional mailer targeting a different community.¹⁰⁵
- **Contributions to PACs by candidates' relatives.** In a 2004 opinion, the FPPC affirmed that taking contributions from family members of a candidate will not endanger a group's ability to spend unlimited amounts to advocate that candidate's election. However, the agency warned that the group's spending would be restricted to contribution limits “[i]f the family member of the candidate acts as an agent of the candidate.”¹⁰⁶
- **PAC member volunteering for candidate.** The FPPC advised in 2002 that “volunteer precinct walking” by members of a PAC to distribute a candidate's campaign literature would not be viewed as coordinating with the candidate, and thus would not endanger the PAC's ability to spend unlimited amounts to advocate the candidate's election.¹⁰⁷ But the agency stressed that the PAC volunteers should avoid discussing the group's advertising plans with the candidate and campaign staff.¹⁰⁸

- **Candidates and supportive outside groups hire the same consultant.** In a 2002 opinion, the FPPC explained that a candidate and an outside group supporting that candidate create a “strong inference” of coordination when they hire the same consultant.¹⁰⁹ But the consultant’s use of a firewall procedure intended to avoid coordination could soften that inference, the agency said.¹¹⁰ In the particular case, a political consulting firm created a firewall by assigning one of its branches to work with candidate clients, and a different branch to work with outside group clients involved in the same elections.¹¹¹ The firm planned to use separate vendors to prepare the different sets of clients’ materials.¹¹² The FPPC concluded that this firewall procedure would suffice to avoid a finding of coordination, “in the absence of other facts demonstrating actual coordination.”¹¹³
- **Voter guides.** In a 2001 opinion, the FPPC concluded that voter guides produced by a committee to describe candidates’ positions on pro-life issues constituted independent expenditures not subject to contribution restrictions, so long as the group’s contact with the candidates was “limited to determining candidate positions.”¹¹⁴
- **Redistribution of campaign materials.** A 1998 opinion issued by the FPPC permits an outside group to volunteer to distribute campaign literature supplied by a candidate.¹¹⁵ But if the outside group spends money to distribute the mailing, that cost will be counted as a campaign contribution subject to limits.¹¹⁶

COLORADO¹¹⁷

Summary of the Law

Colorado’s coordination rules resemble the federal ones in some ways, for instance in prohibiting only “substantial discussion” or greater collaboration between a candidate and spender. But the state’s rules may be significantly more lax, because there is some dispute about whether they apply to communications beyond those that explicitly call for the election or defeat of a candidate. Moreover, though Colorado may question the independence of outside spending involving a consultant who also works for the relevant candidate, unlike the federal government it will not examine the involvement of a recent campaign employee of the candidate. Colorado’s enforcement approach appears to undermine the efficacy of its already modest coordination rules. While the secretary of state has the power to initiate enforcement actions,¹¹⁸ the office has not done so, relying instead on private parties to file complaints. Complainants face an unusually rapid timeline for gathering and presenting evidence in court, to avoid dismissal of a case. Even when someone manages to prove coordination, courts have hesitated to assess penalties.

Like the federal government, Colorado treats an outside expenditure that is coordinated with a candidate as a contribution, which it limits to \$200 to \$550 per donor depending on the office.¹¹⁹ Yet while the state defines “contribution” very broadly — including “[a]ny payment made to a third party for the benefit of any candidate” and “[a]nything of value given . . . indirectly[] to a candidate” — it defines “expenditure” quite narrowly, including only spending that “expressly advocate[s] the election or defeat of a candidate.”¹²⁰ Because the coordination law uses the term “expenditures,” some have argued that coordination is prohibited only for express advocacy communications.¹²¹ By contrast the federal rules apply coordination restrictions to communications that simply mention a candidate — even without express advocacy — close to the time of an election.¹²² Colorado courts have not issued a universal rule about using the broader or narrower approach in coordination cases. But at least one administrative law judge has rejected the narrow interpretation, instead applying the state’s broad definition of contributions to find that an outside group had coordinated with a candidate.¹²³

Colorado defines coordinated conduct much the same as the federal government. An expenditure can be restricted if it is “controlled by or coordinated with any candidate or agent of such candidate”¹²⁴ or made at the “request, suggestion, or direction of” a candidate.¹²⁵ Coordination occurs if a candidate and spender engage in “substantial discussion(s)” involving the exchange of significant, non-public information that relates to the expenditure.¹²⁶ If a consultant who serves both a candidate and a spender passes between them significant, non-public information for a given expenditure, the candidate and spender have coordinated.¹²⁷ But, unlike in the federal system, in Colorado the involvement of a candidate’s former employee does not automatically trigger questions of coordination.¹²⁸

Courts have provided little practical guidance for understanding Colorado’s coordination laws.¹²⁹ The state Court of Appeals once instructed that a coordination penalty would require proof of “something more than” contact between a spender and candidate and of “some level of concerted action between two parties.”¹³⁰ But the state Supreme Court reversed that decision on other grounds without fleshing out the appropriate definition of coordination.¹³¹

Few coordination complaints have resulted in penalties. The infrequency of penalties may stem from the enforcement structure. Complainants have only 15 days — after they have filed their complaint and the secretary of state refers it to an administrative law judge — to compile proof of coordination and of the value of the alleged contribution, or the case will be dismissed.¹³² Cases that resulted in a judgment of coordination usually involved flagrant conduct by candidates — for instance, when candidates themselves distributed the outside advertising in question or extensively controlled the spender’s actions.

Efforts to Enforce Coordination Rules

- **Avoidance of coordination by political party super PACs.** In 2014, Colorado announced that political parties could form super PACs— independent expenditure committees that may raise and spend unlimited amounts of money for election advertising—as long as they did not coordinate with candidates or with the arm of the party that worked with candidates.¹³³

The state Republican Party had asked the secretary of state for permission, offering various measures for avoiding coordination. It promised that the super PAC would be run by independent managers and that the party would exercise no control or even guiding influence over the group beyond its initial creation.¹³⁴ It pledged that the super PAC’s leadership would not be permitted to participate in the party’s political activities including non-public discussions with candidates.¹³⁵

Still, the party planned to appoint the super PAC’s managers at the outset. The secretary of state cautioned that this apparent ability to hire and fire the super PAC’s leadership, while “not indicative, *per se*, of improper coordination,” was “potentially problematic.”¹³⁶ The state recommended that the party create a rule ensuring that the director and management of the IEC could be fired only for legitimate reasons.¹³⁷

The Republican Party filed suit in state court, seeking a declaratory judgment that its PAC could spend unlimited amounts. It explained to the court that its rules prevented PAC management from being fired by the party without cause.¹³⁸ A district judge ruled in favor of the party, noting that under the PAC’s rules, the party could not consult with the PAC about its expenditures.¹³⁹

- **Coordination exception for a group’s communications with its members.** In 2008, the state’s highest court rejected a lower court’s ruling that unions had coordinated with a state senate candidate by supplying labor to distribute his campaign literature and planning events where the candidate appeared.¹⁴⁰ Though the unions’ activities did provide value to the campaign, the Colorado Supreme Court explained, they constituted communications among organization members and therefore should not be counted as campaign contributions under an exception in the law.¹⁴¹

The high court did not address two intriguing nuances in the lower court’s decision. In determining the degree of interaction that would rise to the level coordination, the original court said that “something more than” mere contact and “some level of concerted action between two parties is necessary.”¹⁴² The court also said that, even if a single act did not amount to coordination, multiple acts together could.¹⁴³

- **Value of political party PAC’s actions to candidate.** In 2006, an administrative law judge rejected a complaint that a state party’s PAC had coordinated with a potential state senate candidate when it

conducted a poll of his prospects, and that it therefore should have reported the cost of the poll as an in-kind contribution. The judge decided that the evidence showed no real benefit to the would-be candidate.¹⁴⁴

That would-be candidate had, at the time, held a seat in the state house of representatives, but considered running for state senate.¹⁴⁵ The party PAC told the candidate that it planned to conduct a poll to gauge his chances, and he said he wanted to know the results before deciding.¹⁴⁶ The poll showed the candidate would easily win the senate race, the PAC told him, but he decided to run for reelection to the house.¹⁴⁷

The judge decided the poll held no real value to the would-be candidate, as he had decided not to run in the race tested by the poll and as the polling information was not useful in his house race.¹⁴⁸ The court also highlighted the candidate's lack of involvement in initiating or planning of the poll.¹⁴⁹ The judge also appeared to think that a poll to test the success of a candidacy was not necessarily an expenditure meant to promote that candidacy.¹⁵⁰

- **Candidate's acceptance of services and value of services.** In 2006, an administrative law judge concluded that three candidates for the Perry Park Metropolitan District Board had coordinated with an outside spender by distributing flyers the spender had produced to promote them.¹⁵¹

A supporter had created the flyers at her home and given them to the candidates, who handed them out to voters before and on Election Day.¹⁵² In an election where only 431 people voted at the relevant polling site, the cost of producing more than enough flyers for all voters would have amounted to only about \$200.¹⁵³

The case lacked evidence that the value of the flyers in question was more than \$20 per candidate, the reporting threshold for contributions, so the judge dismissed the complaint.¹⁵⁴

- **Candidate control over outside group's issue advertisements.** In 2006, an administrative law judge ruled that an outside group and a gubernatorial campaign had coordinated to produce issue advertisements, finding that the campaign had exercised significant control over the group and its strategy and had intended for the ads to promote the candidate's election even though they did not expressly advocate it.¹⁵⁵ The judge said the advertising costs should have been reported as contributions.¹⁵⁶

The candidate appeared in several advertisements run by the outside group to oppose tax-related ballot measures.¹⁵⁷ The ads ran almost a year before the party primaries for governor and did not mention his candidacy.¹⁵⁸

The judge concluded that the candidate's campaign had "exercise[d] a significant degree of coordination and control" over the outside group and its ads.¹⁵⁹ The campaign had controlled the outside group's staffing and infrastructure, reviewed the scripts for the ads, and constantly communicated with the outside group during production of the ads.¹⁶⁰ The candidate had done substantial fundraising for the outside group.¹⁶¹ The judge seemed troubled by the candidate's apparently knowing misuse of the issue group for campaign purposes. At one point his campaign

took steps to conceal payment to an issue group employee for campaign services, and his campaign manager wrote in an email that the candidate’s participating in the ballot measure ads would improve his candidacy.¹⁶²

The judge struggled to assess an appropriate penalty. The issue ads were worth more than \$700,000, but their purpose was not exclusively to promote the candidate.¹⁶³ The judge ultimately ordered an imposing a total penalty of \$2,004.¹⁶⁴

- **Common consultant and evidentiary burden.** A 2006 case showed how difficult it can be for private complainants to muster evidence to counter accused parties’ simple denials of coordination within Colorado’s unusually compressed timeframe for cases.¹⁶⁵

An outside group faced allegations that it had coordinated with campaigns and campaign-connected groups through the use of common consultants, and that its spending should therefore be subject to contribution limits.¹⁶⁶ The complaint charged that the group had, through the consultants, shared with campaigns “information, analysis, or strategies” amounting to in-kind contributions.¹⁶⁷

The defendant group produced testimony from those consultants, swearing that they had done nothing of the kind. One consultant swore that it provided entirely different services to the defendant group than it did to a candidate.¹⁶⁸ Another consultant also swore that its work for the two was separate, and that it had kept information involving each client confidential.¹⁶⁹

The accuser requested more time to gather evidence. The administrative law judge said no, stressing the Colorado constitution’s “heavy emphasis upon the expeditious disposition of complaints alleging violation of the political campaign finance laws,” and dismissed the case.¹⁷⁰

CONNECTICUT¹⁷¹

Summary of the Law

Connecticut defines coordination much as the federal government does. However, its law provides an extensive list of scenarios where an expenditure will be presumed to have been coordinated, crystallizing with specificity what actual independence should look like.

If a candidate and a spender coordinate on outside advertising that promotes, opposes, supports, or attacks a candidate seeking election, Connecticut will treat the cost of that advertising as a contribution to the relevant candidate.¹⁷² That amount is subject to Connecticut's contribution limits of \$250 to \$3,500 per election for individual donors, depending on the office, for candidates who do not participate in the state's public campaign finance program.¹⁷³ While corporations may not contribute to candidates, they may form political committees whose contribution limits are between \$750 and \$5,000.¹⁷⁴ The contribution limit for publicly-financed candidates is \$100, and those candidates may only spend a limited amount of money from contributions.¹⁷⁵

As under the federal standard, Connecticut law treats spending as independent only if it is “made without the consent, coordination, or consultation of, a candidate.”¹⁷⁶ The law provides a detailed list of scenarios that create a “rebuttable presumption” of coordination, meaning that the spender must demonstrate that the expenditure in question was independent or face potential penalties.¹⁷⁷ The list of scenarios includes some regulated under the federal rules, such as spending by a person who has worked for a candidate and spending by a person who has hired the same consultant as a candidate, though Connecticut law does not require that the campaign employee or consultant have shared “material” — relevant and important — information.¹⁷⁸ Connecticut goes further than the federal government, though, presuming coordination where a spender has merely informed the relevant candidate about a communication's “audience, timing, location or mode or frequency of dissemination.”¹⁷⁹

While Connecticut's approach applying rebuttable presumptions seems unusually robust, the law is still fairly new; it is not clear how regulators will interpret the presumptions and any evidence to the contrary. The regulatory agency, the State Elections Enforcement Commission (SEEC), has not prosecuted coordination cases often. But when it has, it has shown a willingness to infer coordination based on certain scenarios — such as familial or employment relationships between candidate and spender — leaving accused parties to rebut that conclusion.¹⁸⁰ Even when it concludes that coordination has occurred, however, the Commission has been lenient in assessing penalties for minor infractions or when it believes the violators acted in good faith.¹⁸¹

Efforts to Enforce Coordination Rules

- **Definition of “expenditure.”** This year the SEEC dismissed a complaint alleging that the governor had coordinated with a group to conduct and publish a favorable poll.¹⁸² The agency explained that the type of spending was not subject to coordination regulations.¹⁸³

Gov. Dannel Malloy was accused of coordinating with a former employee to produce a poll by an education advocacy group supporting the governor's reform efforts.¹⁸⁴ The SEEC said the poll

expense was not an expenditure subject to coordination rules, because the poll did not promote, oppose, attack, or support a candidate; it did not even mention the governor's name or the election that was still 18 months away.¹⁸⁵ Nor was the spender group an entity whose major purpose was to elect candidates.¹⁸⁶ The Commission deemed it unnecessary to investigate the governor's role.¹⁸⁷

- **Use of candidate fundraising as evidence of coordination.** In 2014, the SEEC and a federal court addressed the question of whether a candidate's help raising general funds for an outside group that then advertised to promote the candidate's election could constitute evidence of coordination. Both authorities said that it could.¹⁸⁸

The Democratic Governors Association, a national political committee, had sought a ruling from the SEEC confirming that its members — some of whom were candidates for governor — could raise funds that the DGA or groups it donated to could then use to make unlimited independent expenditures promoting these candidates' election.¹⁸⁹ The Commission instructed that, while such fundraising help "is not *presumed* to establish coordination between the candidate and the entity receiving [the relevant funds]," that involvement could constitute evidence of coordination in a particular case.¹⁹⁰

The federal district court in Connecticut agreed, explaining that, "if accompanied by further evidence of an agreement between the candidate and the spender, [such fundraising] could be suggestive of coordination."¹⁹¹

- **Definition of "expenditure" subject to coordination rules.** In a 2013 settlement with the SEEC, gubernatorial candidate Tom Foley agreed to pay a fine for coordinating with a polling firm and distributing its favorable findings to media outlets.¹⁹²

In February 2013, Foley had asked a consulting firm to conduct a poll in part to determine his chances of winning the 2014 gubernatorial election.¹⁹³ Foley and the firm then drafted a memorandum including only polling data favorable to Foley and distributed it to media outlets.¹⁹⁴ The poll and memorandum were paid for by a group called Voters for Good Government (VGG).¹⁹⁵

The SEEC concluded that the poll and the memorandum were expenditures subject to coordination regulation, highlighting the fact that the memorandum only included data that would promote Foley's candidacy.¹⁹⁶ It said that VGG's payment to the consulting firm constituted a contribution to Foley, because "reimbursements for expenses incurred are the functional equivalent of direct cash contributions to a candidate."¹⁹⁷

- **Expenditures by campaign workers.** In 2011, the SEEC expressed a "*strong* inference and presumption" that a candidate and his campaign volunteer had coordinated the volunteer's distribution of a flyer promoting the candidate's election, but the agency declined to impose a penalty.¹⁹⁸

The volunteer for a Middlebury town office campaign had produced and, with the candidate present, distributed a flyer showing the same logos as the candidate's campaign literature and the candidate's name.¹⁹⁹ The Commission concluded that the flyer promoted the candidate's election and said that,

“where [a spender] and the candidate share the same leadership or consultants, it will be presumed to be a non-independent expenditure.”²⁰⁰ The candidate’s prior knowledge would also be taken into account in determining coordination, the agency stressed.²⁰¹ Still, the SEEC decided to drop the case, explaining that there was conflicting evidence.²⁰²

- **Expenditures by former campaign workers.** In 2010, the Commission dismissed a complaint alleging coordination by a candidate and her former campaign volunteer because the two had severed contact at the time the expenditure was made.²⁰³

In 2008, a newspaper advertisement funded by a town party committee urged voters not to reelect a state assembly member.²⁰⁴ The ad had been created and placed by a former campaign volunteer of the assembly member’s opponent.²⁰⁵

Still, the agency declined to find that the ad was coordinated, citing evidence that the former campaign volunteer and the candidate in question had long ago parted ways over disagreements about strategy.²⁰⁶ Moreover, there was no evidence that the challenger candidate helped inform or even knew about the plan to place the newspaper ad opposing the incumbent’s reelection.²⁰⁷

- **Expenditures by campaign officers.** In a 2010 decision, the SEEC determined that a political party’s advertisements urging a candidate’s election was a coordinated expenditure, because the candidate’s staffer had paid for it.²⁰⁸

The candidate’s staffer also worked for the town party committee that had placed the supportive newspaper ads.²⁰⁹ The Commission accepted that the staffer had not been acting at the candidate’s direction when she bought the ads.²¹⁰ But a specific statutory provision clarified that any expenditure made by a candidate’s deputy treasurer should be treated as a coordinated expenditure, and the staffer in question held that role.²¹¹ (What is more, it was illegal for the candidate to receive the coordinated contribution, because she had opted to participate in the state’s public campaign finance program.)²¹² Still, the SEEC assessed no punishment, explaining that neither the staffer nor the candidate had “believed that the expenditure . . . was a contribution.”²¹³

- **Expenditures by family members.** In 2008, the SEEC concluded that an individual’s political expenditures were coordinated because the candidate he had spent to support was his live-in life partner.²¹⁴ Without explanation, the Commission appeared to conclude that the couple had coordinated simply by being in a relationship, and said that the expenditures constituted in-kind contributions to the candidate’s campaign.²¹⁵ The spender agreed to pay the Commission a \$750 penalty.²¹⁶

FLORIDA²¹⁷

Summary of the Law

Florida defines the activities that outside groups and candidates may not coordinate using unlimited spending more broadly than the federal government. But a major loophole and unpredictable enforcement inhibit the Florida law's effectiveness.

In general, coordinated outside spending loses unlimited "independent expenditure" status, and instead becomes subject to Florida's campaign contribution caps of \$3,000 for statewide candidates and \$1,000 for legislative candidates.²¹⁸ But in a significant departure from federal rules, Florida exempts from coordination regulation the widespread form of political advertisement known as "electioneering communications"²¹⁹ — election season ads that appeal to viewers to vote for or against a certain candidate without exactly saying so.²²⁰ Only those outside ads that *expressly* advocate the election or defeat of a candidate are regulated for coordination. So long as their advertisements avoid express advocacy, outside groups may cooperate with candidates to spend unlimited money in Florida elections.²²¹

Like the federal law, Florida law treats expenditures as coordinated when they are "controlled by, coordinated with, or made upon consultation with, any candidate" and when they are used to republish or disseminate a candidate's campaign material.²²² In some ways, Florida law covers a broader range of conduct than federal law. Florida regulators may find coordination occurred if a spender simply "[c]ommunicate[d] with the candidate . . . concerning the preparation of, use of, or payment for, the specific expenditure."²²³ By contrast, the federal law treats only "substantial" communication as coordination.²²⁴ Florida views express advocacy spending on behalf of a candidate by anyone working under contract with that candidate as always coordinated and therefore limited.²²⁵ In the federal system, the contractor must have or use nonpublic information about campaign plans in creating or disseminating the advertisement before coordination will be found.²²⁶

Beyond the text of the laws, outside groups and candidates have little clear guidance as to what would constitute restricted coordination in Florida. The state's enforcing agencies—the Secretary of State's Division of Elections²²⁷ and the Florida Elections Commission²²⁸—and courts have addressed few coordination scenarios. The Commission consists of nine members who are appointed by the Governor, eight of whom are suggested by legislative leaders.²²⁹

Efforts to Enforce Coordination Rules

- **Spending by candidate's spouse who was involved with the campaign.** In a 2009 decision that said more about the peculiar facts of the case than about the meaning of Florida coordination law, an administrative law judge found that the head of a political committee had not coordinated spending on yard signs promoting a candidate, even though that PAC head was the candidate's husband and campaign manager and even though they had discussed the signs.²³⁰ Evidence showed that the candidate had approved the signs, decided not to make her own signs because the PAC's already were on display, and instructed the PAC on sign placement.²³¹ The judge concluded that this history showed "elements of coordination, but not of such an extent as to cause the [PAC] expenditures to fail the test of independence."²³²

The judge downplayed the husband's role in the candidate's campaign, apparently because the couple had separated before election season.²³³ The candidate's campaign manager described the couple's relationship as "weird" and the judge concluded that the candidate had "decided to go it alone and handle her campaign pretty much herself."²³⁴

- **Spending by candidate's spouse who was involved with the campaign.** In 2007, a Florida court concluded that a spouse's spending to produce signage on behalf of a candidate was not an independent expenditure, but rather a contribution that the campaign should have been reported, because the spouse was so closely involved with the campaign as to be an "agent" of the candidate.²³⁵ An administrative law judge had found that the spouse's "regular and multiple acts of assistance" amounted to significant involvement with the campaign.²³⁶ The judge also rejected the claim of independence as not credible, because the signs themselves stated the campaign had paid for them and because the spouse never reported the spending as an independent expenditure.²³⁷ The judge ordered the candidate to pay a fine of \$1,000, which was upheld by the court.²³⁸
- **Outside spending on electioneering communications to benefit a candidate.** Florida defines electioneering communications as election season ads that, while not expressly advocating the election or defeat of a candidate, are "susceptible of no reasonable interpretation other than an appeal to vote for or against a specific candidate."²³⁹ Though in some jurisdictions outside groups may not coordinate these ads with candidates without triggering contribution limits, in Florida they may coordinate them without consequence.²⁴⁰

In 2005, a PAC asked the state's Division of Elections whether it could make electioneering communications that "were coordinated or made upon consultation with a candidate," without restriction.²⁴¹ The Division gave its blessing, noting that Florida law did not regulate such coordination at all.²⁴²

- **Business's provision of free display space for candidate's campaign signs.** In 2004, a scenario of alleged coordination resulted in two different enforcement outcomes for the candidate and the outside spender.²⁴³ A water taxi company had displayed signs for a candidate's campaign on its boats — a service alleged to be worth \$8,000 — free of charge.²⁴⁴ The company owner refused to say who had supplied him with the signs.²⁴⁵ Evidence showed that the campaign had stored its signs in a place most anyone could access.²⁴⁶ The question was whether the company's owner had independently obtained and decided to display the signs, or whether he had coordinated with the campaign. If the parties had coordinated, they would have violated the in-kind contribution limit of \$500.²⁴⁷

In a proceeding against the company by the Florida Elections Commission, the parties mutually agreed there was legally sufficient evidence to show that the company had coordinated with the candidate — and, therefore, made an excessive contribution — and the company was fined \$1,500.²⁴⁸ The Commission explained that to qualify as an independent expenditure, an outside spender's displaying of campaign signs "would have to be made without any coordination or any consultation with a candidate or agent of such candidate."²⁴⁹ It inferred that the company's act was not independent, believing that the company owner's "refusal to provide the name of his friend who gave him the signs suggests that they were given to him by an agent of [the candidate's] campaign."²⁵⁰

In a subsequent proceeding against the candidate, an administrative law judge decided there was insufficient evidence of coordination, and concluded the water taxi company had made a unilateral decision to display the signs.²⁵¹ The judge did not discuss what additional evidence would have sufficed to support a conclusion of coordination.²⁵²

- **Spending by person who is under contract with the candidate.** In a 2002 order, the Florida Elections Commission confirmed that any expenditure that is made by a person working under contract with that candidate will not be considered to be independent, but rather coordinated.²⁵³

The Commission reviewed the conduct of a media consultant for a county sheriff candidate. The consultant had placed a newspaper ad supporting the candidate's election, but did not report an expenditure or contribution.²⁵⁴ He claimed that others had created and paid for the ad, and that he had merely delivered it.²⁵⁵ Though the Commission explained that it would treat any expenditure by the consultant as a campaign contribution, it did not penalize him because it lacked enough proof that he had paid for the ad.²⁵⁶

MAINE²⁵⁷

Summary of the Law

On the books, Maine regulates cooperation between candidates and outside spenders more aggressively than the federal government does. But historically lax enforcement and mild penalties likely undercut the effectiveness of Maine's laws.

Maine counts political spending as a restricted campaign contribution when it is used to distribute campaign materials or "is made in cooperation, consultation or concert with, or at the request or suggestion of" the candidate.²⁵⁸ Contributions from both individuals and corporations are limited to \$375 per election for legislative candidates and \$1,500 for gubernatorial candidates in 2014, though candidates who receive public funding may not accept any contributions.²⁵⁹ Anyone who gives or takes a contribution above the limit may be ordered to pay a fine of no more than the amount that exceeded the limit.²⁶⁰

Coordinated spending is treated as a contribution if it "is made to promote or support the nomination or election of a candidate, or to oppose or defeat the candidate's opponent(s)."²⁶¹ Maine's anti-coordination rules are stricter than the federal ones in certain ways. Both regimes consider whether a candidate has discussed or helped make decisions about an advertisement with an outside funder of that advertisement.²⁶² Yet while the federal rules allow a finding of coordination only if the candidate's involvement is "substantial" or "material," Maine's do not.²⁶³ Maine's law presumes coordination if someone who worked for a candidate in a certain role in the preceding year helps an outside spender create an advertisement promoting the candidate.²⁶⁴ Finally, Maine treats money raised by candidates for outside groups whose primary focus is supporting them as contributions to those candidates, subject to the same restrictions as direct contributions.²⁶⁵ The federal rule operates differently, but similarly seeks to limit candidate fundraising for outside groups: candidates may raise money for outside groups, but may not ask for donations that exceed the federal solicitation limit.²⁶⁶

While Maine's rules permit broad regulation of coordination, its enforcement history is slim. Enforcement is carried out by the state's Commission on Governmental Ethics and Election Practices, a body of five members that are appointed by the governor upon recommendations from the leaders of each party of the legislature.²⁶⁷ The Commission has received a considerable number of complaints of illegal coordination, but has often declined to investigate or, citing insufficient evidence, to assess a penalty.

Efforts to Enforce Coordination Rules

- **Sufficiency of evidence.** In 2014, Maine's Commission on Governmental Ethics and Election Practices dismissed a claim that a county sheriff candidate and an outside group had coordinated in spending \$100,000 on radio advertising and mailers, saying there were "insufficient grounds for an investigation," even though documentation of some cooperation appeared to exist.²⁶⁸

The complaint, filed by the candidate's opponent, mentioned photographs of an officer of the outside group and of the officer's spouse helping the candidate with various campaign activities.²⁶⁹ The group and the candidate also used the same photographs in their promotional materials.²⁷⁰ The

complaint further suggested that the candidate had given voter information to the outside group to use in sending mailers.²⁷¹

At a hearing the candidate's campaign manager and the outside group's manager both testified that there had been no coordination.²⁷² The Commission then voted unanimously not to investigate.²⁷³

- **Campaign worker's involvement in outside spending.** The Commission examined two possible violations of coordination rules by a Maine House of Representatives candidate in 2012, resulting in the dismissal of one allegation and a \$700 fine for the other.²⁷⁴

In the first incident, a \$1,500 mailing supporting the candidate was reported to the state as an independent expenditure, but turned out to have been paid for by the candidate's campaign treasurer.²⁷⁵ Still, the Commission voted to drop the investigation,²⁷⁶ reasoning that the treasurer had not necessarily been acting as an "agent" of the candidate when he funded the mailing because his ongoing campaign duties were merely administrative.²⁷⁷

The Commission also investigated a newspaper advertisement supporting the candidate, which a campaign volunteer had paid for; a disclaimer on the advertisement stated that it was paid for by the volunteer.²⁷⁸ Evidence showed that the volunteer had placed the ad later on the same day that the candidate himself had contacted the newspaper about placing an ad, and that the advertising text the volunteer submitted showed notes in the candidate's handwriting.²⁷⁹

Again the commissioners considered whether the volunteer had been acting as the candidate's agent when placing the ad — whether, in other words, the candidate had directed the volunteer's actions.²⁸⁰ They concluded that the volunteer had been acting as an agent, and that his newspaper expenditure therefore was not an independent expenditure but a contribution.²⁸¹ The candidate's campaign was fined \$700.²⁸²

- **Candidate's role in supportive PAC.** In a 2012 examination of possible coordination between a state senator and an outside PAC producing purportedly independent television advertisements, the Commission stressed the need for "proof of *actual* coordination" specific to the expenditures, not merely documentation of a general relationship, to find a violation.²⁸³

The PAC had listed the senator as being a "primary decision-maker and fundraiser" for the group on its registration form.²⁸⁴ Based on witness statements, however, the Commission staff concluded that the senator was a decision maker in title only, that she did not actually make decisions for the PAC, and that she had not cooperated with the PAC on the expenditures in question.²⁸⁵ The investigators also credited the PAC with creating a formal firewall between its independent expenditure strategist and the candidates it supported.²⁸⁶

The Commission unanimously decided to drop the investigation after finding no evidence of the senator's "actual involvement or participation in the planning or making of the expenditure."²⁸⁷

- **Candidate fundraising for supportive PAC.** In 2012, the Commission decided that a state senate candidate who raised funds via her campaign website for outside groups that supported her party had not coordinated with those groups.²⁸⁸

The campaign web site urged supporters to donate to “like-minded groups,” and linked to an outside fundraising page.²⁸⁹ That page, according to the Commission, “allow[ed] members of the public to show their support for [the candidate] by making contributions” to two PACs.²⁹⁰ One of the PACs had language on its website “which may [have] convey[ed] to donors that the two PACs [were] setting aside money that is specifically designated to promote” the candidate.²⁹¹

The Commission’s executive director noted that, under Maine law, contributions to PACs that primarily promote or support a single candidate are considered to be contributions to the *candidate*, if solicited by the candidate.²⁹² But he explained that that provision of the law would be inapplicable because the PACs supported numerous candidates.²⁹³

In recommending that the investigation be dropped, the executive director considered the candidate’s testimony that she had not known whether the outside groups would use the money she helped raise to support her election.²⁹⁴ Her campaign’s web site had also stated that the outside groups might not necessarily help her campaign and that she was not allowed to coordinate with those groups, the agency noted.²⁹⁵ Her conduct could not be called prohibited coordination because there was “no evidence that she cooperated or consulted with the PACs” on how their money would be spent.²⁹⁶

- **Candidate appearance in PAC ads; intent to influence election.** In 2008, the Commission considered whether a state house candidate had coordinated with an outside PAC by appearing in the PAC’s television commercial, in which he discussed the record of a U.S. senator.²⁹⁷

The Commission’s executive director said the advertisement would count as a contribution if it was “made for the purpose of influencing” the candidate’s election.²⁹⁸ The executive director decided that it was not, because the commercial did not mention the candidate’s own campaign; the commercial ran all over Maine and not just in the candidate’s district; and the PAC was a national organization that also focused on federal elections in other states.²⁹⁹

The agency included the case in its 2014 guide for candidates, cautioning that, “if an individual or organization invites you to appear in a paid advertisement, the value of the advertising *could* be considered a contribution to your campaign.”³⁰⁰

MICHIGAN³⁰¹

Summary of the Law

Michigan statutorily regulates coordinated activity more narrowly than does the federal government. The state asks only whether an outside spender has made an expenditure “at the direction of, or under the control of” a candidate.³⁰² Expenditures that reflect significant candidate involvement (but do not otherwise reach this threshold) are independent and therefore cannot be limited by the state. By contrast, federal law defines a coordinated expenditure as one that is “made in concert or cooperation with or at the request or suggestion of” a candidate or political party.³⁰³

In the particular case of a Michigan super PAC, however, expenditures are subject to a three-prong independence test that utilizes both definitions. Such expenditures may be restricted if they (1) are coordinated under the Michigan statutory standard, (2) are coordinated under the federal standard, *or* (3) “otherwise constitute[] *quid pro quo* corruption or reasonably foster[] the appearance of *quid pro quo* corruption.”³⁰⁴ Entities other than super PACs, however, are seemingly constrained only by the Michigan statutory standard of coordination.

Like many other states, Michigan treats expenditures that are not independent as contributions that may be limited.³⁰⁵ Yet under the state’s relatively lax coordination standard, a collaboration that may not appear independent in the conventional sense nevertheless may be treated as an “independent expenditure” under Michigan law.

The Secretary of State, who interprets and enforces the election laws, has said that Michigan’s narrow conceptualization of coordination “stands in marked contrast” to the broader federal coordination standard.³⁰⁶ The Secretary explained, “[w]hile the [federal statute] regulates nearly all coordination, cooperation, and consultation between a candidate committee and a 3rd party, the [Michigan statute] clearly does not. . . . Direction or control . . . is a form of coordination, but not all coordination—or cooperation, or consultation—constitutes direction or control by a candidate committee.”³⁰⁷

“Made at the direction of” means, the Secretary of State explained, that the expenditure or communication was “organized, supervised or created by a candidate committee.”³⁰⁸ The Secretary illustrated the concept of candidate “direction” with the scenario of an outside spender producing a communication “substantially similar” to one that a candidate had created and proposed to that spender.³⁰⁹ Explaining coordination by candidate “control,” the Secretary said that such conduct involves “a higher degree of power exercised by the candidate committee than ‘direction.’”³¹⁰ Coordination by control would arise if a candidate were able to “terminate a potential expenditure, or a communication resulting from an expenditure” by an outside group.³¹¹

Among the unrestricted collaborations that Michigan permits between candidates and outside groups is fundraising by a candidate on behalf of an outside group.³¹² Even in an instance where there were “various discussions and exchanges between the candidate” and the outside spender, such as the candidate providing “thank you” letters by schoolchildren to the outside spender and arranging for constituents to provide photographs and comments to the spender, all of which ultimately appeared in an ad, the resulting ad was considered independent.³¹³ The state did treat as regulable coordination, however, an instance in which an

outside spender funded the production of postcards designed by the candidate. The state classified the postcard expenditures as in-kind contributions to the candidate.³¹⁴ However, because the \$493 aggregate value of the in-kind contributions fell below the then-existing \$500 contribution limit, the complaint in that matter was dismissed.³¹⁵

The only published court decision addressing Michigan's concept of coordination is *Michigan Chamber of Commerce v. Land*, a 2010 federal court challenge to the state's ban on corporate treasury contributions to PACs by the Michigan Chamber of Commerce, its PAC, and a chamber member.³¹⁶ The state defended the ban as necessary to prevent corruption or the appearance of corruption. Ruling for the challengers in the wake of *Citizens United*, the district court opined that neither corporate expenditures nor their funding sources can corrupt so long as they are independent and not coordinated with candidates.³¹⁷ But the court found the applicable standard of coordination to be broader than the narrow formulation under Michigan statutory law. Namely, the court held that corporations could make contributions to super PACs so long as the expenditures the PAC engaged in did not (1) satisfy the Michigan statutory definition of coordination, (2) satisfy the federal definition of coordination, or (3) otherwise constitute *quid pro quo* corruption or the appearance of *quid pro quo* corruption.³¹⁸ This three-pronged approach applies to all super PACs.³¹⁹ Absent any authority suggesting that this standard applies to entities other than super PACs, however, it appears that only Michigan's narrower standard of coordination would apply to those other entities.

Efforts to Enforce Coordination Rules

- **Candidate and outside group using the same vendor.** In 2014, the Secretary of State dismissed a complaint alleging coordination between a candidate and an outside group. The candidate and the outside group used two of the same vendors to acquire polling and survey services. Using the same vendors was not enough to presume coordination. Additionally, because the vendors' claim that they had not used information from one entity to help the other was unrefuted, there could be no finding of coordination.³²⁰
- **Candidate fundraising for outside groups.** In 2013, the Secretary of State issued an interpretive statement that "[g]iven the absence of any legal authority in Michigan that restricts a candidate's or officeholder's ability to solicit contributions to an independent expenditure political committee," candidates were permitted to fundraise for super PACs.³²¹ The Secretary stated that the district court in *Michigan Chamber of Commerce* "did not address the issue of whether . . . candidates and officeholders . . . may engage in fundraising on behalf of Super PACs . . ."³²²
- **Outside spender's payment for election material created by a candidate.** In 2012, the Secretary of State concluded that a candidate and an outside spender had coordinated when the outside spender paid for the production of a campaign postcard created by the candidate.³²³ The candidate had provided the outside spender with a copy of a postcard that his campaign had created to be mailed to local registered voters for a primary election. The independent spender said that he "looked at the postcard and decided that the mailing . . . was a good idea [and] made up [his] mind to pay for the postcards" that the candidate was mailing out.³²⁴ No conversations took place between the independent spender and the candidate. These postcards were considered in-kind contributions to the candidate.³²⁵

- **Cooperation between outside group and candidate to develop the substance of outside group’s political flier.** In response to a 2002 complaint alleging the impropriety of “various discussions and exchanges” between a candidate and an outside group to produce a flier promoting the candidate, the Secretary concluded that there was no coordination.³²⁶ For use in creating the ad, the candidate had provided to the outside group “thank you” letters he had received from schoolchildren; arranged for the outside group “to take photographs of, and get commentary from, two constituents;” and placed photographs and information on his campaign’s website, according to the Secretary’s investigation.³²⁷ All of those materials appeared in the outside group’s ad, but the state declined to treat this cooperation as coordination.³²⁸
- **Use by outside group of candidate’s public campaign material.** When in 2000 the Michigan Democratic Party used material from a candidate’s campaign website to produce a flier promoting that candidate, the Secretary dismissed a complaint alleging the flier should be an in-kind contribution because it found “no reason to believe that the [candidate] committee directed or controlled the [party’s] expenditure.”³²⁹ The agency instructed that, “absent evidence to the contrary, it will consider communications created with material accessible to the general public or news media to be evidence of an independent expenditure, rather than an in-kind contribution.”³³⁰

MINNESOTA³³¹

Summary of the Law

Compared to the federal government and other states, Minnesota imposes strict rules against coordination between candidates and outside groups. To avoid contribution limits and other restrictions, outside spenders must ensure that all steps leading up to a political communication, including “fundraising, budgeting decisions, media design . . . production [and] distribution,” occur independent of the candidate.³³² The Campaign Finance & Public Disclosure Board, which interprets and enforces the relevant law,³³³ has interpreted the legislative intent behind the state’s anti-coordination laws as requiring “the highest degree of separation between candidates and independent expenditure spenders that is constitutionally permitted.”³³⁴ The agency issued these interpretations of law after *Citizens United*, in February 2014.

By contrast, under the federal rules fundraising by a candidate on behalf of an outside group does not destroy the independence of an outside expenditure, and the degree of permissible candidate involvement in advertisements is more expansive.³³⁵

Minnesota refers to coordinated expenditures as “approved expenditures,” and statutorily defines them, similar to the federal standard, as expenditures “made with the authorization or expressed or implied consent of, or in cooperation or in concert with, or at the request or suggestion of the candidate.”³³⁶ An expenditure is “a purchase or payment of money or anything of value . . . made or incurred for the purpose of influencing the nomination or election of a candidate.”³³⁷

Approved expenditures are treated as contributions to the candidate, and therefore are subject to the state’s contribution limits of \$1,000 to \$6,000 per election cycle, depending upon the office sought.³³⁸

Efforts to Enforce Coordination Rules

- **Candidate fundraises for a super PAC.** In 2014, the Campaign Finance & Public Disclosure Board (the Board) issued an advisory opinion stating that if a candidate helps a would-be super PAC raise funds, such conduct will “destroy the independence of an expenditure later made” by the group in support of the candidate.³³⁹ The Board would consider a candidate’s mere appearance as a speaker at a super PAC fundraiser to constitute implied consent to the group’s subsequent actions, including expenditures.³⁴⁰ It would not matter, the Board warned, if the candidate lacked knowledge of the “content, timing, [] volume, . . . location, mode, or intended audience” of the expenditures to be made.³⁴¹
- **Candidates participate in photo shoots organized by outside groups for use in producing outside ads.** In 2013, the Board responded to a complaint that a party committee had improperly reported as independent more than \$315,000 in expenditures for literature it had produced to promote a slate of candidates, using photographs from a photo shoot the committee had arranged.³⁴² Those ads, the Board concluded, were not independent, because the candidates had participated in the photo shoot.³⁴³ However, the Board accepted as a mitigating factor that neither the party committee nor the candidates understood that their actions would constitute impermissible

coordination.³⁴⁴ The agency fined the party committee only a fraction of the excess contributions, \$100,000, and did not monetarily penalize the candidates.³⁴⁵

- **Joint purchases of research and polling services.** In a 2013 advisory opinion, the Board ruled that the joint purchase of research or polling services by multiple committees will not result in an in-kind contribution so long as each committee has a “bona fide use for the services purchased” and the amount paid by each committee is proportionate to its expected use of the services.³⁴⁶
- **Candidate contributes to an independent expenditure committee that supports other candidates.** In a 2010 advisory opinion, the Board advised that in general a candidate may contribute to an independent expenditure committee that supports other candidates (but not the contributing candidate herself) without destroying the independence of the group’s expenditures. However, the Board stressed that a case-by-case inquiry would be necessary to determine whether any relationship or communication between the contributing candidate and the supported candidate was close enough to compromise the independence of the expenditures.³⁴⁷
- **Super PAC advisory committee member also works for candidate’s campaign.** In a 2010 advisory opinion issued seven months after the U.S. Supreme Court decision in *Citizens United*, the Board advised that the presence on a super PAC’s advisory committee of a candidate’s campaign staffer would create a “strong presumption” that spending by the PAC to support that candidate was coordinated with the candidate. However, the board cautioned that “[o]nly an after-the-fact analysis of the evidence surrounding the arrangements would permit a definitive conclusion.” Consequently, the Board “strongly recommend[ed] against entering into situations” like this one.³⁴⁸ The Board considered variations on this situation in the following six scenarios.
- **Super PAC advisory committee member hosts a fundraiser for a candidate.** The fact that a super PAC advisory committee member held a fundraiser for a candidate would not, by itself, defeat the independence of subsequent expenditures by the super PAC to support that candidate.³⁴⁹
- **Super PAC advisory committee member holds a leadership position in a political party.** The fact that a super PAC supports a candidate and that an advisory committee member of that super PAC also holds a leadership position in the political party of that candidate will not, by itself, compromise the independence of super PAC spending supporting the candidate. “While the Board understands that parties and their candidates have similar interests, the Board will not presume that a party acts for or on behalf of a candidate,” the Board explained.³⁵⁰
- **Super PAC committee member tells a candidate about an upcoming independent expenditure supporting the candidate.** Mere knowledge by a candidate about an upcoming independent expenditure, by itself, will not destroy independence, the Board concluded. However, it warned, “[a]lthough the [super PAC] representative is not asking for the candidate’s consent or authorization, the danger is that the candidate will nevertheless consent to the expenditure or implicitly approve of it. If the conversation goes beyond the [representative’s] statement, the independence of the expenditure could inadvertently be destroyed.”³⁵¹

- **Employee of a corporation that donated to a super PAC tells a candidate about an upcoming independent expenditure supporting the candidate, but the employee holds no office in the super PAC.** Because the employee has no official role in the super PAC, such an exchange ordinarily would not compromise independence, the Board reasoned. However, it cautioned that if evidence showed that the employee somehow represented the super PAC, the exchange would be viewed in the same way as the preceding scenario.³⁵²
- **Party asks a super PAC to support the party's candidate, and the super PAC makes an independent expenditure supporting the candidate.** These facts, by themselves, would not destroy independence, the Board explained, because a party and a candidate are not presumed to be the same entity.³⁵³
- **Super PAC and a candidate it is supporting hire the same consultant.** In a 2010 advisory opinion, the Board opined that it is impossible for an *individual* consultant to provide “messaging and campaign services” to a super PAC and a candidate without destroying the independence of any spending by the super PAC to promote that candidate’s election.³⁵⁴ However, the Board noted that a consulting *firm* could create an effective firewall policy to separate staff helping the super PAC from staff helping the candidate, and thus avoid compromising the independence of the super PAC’s spending.³⁵⁵
- **Individual puts up billboard supporting candidate after discussion with candidate’s agent.** In 2009 a candidate for state representative paid \$750 to settle an investigation by the Board that found his campaign had coordinated with the owner of a billboard company.³⁵⁶ The company owner had told the candidate’s campaign staffer in 2006 that he wanted to donate billboard advertising. The Board found the staffer “left the impression that the sign would be a good idea, which is at least implied and possibly express consent for the expenditure.”³⁵⁷ The company owner put up billboards supporting the candidate in both 2006 and 2008.³⁵⁸

The 2006 billboard, the Board concluded, was an in-kind contribution that exceeded the contribution limit at the time of \$500.³⁵⁹ The 2008 billboards, however, were independent expenditures because the evidence did not show the campaign and the outside spender had communicated during the 2008 election cycle.³⁶⁰

- **Consultant working for a PAC and a candidate who signs a confidentiality agreement with each entity.** In a 2008 advisory opinion, the Board concluded that an individual consultant’s separate confidentiality agreements with a candidate and a super PAC supporting the candidate “are not sufficient to provide the requisite degree of separation between the two components of the consultant’s work.”³⁶¹
- **Political party produces a politically-purposed television program in which a candidate participates.** In a 2005 advisory opinion, the Board concluded that if a political party produces a television program for a political purpose in which a candidate participates, a portion of the production costs would be considered an in-kind contribution to the candidate.³⁶²

- **Political party runs political ads using materials prepared for use by candidate.** In 2002, then-gubernatorial candidate Tim Pawlenty hired a media firm to film footage of him for campaign advertisements.³⁶³ The Republican Party of Minnesota purchased the footage from the media firm, unbeknownst to the Pawlenty campaign.³⁶⁴ The party hired an affiliated firm to produce ads promoting Pawlenty at the same time that the affiliated firm was under contract to provide similar services to Pawlenty’s campaign.³⁶⁵ The party issued ads featuring the Pawlenty campaign footage purchased from the media firm, in addition to the “visual images, concepts, ideas, and scripted material created by [the affiliated firm] at the request and with the approval of the Pawlenty Committee.”³⁶⁶ Once the Pawlenty campaign became aware of the ads, it did nothing to stop them.³⁶⁷

The Board found probable cause to believe that the Pawlenty campaign had “ratified coordination by its agent” (a principal of the media firm hired by the Pawlenty campaign), and that “the TV ads were therefore not an independent expense.”³⁶⁸ In a conciliation agreement the Pawlenty campaign agreed to report the ads as in-kind contributions worth \$500,000 and to pay a fine of \$100,000.³⁶⁹ The Republican Party of Minnesota was fined \$3,000 for claiming that the ads were independent.³⁷⁰ The conciliation agreement specified that it would “not be construed as an admission of liability” and was a “compromise of disputed claims.”³⁷¹

- **Candidate asks outside committee to stop running a particular ad.** In 2002, the Board dismissed a complaint where the only evidence of coordination was that the candidate asked an outside spender to cease running a particular ad about his opponent. Although the candidate did not object to other ads the spender was running relevant to his election, because of the absence of further evidence of coordination, the Board dismissed the complaint.³⁷²

MONTANA³⁷³

Summary of the Law

Montana's coordination law resembles the federal law,³⁷⁴ yet its campaign finance regulation agency had almost no record of assessing penalties for coordinated activity until 2010, when the state was hit with a flood of spending.

In Montana, spending becomes a “coordinated expenditure,” and is therefore treated as a contribution, if it is “made in cooperation with, consultation with, at the request or suggestion of, or the prior consent of a candidate.”³⁷⁵ Corporations are banned from making contributions, while individuals are limited to contributing \$170 to legislative candidates and \$650 to gubernatorial candidates, per election.³⁷⁶

Montana's definition of coordinated expenditures could be interpreted to be more expansive than the federal definition, but the state's rules and statutes do not elaborate on the breadth of terms like “cooperation” and “consultation.” The Commissioner of Political Practices (COPP) has explained that, like the federal government, the state has concluded that a finding of coordination requires “more than common vendors, interrelated individuals (as in a former employee of the candidate) and shared contacts” between outside spenders and candidates' campaigns.³⁷⁷ Yet recently, the COPP has regulated fairly strictly³⁷⁸ and has been willing to use a wide range of evidence to determine whether coordination has occurred. For example, the Commissioner recently explained that “a candidate's campaign activity may indicate coordination by showing candidate campaign gaps filled by coordinated third party campaign activity,” and that a campaign's payment of below-market rates for services might constitute evidence of coordination.³⁷⁹ However, the agency recently confirmed that outside organizations may create firewalls enabling one part to spend independently while another part coordinates with a candidate.³⁸⁰

Though there are many recent decisions from the COPP, neither the Commissioner nor the Montana courts have addressed the issue of whether communications resulting from coordinated expenditures should be treated as contributions if they do not expressly advocate for the election or defeat of a candidate. However, the statutes define “expenditure” as including payments and gifts “made for the purpose of influencing the results of an election,”³⁸¹ indicating that coordinated expenditures should be treated as contributions as long as they are intended to affect the election's results.

Efforts to Enforce Coordination Rules

- **Professional relationship between candidate and spender.** In a decision this year, the COPP found insufficient evidence of coordination between a candidate and an outside spender who had shared office space and worked together as attorneys on one case.³⁸²

The complaint alleged that Missoula County Attorney candidate Kirsten Pabst improperly received coordinated contributions from the group MVDW, when the group mailed flyers and published newspaper ads supporting Pabst.³⁸³ Evidence showed that Pabst shared an office suite with the man who controlled MVDW, and the two were co-counsel on at least one case.³⁸⁴ But the COPP determined that these connections did not by themselves demonstrate coordination of the expenditures, and the evidence weighing against coordination included testimony by MVDW's media vendors that they had no contact with Pabst.³⁸⁵

- **Sufficiency of evidence; characteristics of coordinated activity.** In July 2014, the COPP dismissed a complaint against a Montana Senate candidate for lack of evidence.³⁸⁶

The case concerned a 2010 campaign for state senate, where the candidate stood accused of coordinating expenditures with nine individuals and groups.³⁸⁷ Each of the nine entities and the candidate denied any coordination.³⁸⁸ The Commissioner noted that “a candidate’s campaign activity may indicate coordination by showing candidate campaign gaps filled by coordinated third party campaign activity,” noting that in several other cases (discussed below), a candidate’s payment of below-market rates for services can lead to a finding of coordination.³⁸⁹ A review of the candidate’s campaign records showed no payment to or contact with any of the entities in question, and also showed no “gap” in campaign activity that might have been filled by an outside group.³⁹⁰

- **Use of firewalls; candidate consultant paid for by candidate and outside group.** In a 2014 advisory opinion the COPP addressed the issue of campaign consultants who are paid by the candidate and organizations which make independent expenditures. The COPP explained that a firewall between the consultant and the independent spender will generally prevent findings of coordination.³⁹¹ That firewall, the agency explained, should be structured so that the candidate’s consultant is not “involved in any aspect of the independent expenditure activity.”³⁹²

In this case the consultant wanted to do work for a candidate that was paid for in part by the campaign and in part by an outside group.³⁹³ The COPP explained that the outside group’s payments to the consultant would be considered in-kind campaign contributions to the candidate (which were permissible so long as they did not exceed the PAC-to-candidate contribution limit). The group was also free to engage in independent expenditures supporting that candidate, the opinion added, but to avoid coordination problems the campaign consultant should be walled off from such spending.³⁹⁴

- **Candidate answering questionnaire of outside group.** In another 2014 advisory opinion, the COPP clarified that “there is NO coordination between a candidate and a third party entity when the contact between the candidate and the third party is the sole act of completing and returning a questionnaire.”³⁹⁵ Furthermore, the entity later using the information gathered through the questionnaire would not “by itself, create coordination with an arms-length candidate.”³⁹⁶
- **Coordination of strategy and knowledge of outside assistance.** The COPP has issued a number of decisions concerning alleged coordination between Western Tradition Partnership (WTP) and Republican candidates, most of which involved primary races for the 2010 state legislative elections. Most of those decisions addressed very similar facts, and in the cases with similar fact patterns, the COPP concluded that coordination had occurred.³⁹⁷ This section will discuss one of those cases to provide a representative example of the facts that the COPP used to conclude that coordination occurred.

In *Bonogofsky v. Kennedy*, the COPP determined that Dan Kennedy, a candidate in the Republican primary election for Montana House District 57, coordinated the production of various mailings with WTP, whose valuable services had not been reported as contributions.³⁹⁸ First, the COPP

determined that WTP provided services to Kennedy by writing and editing a letter that was sent to potential voters and signed by Kennedy's wife.³⁹⁹ Kennedy paid WTP below-market value for the services, and he "knew of, consulted on and consented to the full range of . . . services and therefore coordinated this activity with WTP."⁴⁰⁰ Thus, the Commissioner concluded that there was sufficient evidence to justify civil prosecution of Kennedy for accepting illegal corporate contributions.⁴⁰¹ The agency inferred coordination from the fact that Kennedy had signed the letters produced by WTP and partially paid WTP for them.⁴⁰²

Regarding a different set of letters sent on behalf of Kennedy, the COPP found that WTP had additionally provided lists of likely voters who should receive the letters. This act constituted "an additional service value provided by WTP to Candidate Kennedy."⁴⁰³ Prosecutions of Kennedy and a number of other candidates are currently pending in court.

The COPP also identified coordination involving a set of attack letters sent by WTP that were helpful to Kennedy, but did not evidence obvious candidate involvement. The agency inferred coordination in part based on the testimony of two candidates in other primary races, who had "told the Commissioner that any 2010 legislative candidate accepting WTP's endorsement had to know of or give consent to WTP's use of attack letters."⁴⁰⁴ In this case, the opinion explained, "[t]he Commissioner takes administrative notice that a candidate endorsed by WTP in the 2010 elections would have known of and consented to the use of attack letters . . . , as such use was WTP's signature electioneering brand."⁴⁰⁵ Besides such "imputed knowledge," the COPP found that the Kennedy campaign's own timing of issue-specific mailings to specific voter groups implied knowledge of when the WTP would send attack letters to those same groups.⁴⁰⁶

- **Use of vendor that undercharges; candidate "acceptance" of in-kind contribution.** Another agency investigation, *Ponte v. Buttrey* also involved WTP, but the COPP did not find that coordination had occurred.⁴⁰⁷ In this case the candidate had paid WTP about \$2,100 for campaign consulting, but, unlike with candidates who had coordinated with WTP, this payment constituted only a small fraction of the candidate's campaign spending and WTP had a limited role in his campaign.⁴⁰⁸ The mere use of WTP as a vendor did not amount to coordination.⁴⁰⁹

Though the candidate had received WTP's direct mail services at a below-market rate, the agency declined to count this benefit as the receipt of an illegal in-kind corporate contribution.⁴¹⁰ The agency concluded that the candidate should not be charged with "accept[ing]" the contribution, because he was a first-time candidate and cut ties with WTP "once he understood their method of operation."⁴¹¹ The office also pointed to practical limitations as a reason for dismissing the case, explaining that a finding of violation in this case would out of fairness necessitate reviews of at least six other candidates, and "[t]here is neither time or resources to expand 2010 campaign investigations into this lesser level of WTP involvement."⁴¹²

- **Sharing of expenses between candidate and spender; sufficiency of evidence.** In *Ponte v. MT BASE*, the COPP addressed complainant Ponte's allegation that "a shared expense by a PAC with a candidate creates coordination."⁴¹³ The shared expense at issue was a campaign "kick-off party."⁴¹⁴ The COPP dismissed the complaint as frivolous, because it lacked any details about any election expense of the candidate that had been subsidized.⁴¹⁵ The COPP explained that, to act on this

complaint would “likely implicate[] any association between any entity and a candidate including picnics, award ceremonies and workshops.”⁴¹⁶ The decision also elaborated generally on the Commissioner’s approach to coordination enforcement, which tracked the federal coordination rules.⁴¹⁷

- **Candidate’s use of outside spender’s tactics; sufficiency of evidence.** In *Madin v. Burnett*, the COPP noted the similarity between a candidate’s wife’s letters and those sent by WTP, but found insufficient evidence of coordination.⁴¹⁸

Tom Burnett ran for a Montana House seat in 2010, and his campaign sent letters to voters written by his wife and daughters.⁴¹⁹ While the style of the letters was very similar to those mailed by WTP in other 2010 races, the Commissioner found insufficient evidence of coordination: the letter had been printed by a business independent of WTP, and the candidate paid full price for the printing.⁴²⁰ Further, WTP had no file on Burnett and the Burnett campaign had no record of contact with WTP.⁴²¹

- **Publicly-available materials used in outside advertisements.** In *Hamlett v. McKamey*, the COPP declined to investigate coordination between a candidate and an entity called Montana Growth Network (MGN).⁴²² The complaint alleged that coordination occurred because MGN used the candidate’s photograph on a mailer, but the COPP rejected this claim because the candidate denied providing the photograph and because the photograph was publicly available.⁴²³
- **Candidate membership in supportive organizations.** In a 2008 opinion, the COPP declined to find coordination between a state house candidate and two PACs that made independent expenditures to promote his election, even though the candidate was a member of one PAC’s sister organization and discussed his campaign with other members who then contributed to the entities spending to support him.⁴²⁴

An individual (who would later become the candidate at issue) belonged to the state’s Progressive Labor Caucus, which had an associated PAC (PLC-PAC).⁴²⁵ In early 2006, a leader of PLC talked with the individual about his issue stances and about his potentially running in the primary.⁴²⁶ In March, the individual filed as a candidate.⁴²⁷ In April, the PLC leader founded a different PAC, Montanans for a True Democrat Club (MTDC), to make expenditures against the candidate’s opponent.⁴²⁸ MTDC drew financial support from PLC-PAC and its members, and spent nearly \$9,000 in support of the candidate.⁴²⁹ The candidate had discussed his campaign with at least two PLC members who contributed to MTDC.⁴³⁰

The COPP found that no coordination occurred between MTDC and the candidate, because there was no evidence that the PAC’s expenditures “were made with the prior knowledge, consent, and encouragement of [the candidate] or his campaign.”⁴³¹ Similarly, the agency found no coordination between PLC and the candidate, concluding that the members who spoke with the candidate did so not as PLC members but as individuals.⁴³² The Commissioner also stressed that no evidence indicated that the candidate knew that the caucus planned to donate to MTDC or to his campaign.⁴³³ Finally, the agency said that the candidate’s membership in the caucus was not evidence of

coordination, because “he was at most a passive member who did not participate” in the group’s activities.⁴³⁴

- **Candidate relationship with former member of supportive organization.** In *Close v. People for Responsible Government*, the COPP rejected allegations that a Bozeman City Commission candidate and an independent committee had coordinated attack ads against other candidates.⁴³⁵

The candidate worked at a bar for a man who had once belonged to the political committee responsible for the attack ads, but claimed not to belong any longer.⁴³⁶ The COPP compared the list of contributors to the candidate’s campaign with the list of contributors to the political committee, finding an approximate 15 percent overlap.⁴³⁷ The investigation found no “discernable pattern or striking similarity,” between the candidate’s campaign and the political committee and thus declined to find illegal coordination.⁴³⁸

- **Discussion of strategy and advertisements between candidate and outside groups.** In *Little v. Progressive Missoula*, the COPP found that a Missoula City Council candidate had coordinated with an independent-expenditure committee to design and distribute a campaign flyer criticizing her opponent.⁴³⁹

In emails, the candidate had told the outside committee’s board members that she wanted to keep her campaign positive, but invited an outside spender to go negative on her behalf.⁴⁴⁰ In one email she suggested that the specific committee “do a negative piece on” on her opponent.⁴⁴¹ A committee board member chastised her by email for the “inappropriate” message and reminded her that the committee was an independent-expenditure committee.⁴⁴² At the same time, the committee prepared negative ads based on their discussions, according to the evidence, one of which was based directly on a concept the candidate had floated.⁴⁴³

The COPP considered these email exchanges and the ultimate advertisement’s similarities to the candidate’s suggestions, and found them to constitute “substantial evidence [that the outside committee and the candidate’s campaign] worked collaboratively.”⁴⁴⁴ The consequence, the agency said, would be to count contributions to the committee as well as relevant expenditures by the committee as contributions to the candidate’s campaign.⁴⁴⁵ Because the amounts exceeded contribution limits, the COPP concluded that the outside committee, its members, and the candidate had violated Montana law.⁴⁴⁶

NEW MEXICO⁴⁴⁷

Summary of the Law

New Mexico has no statute or rule defining coordinated expenditures, nor any record of attempting to regulate coordination through other means.⁴⁴⁸ Recent events indicate that the state may adopt the federal coordination rules, at least temporarily.

The lack of a coordinated-expenditures definition has prompted many calls for change in recent years. For the third time in three years, the state senate recently approved a proposed definition that died in the state house; observers expect proponents will reintroduce the bill in 2015.⁴⁴⁹ This year the Secretary of State's office, which has the power to enforce campaign finance laws, issued a candidate guide that advises politicians to follow the federal coordination standard.⁴⁵⁰ In August the state attorney general urged the secretary of state to extend the federal rules-based guidance to outside spenders as well.⁴⁵¹ Given the apparent absence of statutory authority, it is not clear if any attempt to enforce the federal rules in a state election would stand up if challenged in court.⁴⁵²

Efforts to Enforce Coordination Rules

In 2010, a state senator sought guidance from the Attorney General's office on the following question: "if a person spends money for a political purpose related to a candidate but does not coordinate that spending with a candidate, does that spending qualify as an in-kind contribution to the candidate?"⁴⁵³ Even without a state definition of coordination, the Attorney General's resolved the question, explaining that "an expenditure made by a person separately and independently of a candidate, even for a political purpose, is not, without more, a contribution to a candidate."⁴⁵⁴

Summary of the Law

On the books, Ohio restricts coordination somewhat more aggressively than the federal government does. Yet, with almost no documented history of enforcement, this difference appears to hold little real meaning.

Ohio’s coordination law mostly resembles the federal law, but contains variations that could be interpreted to conceptualize coordination more broadly. Similar to the federal standard, in Ohio outside political spending loses “independent expenditure” status — and, therefore, unlimited status — when it is used to distribute or republish a candidate’s campaign materials or occurs “with the consent of, in coordination, cooperation, or consultation with, or at the request or suggestion of any candidate.”⁴⁵⁶ The state considers spending to be “coordinated,” if it is done “pursuant to any arrangement, coordination, or direction by the candidate.”⁴⁵⁷ Coordinated spending by an individual is treated as a campaign contribution, and is subject to a cap of about \$12,000 to \$36,000, depending on the type of recipient.⁴⁵⁸ Because Ohio (like the federal government)⁴⁵⁹ entirely bans corporate and union campaign contributions made directly to candidates or their campaigns,⁴⁶⁰ any coordinated spending by these entities is treated as an illegal contribution. Violation of the ban results in a fine of \$500 to \$5,000.⁴⁶¹

Like the federal government, Ohio restricts coordination of outside group advertising that mentions a candidate during a certain period before an election, not just ads that explicitly advocate voting for or against a candidate.⁴⁶² Also like the federal government, Ohio considers certain conduct of an outside group when determining whether outside spending is coordinated with a candidate: involvement by a candidate’s campaign in deciding the content, audience, or release of an ad, and certain types of involvement by a candidate’s former employee or by a vendor to both the outside spender and the campaign.⁴⁶³ Yet unlike the federal rules, the text of Ohio law restricts such conduct absolutely — it does not police only “material” or “substantial” involvement by a candidate.⁴⁶⁴ The state likely cannot act on this more expansive language, however, after a 2005 decision by the Ohio Supreme Court indicated that any arrangement or coordination between a candidate and outside group would need to reach the level of “substantial discussion or negotiation” for the outside spending to be limited to contribution caps.⁴⁶⁵

The responsibility to enforce and interpret Ohio’s election law lies with the Ohio Elections Commission, which is composed of seven members, six of whom are appointed by the Governor on the recommendation of legislative leaders. The seventh member, who must be nonpartisan, is chosen by the six members appointed by the Governor.⁴⁶⁶ There are no known instances in which the Commission has addressed a matter concerning coordination.

Efforts to Enforce Coordination Rules

- **Involvement by agent of a candidate with outside spender and with communications firm creating the questioned political advertising.** The 2005 decision in *Disciplinary Counsel v. Spicer*⁴⁶⁷ offers a window into how the state’s highest court views coordination regulation. Although the case concerned coordination under Ohio’s judicial conduct code, not its campaign finance laws, both contain similar language regarding the independence of campaign expenditures.⁴⁶⁸ In *Spicer*, the court declined to find coordination when a state political party paid \$100,000 to rebroadcast an incumbent

judicial candidate’s campaign ad, even though the same person owned the company that produced the ad, worked for the candidate’s campaign, worked for the candidate as a court employee, and served as an officer of the political party that paid for the ad.⁴⁶⁹

The judicial candidate had learned of the party’s advertising plan and sought guidance from the court’s ethics authority, learning that party spending could be unlimited and not subject to contribution caps “assuming the . . . advertising was properly funded, directed, acknowledged, and controlled by the party.”⁴⁷⁰ The ads ran, and the candidate did not report the spending as a contribution.⁴⁷¹ The judicial ethics body’s lawyer then filed a complaint against the candidate, claiming that the ads had been coordinated and should have been reported as in-kind contributions subject to caps.

Looking to federal coordination law, the Court instructed that “there can be no [coordination] absent a meeting of the minds, including informal or de facto arrangements, with respect to the intended advertising. An agreement is an essential component of such an expenditure.”⁴⁷² Thus, there must be “more than mere knowledge or passive participation on the part of the candidate,” and that coordination “occurs when the candidate engages in substantial discussion or negotiation with the political party regarding the contents, timing, type, or frequency of the communication or when the candidate has the ability to direct or control the political party’s expenditure in a meaningful way, such that the candidate and the political party engage in a joint venture.”⁴⁷³ The Court concluded that the judicial candidate’s participation in the outside advertising was insufficient to amount to coordination. The Court also declined to find that the campaign operative involved in the ad had acted “solely as a campaign operative” and thus coordinated on behalf of the candidate — because the operative also served other interests, including his own, as an owner of the company that produced the ad.⁴⁷⁴

Spicer’s applicability to non-judicial races is limited because under Ohio’s campaign finance laws, republication of any broadcast is defined as an in-kind contribution,⁴⁷⁵ and all party spending is presumed to be coordinated with a party candidate.⁴⁷⁶ Yet the *Spicer* decision suggests a broadly principled reluctance on the part of Ohio’s highest court to regulate coordination aggressively. Any finding of coordination at the agency level likely would need very strong evidence to survive a court challenge.

PENNSYLVANIA⁴⁷⁷

Summary of the Law

Pennsylvania's statutory standard for coordination is fairly typical, resembling the federal one, but it lacks any history of enforcement.

Similar to federal law, Pennsylvania's statute treats spending as independent if it is "made for the purpose of influencing an election without cooperation or consultation with any candidate or any political committee authorized by that candidate and which is not made in concert with or at the request or suggestion of any candidate."⁴⁷⁸ However, unlike the federal government and many states, Pennsylvania provides no further statutes or rules to clarify this definition, and it appears that the law has never been enforced. Part of the reason for the lack of enforcement may be that Pennsylvania does not limit individual contributions directly to candidates; in other jurisdictions the chief goal for deterring coordination is to prevent circumvention of contribution limits through connected outside spending. Yet, even after *Citizens United* lifted limits everywhere on corporations' ability to make independent expenditures, Pennsylvania still bans corporations from making direct contributions to candidates.⁴⁷⁹ To the extent that corporations coordinate their outside spending with candidates and thus circumvent the contribution ban, enforcement of the state's coordination law would have a real impact.

Efforts to Enforce Coordination Rules

None.

VERMONT⁴⁸⁰

Summary of the Law

Vermont defines coordination much as the federal government does, but groups seeking to engage in unlimited outside spending in Vermont elections still face higher hurdles. Unlike at the federal level, where super PAC independence is based only on whether the organization’s expenditures are independent,⁴⁸¹ a new Vermont law requires that a group “conduct[] its activities entirely independent of candidates” in order to accept unlimited contributions as an independent-expenditure only political committee.⁴⁸² The state treats groups that do not meet this standard as regular political committees, which can only accept contributions of up to \$2,000 from a single source per election cycle.⁴⁸³ Though too new to have been tested in different scenarios, this independence standard appears to restrict certain kinds of cooperation between candidates and outside groups that federal law permits—for instance, candidate fundraising for super PACs.

State statute defines outside group spending on behalf of a candidate as coordinated with that candidate — or, in Vermont’s parlance, as a “related expenditure” — if it is “intentionally facilitated by, solicited by or approved by the candidate or the candidate’s committee.”⁴⁸⁴ Coordinated spending is subject to contribution limits, and must be publicly reported by the spender as a contribution and by the candidate as a received contribution.⁴⁸⁵

To show that spending was “facilitated by” a candidate, a federal appeals court has said, the government must prove that the spender engaged in “some prearrangement or coordination with the candidate.”⁴⁸⁶ According to the Secretary of State’s office, which administers Vermont’s election laws,⁴⁸⁷ such proof need not show that a candidate had a “specific intent to make an activity or expense” a coordinated expenditure, but it must show that the candidate had “some knowledge of the fact, or willful blindness toward the fact that the action will be used in connection with an activity or expenditure on the candidate’s behalf.”⁴⁸⁸ Similarly, to show a candidate has “approved” a questionable expenditure, the government must prove that the candidate has “consciously, and not accidentally, taken . . . prior action or inaction that indicates permission or approval. Simply knowing that an activity or expenditure is taking place does not, alone, constitute approval.”⁴⁸⁹

These concepts resemble the federal coordinated expenditures standard.⁴⁹⁰ But because of Vermont’s separate standard for qualifying as an independent-spender group, a Vermont PAC could engage in cooperative activity with a candidate that would prevent it from operating as a super PAC, even without making a coordinated expenditure.⁴⁹¹

Vermont’s Secretary of State administers and interprets the election laws including coordination rules, and its Attorney General enforces the laws.⁴⁹² Candidates may jumpstart an investigation into coordinated spending involving an opponent by taking their claims to county court.⁴⁹³

Efforts to Enforce Coordination Rules

- **Fluidity of funds and other overlaps between a purported super PAC and a candidate-related PAC.** In July 2014, the Second Circuit held that a would-be state super PAC could not claim independent status and thus unlimited fundraising and spending power, because its funds, leadership,

and activities were too closely intertwined with those of a regular PAC that worked directly with candidates.⁴⁹⁴ Evidence showed that “[a]t every step of the campaign process, [the purported super PAC was] completely enmeshed” with the regular PAC.⁴⁹⁵ The Second Circuit deemed it therefore appropriate to enforce contribution limits against the would-be super PAC, explaining “[t]he Supreme Court has upheld limitations on contributions to entities whose relationships with candidates are sufficiently close to justify concerns about corruption or the appearance thereof.”⁴⁹⁶ The court’s opinion lists numerous details of the groups’ “indistinguishable” nature, including “the total overlap of staff and resources, the fluidity of funds, and the lack of any informational barrier between the entities.”⁴⁹⁷

- **Use by outside group of candidate’s confidential campaign material for advertising.** In 2013, in a stipulated judgment, the state, an outside group, and a candidate agreed that an outside group and a candidate would be considered to have coordinated if the candidate shared confidential polling data used in his campaign with the group, and the candidate then allowed that group to fund advertising based upon that confidential data in support of his candidacy.⁴⁹⁸ In the case, the campaign of Brian Dubie, a Republican candidate for Governor, gave the Republican Governors Association confidential polling data, which the RGA solicited “for the purpose of gleaning information the RGA could use as one of the factors in its determination of the content, timing, frequency, audience, and/or media outlets for its radio and television advertisements” relating to Dubie.⁴⁹⁹ Dubie “knew, or should have known and failed to ascertain” that the RGA might use the polling data in this way.⁵⁰⁰ Because the value of the advertisements exceeded the \$6,000 contribution limit, the RGA was fined \$30,000, Dubie was fined \$10,000, and Dubie had to donate an additional \$10,000 to the Vermont Food Bank.⁵⁰¹ According to Attorney General Bill Sorrell, but for the settlement, fines “could have been in the stratosphere.”⁵⁰²
- **Appearance in outside group advertising by a spokesperson who endorsed the subject candidate and also appeared in the candidate’s campaign advertising.** In 2013, a state court found no coordination in the appearance of former Vermont governor and former presidential candidate Howard Dean in outside group advertising advocating Bill Sorrell’s election as attorney general, even though Dean had endorsed Sorrell and also appeared in a Sorrell campaign advertisement.⁵⁰³ Sorrell’s opponent, Jack McMullen, had also alleged that Dean had “consulted with Sorrell and advised him on how to run his campaign prior to narrating the [outside group’s] advertisement; advised [the outside group] on how it should spend its money to support Sorrell; and attended fundraising events and a television show with Sorrell.”⁵⁰⁴ The court rejected these assertions for lack of proof, and questioned whether they would show coordination even if true.⁵⁰⁵ The court explained its core reasoning for finding no coordination in Dean’s work on behalf of both the outside group and the candidate: “[T]here is no evidence of any confidential information being exchanged. The information and images used in the advertisement would have been available from other sources.”⁵⁰⁶

Summary of the Law

Wisconsin's coordination statute and rules resemble the federal approach, but are somewhat more lenient.

A spender wishing to make unlimited independent expenditures must file an oath swearing that it “does not act in cooperation or consultation with . . . [or] in concert with, or at the request or suggestion of, any candidate.”⁵⁰⁸ The practical reach of this standard, however, is relatively moderate. The state's general instruction is that “in the absence of a request or suggestion from the campaign,” coordination may only be found when a candidate “exercises control over” a communication or when there has been “substantial discussion or negotiation” between the campaign and the spender about the communication.⁵⁰⁹ Spending that results from a decision by an agent of the relevant candidate's campaign, or that funds the distribution of campaign materials, will be presumed to be coordinated with the campaign, under rules adopted by the state's Government Accountability Board (GAB).⁵¹⁰ But no rule prohibits a candidate's vendors or former agents from directing unlimited spending to promote the candidate's campaign.

A recent federal district court decision created uncertainty in this area by limiting the reach of the state's coordination rules to only express advocacy: advertisements explicitly calling for a candidate's election or defeat.⁵¹¹ Citing *Citizens United*, the court determined that advocacy not explicitly calling for a candidate's election or defeat (so-called issue advocacy) is protected from coordination regulation by the First Amendment.⁵¹² But a federal appeals court reversed and, declining to address the constitutional question, sent the case back to state court.⁵¹³

In the meantime, Wisconsin counts all coordinated expenditures as campaign contributions, which face caps of \$250 to \$10,000, depending on the office.⁵¹⁴ Fines for violations may amount to three times the value of any excessive contribution.⁵¹⁵

Efforts to Enforce Coordination Rules

- **Regulation of communications not containing express advocacy.** A recent federal case concerning alleged coordination by Wisconsin Governor Scott Walker's campaign created uncertainty about the state's coordination law, but a recent federal appeals court decision appears to have settled the matter, for the time being.⁵¹⁶

After state prosecutors launched an investigation into whether Walker's campaign coordinated with outside groups during the 2012 gubernatorial recall election, one group filed suit in federal court to stop the investigation.⁵¹⁷ The plaintiffs argued that only express advocacy communications may be regulated under the Constitution; and because none of the advertisements in question contained express advocacy, the investigation was unconstitutional. The district court agreed, holding that neither Wisconsin coordination law nor the First Amendment permitted the investigation to continue.⁵¹⁸

The federal appellate court reversed the district court's decision. Because “[t]he Supreme Court has yet to determine” whether the government can “regulate coordination of contributions and speech

about political issues, when the speakers do not expressly advocate any person's election," the appellate court saw fit to allow the state court to decide the matter.⁵¹⁹

- **Constitutionality of non-coordination oath and regulation of issue advocacy.** In 2014 a federal appeals court struck down many of the GAB's campaign finance rules, but left standing the provisions requiring independent spenders to file an oath promising not to engage in what the state defined to be coordination.⁵²⁰ The court concluded that the law is "a minimally burdensome regulatory requirement, and it's reasonably tailored to the public's informational interest in knowing the source of independent election-related spending."⁵²¹

While the court did not review the substance of the GAB's coordination regulations, it mentioned in an aside that "[s]everal other features of the rule," such as provisions permitting regulators to presume coordination under certain circumstances, "raise potentially troubling questions."⁵²²

- **Candidate's involvement in supportive organization.** In a 2011 decision, the GAB dismissed a complaint against a state senate candidate who sat on the board of an organization at the same time that it made purportedly independent and therefore unlimited expenditures supporting her campaign.⁵²³ The agency interviewed the candidate, her campaign treasurer, and other members of the organization, and concluded that the candidate had left the room whenever the board discussed election issues and therefore did not coordinate with the group.⁵²⁴ Her campaign manager did not leave the room on at least one occasion, but the agency decided that the manager's mere presence "did not amount to consultation or cooperation".⁵²⁵
- **Campaign supporter funds outside spending.** The GAB dismissed a complaint alleging that a 2008 candidate for state senate had coordinated with a PAC because his campaign supporter was the sole funder of the PAC. Although the agency noted the relationship provided a "reasonable basis" for suspecting improper coordination, upon review of the evidence, the GAB concluded no such coordination had occurred.⁵²⁶

A former state senator who had resigned during his term told his campaign treasurer to find a legal way to direct \$76,000 remaining in his campaign coffers, ideally to someone who would use those funds in his former district. The treasurer gave the money to the head of the PAC, telling him that "it would be good if the money was spent . . . in support of [the state senate candidate]."⁵²⁷ Still, the evidence showed that the treasurer had no role in the PAC's spending of the funds, and that the former senator who gave the money did not even know the PAC existed until he saw one of its ads on television.⁵²⁸ The agency concluded that no coordination had occurred.⁵²⁹

- **Defining statutory terms and the constitutional bounds of coordination law.** In 2000 the Wisconsin Elections Board, the GAB's predecessor, issued an opinion describing the extent to which candidates and groups that spend on elections (including on get-out-the-vote efforts) may interact before triggering coordination concerns.⁵³⁰

After reviewing court decisions including leading federal cases, the Board concluded that the "outright ban on any 'consultation cooperation, or action in concert'" that exists in Wisconsin law "may be unenforceable."⁵³¹ Spending could be subject to coordination regulation, the Board said,

only if it was “made for the purpose of influencing voting at a specific candidate’s election” and the expenditure was coordinated with the campaign.⁵³²

Synthesizing federal case law and the state’s statute, the Board derived the following definition of coordination:

The communication is made at the request or suggestion of the campaign (i.e., the candidate or agents of the candidate); or, in the absence of a request or suggestion from the campaign, if the cooperation, consultation or coordination between the two is such that the candidate or his/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 the spender emerge as partners or joint venturers in the expressive expenditure, but the candidate and spender need not be equal partners.⁵³³

The Board further concluded that a candidate’s right to discuss his or her position on issues and philosophy is absolute, but that the state may regulate when discussions begin to provide details that will help an independent spender optimize its expenditures.⁵³⁴

- **Regulating coordinated issue advocacy.** In 1999, the Court of Appeals of Wisconsin affirmed that the Elections Board could regulate coordinated advertisements that did not contain express advocacy and allowed the Board’s coordination investigation to continue despite a First Amendment challenge.⁵³⁵

The Board of Elections investigated a connection between The Wisconsin Coalition for Voter Participation and Wisconsin Supreme Court candidate Jon Wilcox, after the Coalition mailed postcards with information about Wilcox that matched Wilcox’s campaign ads almost exactly.⁵³⁶ The Coalition challenged the investigation as unconstitutional, but both the trial court and appeals court rejected the claim.⁵³⁷

The Court of Appeals concluded that all expenditures for political purposes — whether or not constituting express advocacy — are subject to coordination analysis. When such an expenditure has been coordinated, the Court of Appeals said, it should be regulated as a campaign contribution, not as an independent expenditure. In this case, “if the mailing was a contribution . . . it was illegal regardless of how one might interpret the postcards’ language.”⁵³⁸ The constitutionality of regulating contributions had long been settled, the court pointed out.⁵³⁹

ENDNOTES

¹ 52 U.S.C. § 30101(17).

² The Commission is composed of six members, three each per major political party, and four votes are required to take enforcement action. In recent years the bipartisan composition has resulted in repeated deadlocks, stymieing not just enforcement but also publication of new rules to guide election spending after *Citizens United* and related cases. See, e.g., Lisa Rosenberg, *Impotent FEC fails to act on Disclosure Rules*, SUNLIGHT FOUNDATION BLOG, (Jan. 21, 2011), <http://sunlightfoundation.com/blog/2011/01/21/impotent-fec-fails-to-act-on-disclosure-rules/> and Nicholas Confessore, *Election Panel Enacts Policies by Not Acting*, N.Y. TIMES, Aug. 25, 2014 available at http://www.nytimes.com/2014/08/26/us/politics/election-panel-enacts-policies-by-not-acting.html?_r=0.

³ Coordinated communications are addressed in 11 C.F.R. § 109.21, while all other coordinated expenditures are addressed in 11 C.F.R. § 109.20.

⁴ 11 C.F.R. § 109.21(c)(3).

⁵ *Id.* § 109.21(c)(5).

⁶ *Id.* § 109.21(c)(1), (4).

⁷ *Id.* § 109.21(d)(1).

⁸ *Id.* § 109.21(d)(2), (3).

⁹ *Id.* § 109.21(d)(4), (h).

¹⁰ *Id.* § 109.21(d)(5), (h).

¹¹ *Id.* § 109.21(d)(6).

¹² Our review of relevant case law and enforcement actions in Arizona was limited by the accessibility of information. We found no court cases involving Arizona coordination law in the Westlaw and Lexis databases. We reviewed a number of decisions from the state's Office of Administrative Hearings database. The Citizens Clean Elections Commission maintains meeting minutes online, but not written decisions. The state courts' online database is searchable only by party name, not keyword. The CCEC Executive Director provided us with several enforcement decisions and commission recommendations, and confirmed that there were no known court cases.

¹³ ARIZ. REV. STAT. § 16-901(14).

¹⁴ Ariz. Secretary of State, Campaign Contribution Limits, 2014 General Election, http://www.azsos.gov/election/2014/info/campaign_contribution_limits.pdf. Candidates who participate in the state's public financing system may not accept contributions other than five-dollar qualifying contributions. ARIZ. REV. STAT. ANN. § 16-941(A).

¹⁵ ARIZ. REV. STAT. § 16-905(J).

¹⁶ *Id.* §16-919(A).

¹⁷ *Id.* § 16-911(A)(1); see also 11 C.F.R. § 109.21(d)(5).

¹⁸ ARIZ. REV. STAT. § 16-911(A)(2).

¹⁹ Telephone Interview with Ariz. Citizens Clean Elections Comm'n Executive Director Thomas M. Collins (Sept. 3, 2014); see also Ariz. Citizens Clean Elections Comm'n, Transcript of Public Meeting 14-16 (Oct. 22, 2010) (explaining belief that "*Wisconsin Right to Life* and other Supreme Court cases" require that there be "no other reasonable meaning" before a communication qualifies as express advocacy); Ariz. Citizens Clean Elections Comm'n, Statement of Reasons of Executive Director 2, MUR No. 10-0018 (Oct. 2010) ("The question becomes whether the website contains express advocacy for [Brewer].").

²⁰ See ARIZ. REV. STAT. ANN. §§ 16-905(O); 16-924; 16-957.

²¹ Ariz. Citizens Clean Elections Comm'n, Transcript of Public Meeting 46-48 (Aug. 21, 2014).

²² Recommendation of No Further Action by Executive Director, MUR No. 14-0011, at 1 (Ariz. Citizens Clean Election Comm'n Aug. 19, 2014), available at <http://www.brennancenter.org/sites/default/files/analysis/MUR14-011.pdf>.

²³ *Id.* at 1.

²⁴ *Id.* at 4.

²⁵ Order Requiring Compliance, In The Matter of Tom Horne, (Office of Yavapai County (Ariz.) Attorney Campaign Finance Proceeding Oct. 17, 2013).

²⁶ *Id.* at 2, 4-5.

²⁷ *Id.* at 6, 17-19.

²⁸ *Id.* at 6-9. In the emails sent by Winn to the producer, she used the term "we" and other phrases indicating that she was not acting alone in making decisions about the advertisement.

²⁹ *Id.* at 21-22.

³⁰ In the Matter of Tom Horne, Administrative Law Judge Decision, No. 14F-001-AAG (Ariz. Office of Admin. Hrgs. Apr. 14, 2014). Under Arizona law, parties subject to a compliance order may request an administrative hearing to

contest the order. *See* ARIZ. REV. STAT. ANN. § 16-924(B). After such a hearing, the relevant agency may reject the administrative law judge’s recommendation. *Id.* § 41-1092.08(B). After the agency decision is final, the case may be appealed to state court. *Id.* § 41-1092.08(H).

³¹ In the Matter of Tom Horne, Administrative Law Judge Decision, No. 14F-001-AAG, at 20 (Ariz. Office of Admin. Hrgs. Apr. 14, 2014).

³² *Id.* at 21.

³³ *Id.* at 29.

³⁴ *See* Horne v. Polk, No. LC2014-000255 (Maricopa Cnty. Superior Ct., filed May 29, 2014).

³⁵ Ariz. Citizens Clean Elections Comm’n, Transcript of Public Meeting 11-12 (May 22, 2014).

³⁶ *Id.* at 13.

³⁷ *Id.* at 35-36.

³⁸ Statement of Reasons of Executive Director, MUR No. 12-0007 (Ariz. Citizens Clean Elections Comm’n Aug. 2012), available at <http://www.brennancenter.org/sites/default/files/analysis/MUR12-0007.pdf>.

³⁹ *Id.* at 2.

⁴⁰ *Id.* at 5.

⁴¹ Telephone Interview with Ariz. Citizens Clean Elections Comm’n Executive Director Thomas M. Collins (Sept. 3, 2014).

⁴² Ariz. Citizens Clean Elections Comm’n, Transcript of Public Meeting 8-9 (Oct. 22, 2010).

⁴³ *Id.* at 10.

⁴⁴ *Id.* at 10-13.

⁴⁵ *Id.* at 13-15 (explaining belief that “*Wisconsin Right to Life* and other Supreme Court cases” require that there be “no other reasonable meaning” before a communication qualifies as express advocacy); *see also* MUR No. 10-0018 Statement of Reasons at 2 (“The question becomes whether the website contains express advocacy for [Brewer].”).

⁴⁶ Ariz. Citizens Clean Elections Comm’n, Transcript of Public Meeting 29 (Oct. 22, 2010).

⁴⁷ Statement of Reasons of Executive Director, MUR No. 06-0036 (Ariz. Citizens Clean Elections Comm’n Nov. 2006).

⁴⁸ *Id.* at 2.

⁴⁹ Statement of Reasons of Executive Director, MUR No. 06-0032, at 1-2 (Ariz. Citizens Clean Elections Comm’n Oct. 2006).

⁵⁰ *Id.*

⁵¹ *Id.* at 3 & n.4.

⁵² *Id.* at 4. The same analysis was applied to a very similar situation in a case against Napolitano’s opponent Len Munsil. *See* Statement of Reasons of Executive Director, MUR No. 06-0023, at 4 (Ariz. Citizens Clean Elections Comm’n Oct. 2006).

⁵³ Statement of Reasons of Executive Director, MUR No. 06-0018 (Ariz. Citizens Clean Elections Comm’n Sept. 2006).

⁵⁴ *Id.* at 4.

⁵⁵ *Id.* at 1-4.

⁵⁶ We reviewed the Arkansas State Board of Election Commissioners’ public guide, “Running for Public Office,” along with the relevant statutes and rules promulgated by the Arkansas Ethics Commission. We reviewed advisory opinions and decisions in contested matters as published online by the Commission. Searches of Westlaw and Lexis yielded no additional cases of note. We obtained additional written decisions—available to the public, but not online—from the Commission, where a representative confirmed that the scope of our research was sufficiently comprehensive.

⁵⁷ Ark. Ethics Comm’n, Advisory Opinion No. 2006-EC-004, at 3 (2006), available at <http://www.arkansasethics.com/opinions/06-EC-004.pdf>.

⁵⁸ 11 C.F.R. § 109.21(c)(1).

⁵⁹ Ark. Ethics Comm’n, Advisory Opinion No. 2006-EC-004, at 3 (2006), available at <http://www.arkansasethics.com/opinions/06-EC-004.pdf>. This advisory opinion was premised on the idea that only express advocacy can be regulated, an idea that dubiously sprung from the *Buckley* case, decided in 1976. *Buckley v. Valeo*, 424 U.S. 1 (1976). The advisory opinion predates the U.S. Supreme Court’s *Citizens United v. FEC* decision, which stated that political speech beyond express advocacy may be regulated. 558 U.S. 310, 369 (2010). For this reason, it is unclear that this advisory opinion would continue to be valid if the question was raised again with the Arkansas Ethics Commission. However, because no such inquiry has been made, this advisory opinion appears to be the current controlling precedent.

⁶⁰ Ark. Code Ann. § 7-6-201(11) (defining “independent expenditure”); *see also* Ark. Admin. Code § 153.00.2-200(n) (essentially identical definition). It is worth noting that, in a 1999 opinion, the Ethics Commission acted to regulate an outside spender’s newspaper ad that did not contain express advocacy. It ruled that the ad would be treated as an in-kind

contribution, if a candidate was “involved in” the running of the ad. Ark. Ethics Comm’n, Advisory Opinion No. 99-EC-004 (1999), *available at* <http://www.arkansasethics.com/opinions/99-EC-004.htm>.

⁶¹ Ark. Ethics Comm’n, Advisory Opinion No. 2006-EC-004, at 3-4 (2006), *available at* <http://www.arkansasethics.com/opinions/06-EC-004.pdf>. (explaining that coordinated expenditures are counted as contributions); Ark. Code Ann. § 7-6-203(a)-(b) (defining contribution limits).

⁶² *See* Ark. Code Ann. § 7-6-217(g).

⁶³ Ark. Ethics Comm’n, Final Action Letter to Hon. Joe Bodenhamer, Baxter County Judge (Mar. 30, 2009) (Case No. 2008-CO-041) (on file with Brennan Center).

⁶⁴ Ark. Ethics Comm’n, Advisory Opinion No. 2008-EC-011, at 3 (2008), *available at* <http://www.arkansasethics.com/opinions/08-EC-011.pdf>.

⁶⁵ Ark. Ethics Comm’n, Final Action Letter to Cindy Baker (May 18, 2007) (Case No. 2007-CO-004) (on file with Brennan Center).

⁶⁶ We reviewed all relevant statutes and regulations, and more than 130 relevant cases and agency advice letters available in Westlaw. The FPPC web site archives some enforcement actions and warning letters, but not in a searchable format. We confirmed the scope of our research with the FPPC chief of enforcement. Because the FPPC has issued a great number of opinions concerning coordination, the cases here are only representative examples.

⁶⁷ CAL. FAIR POLITICAL PRACTICES COMM’N, CALIFORNIA STATE CONTRIBUTION LIMITS, *available at* <http://www.fppc.ca.gov/bulletin/007-Dec-2012StateContributionLimitsChart.pdf>. Corporations are subject to the same limits as individuals. *Id.*

⁶⁸ CAL. GOV’T CODE § 91000(b).

⁶⁹ *Id.* § 82015(b)(2).

⁷⁰ CAL. CODE. REG. tit. 2, § 18225.7(c)(3)(A).

⁷¹ 11 C.F.R. § 109.21(d)(4).

⁷² CAL. CODE. REG. tit. 2, § 18225.7(b).

⁷³ *See* 11 C.F.R. § 109.21(d)(2)-(3).

⁷⁴ Informal Advice Letter to Ash Pirayou, No. I-10-159, 2010 WL 5481367, at *6 (Cal. Fair Political Practices Comm’n Dec. 13, 2010).

⁷⁵ CAL. CODE. REG. tit. 2, § 18225.7(c)(3)(B); 11 C.F.R. § 109.21(d)(6).

⁷⁶ Warning Letter to Peter Bagatelos, No. 13/521 (Cal. Fair Political Practices Comm’n Mar. 20, 2014).

⁷⁷ *Id.* at 2.

⁷⁸ *Id.*

⁷⁹ *Id.*

⁸⁰ *Id.* at 2-3.

⁸¹ In the Matter of Aide Castro, Stipulation, Decision, and Order, No. 11/253 (Cal. Fair Political Practices Comm’n, approved June 20, 2013).

⁸² *Id.* Ex. 1 at 4-5.

⁸³ *Id.* Ex. 1 at 5.

⁸⁴ *Id.* Ex. 1 at 7.

⁸⁵ In the Matter of Voters for a New California and Joaquin Ross, Stipulation, Decision, and Order, No. 10/470 (Cal. Fair Political Practices Comm’n, approved Apr. 25, 2013).

⁸⁶ *Id.* Ex. 1 at 1.

⁸⁷ *Id.* Ex. 1 at 6.

⁸⁸ *Id.*

⁸⁹ *Id.*

⁹⁰ *Id.*

⁹¹ *Id.* Ex. 1 at 9.

⁹² Letter from Gary S. Winuk & Neil P. Bucknell, Cal. Fair Political Practices Comm’n, to Vice Chair Eskovitz et al., Cal. Fair Political Practices Comm’n (Oct. 28, 2013).

⁹³ Informal Advice Letter to Fred L. Starrh, No. I-10-205, 2011 WL 442166, at *1 (Cal. Fair Political Practices Comm’n Jan. 20, 2011).

⁹⁴ *Id.*

⁹⁵ Informal Advice Letter to Ash Pirayou, No. I-10-159, 2010 WL 5481367 (Cal. Fair Political Practices Comm’n Dec. 13, 2010).

⁹⁶ *Id.* at *4.

⁹⁷ *Id.* at *6.

⁹⁸ *Id.* at *2-3, *6.

⁹⁹ *Id.* at *3, *6.

¹⁰⁰ Informal Advice Letter to Christine Nolan, No. I-10-193, 2010 WL 5739255, at *3 (Cal. Fair Political Practices Comm'n Jan. 7, 2010).

¹⁰¹ *Id.*

¹⁰² Informal Advice Letter to Mr. Matt Hedges, Director of Public Affairs, No. I-09-227, 2009 WL 3754268, at *4 (Cal. Fair Political Practices Comm'n Oct. 27, 2009).

¹⁰³ *Id.*

¹⁰⁴ Informal Advice Letter to James Bieber, No. I-04-014, 2004 WL 419925, at *1 (Cal. Fair Political Practices Comm'n Mar. 3, 2004).

¹⁰⁵ *Id.* at *4-5.

¹⁰⁶ Advice Letter to Chris Modica, Treasurer, No. A-04-002, 2004 WL 419927, at *2 (Cal. Fair Political Practices Comm'n Mar. 2, 2004).

¹⁰⁷ Advice Letter to Marcie Burgess, Administrative Assistant, No. A-02-250, 2002 WL 31418402, at *1 (Cal. Fair Political Practices Comm'n Oct. 16, 2002).

¹⁰⁸ *Id.*

¹⁰⁹ Informal Advice Letter to Jason D. Kaune, No. I-01-292, 2002 WL 171410, at *1 (Cal. Fair Political Practices Comm'n Jan. 22, 2002).

¹¹⁰ *Id.* at *3.

¹¹¹ *Id.* at *1-2.

¹¹² *Id.* at *2.

¹¹³ *Id.* at *3.

¹¹⁴ Informal Advice Letter to James Bopp, Jr., No. I-01-158, 2001 WL 1468690, at *1 (Cal. Fair Political Practices Comm'n Nov. 15, 2001).

¹¹⁵ Informal Advice Letter to Carl Freeman, No. I-98-247, 1998 WL 791881, at *1 (Cal. Fair Political Practices Comm'n Nov. 12, 1998).

¹¹⁶ *Id.* at *2.

¹¹⁷ We reviewed all relevant statutes and enforcement results including court cases available in legal databases. We confirmed the scope of our research with the Colorado Secretary of State. The office advised us of a coordination case pending, as of September, in state district court.

¹¹⁸ 8 COLO. CODE REGS. § 1505-6:18.3.

¹¹⁹ COLORADO SECRETARY OF STATE, CONTRIBUTION ACCEPTANCE LIMITS, *available at* <http://www.sos.state.co.us/pubs/elections/CampaignFinance/limits/acceptance.html>. While candidates may not accept corporate contributions, the law allows political committees to accept corporate contributions and then make contributions to candidates. COLO. REV. STAT. ANN. §1-45-103.7(2). Excess contributions can result in a “civil penalty of at least double and up to five times the amount contributed.” COLO. CONST. art. XXVIII, § 10.

¹²⁰ COLO. CONST. art. XXVIII, § 2(5)(a), (8)(a).

¹²¹ In the Matter of Durham, Case No. OS 2006-0004 at 16 (Colo. Office Admin. Cts. 2006).

¹²² 11 C.F.R. § 109.21(c).

¹²³ In the Matter of Durham, at 16-17, 20.

¹²⁴ COLO. CONST. art. XXVIII, § 2(9).

¹²⁵ 8 COLO. CODE REGS. § 1505-6:1.4.1.

¹²⁶ 8 COLO. CODE REGS. § 1505-6:1.4.2(a); *see also* 11 C.F.R. § 109.21(d)(3).

¹²⁷ 8 COLO. CODE REGS. § 1505-6:1.4.2(a); *see also* 11 C.F.R. § 109.21(d)(4). Both jurisdictions also provide an exception when the vendor employs a firewall to ensure that information is not improperly shared. 8 COLO. CODE REGS. §1505-6:1.4.4; 11 C.F.R. § 109.21(h).

¹²⁸ *See* 11 C.F.R. § 109.21(d)(5).

¹²⁹ *See* Colo. Secretary of State, In the Matter of the Colo. Republican Party's Petition for Declaratory Order 11 (Feb. 6, 2014) (“There is little Colorado case law discussing the definition of ‘coordination’ as it applies to Colorado campaign finance law.”); *see also* Rutt v. Poudre Educ. Ass'n, 151 P.3d 585, 590 (Colo. App. 2006) (“No reported appellate decision in Colorado has defined the term ‘coordination’ in the context of political campaign contributions.”).

¹³⁰ *Poudre Educ. Ass'n*, 151 P.3d at 590 (Colo. Ct. App. 2006) (internal quotation marks omitted).

¹³¹ *See* Colo. Educ. Ass'n v. Rutt, 184 P.3d 65 (Colo. 2008).

¹³² The Constitution requires that after the Secretary of State receives a complaint, it must be forwarded to an Administrative Law Judge within three days, and the judge must hold a hearing within fifteen days. COLO. CONST. art.

XXVIII, § 9(2)(a). *See also* In the Matter of Fink, Case No. 2006-0026, at 5 (Colo. Office Admin. Cts. 2006) (explaining Constitution’s “heavy emphasis upon the expeditious disposition of complaints alleging violation of the political campaign finance laws” and that complainants have no right to delay a hearing date).

¹³³ Colo. Secretary of State, In the Matter of the Colorado Republican Party’s Petition for Declaratory Order 6-11 (Feb. 6, 2014). The Secretary’s office refused to issue a declaratory order because Colorado courts and ALJs do not defer to the Secretary’s opinion, and therefore “a declaratory order would not remove uncertainty in the application of Colorado law to the Petitioner’s conduct.” *Id.* at 4-5. *See* Colo. Ethics Watch v. Clear the Bench Colo., 277 P.3d 931, 936-37 (Colo. App. 2012).

¹³⁴ *Id.* at 9-10.

¹³⁵ *Id.* at 10.

¹³⁶ *Id.* at 11.

¹³⁷ *Id.*

¹³⁸ Colo. Republican Party v. Gessler, 2014CV031851, slip op. at 2-3 (Colo. Dist. Ct. 2014) (BCA).

¹³⁹ *Id.* at 4.

¹⁴⁰ Colorado Educ. Ass’n v. Rutt, 184 P.3d 65 (Colo. 2008).

¹⁴¹ *Id.* at 78. The Colorado Constitution provides that the term “expenditure” does not include spending “by a membership organization for any communication solely to members and their families.” COLO. CONST. art. XXVIII, § 2(8)(b)(III).

¹⁴² *Poudre Educ. Ass’n*, 151 P.3d at 590 (internal quotation marks omitted).

¹⁴³ *Id.*

¹⁴⁴ In the Matter of Stinehagen, Case No. OS 2006-0002 (Colo. Office Admin. Cts. 2006).

¹⁴⁵ *Id.* at 2.

¹⁴⁶ *Id.*

¹⁴⁷ *Id.* at 2-3. The senate district overlapped with Merrifield’s house district. *Id.* at 4.

¹⁴⁸ *Id.* at 5-6.

¹⁴⁹ *Id.* at 6.

¹⁵⁰ *Id.* at 7.

¹⁵¹ In the Matter of Ruch, Case No. OS 2006-0035 (Colo. Office Admin. Cts. 2006).

¹⁵² *Id.* at 3.

¹⁵³ *Id.*

¹⁵⁴ *Id.* at 6-7.

¹⁵⁵ In the Matter of Durham, Case No. OS 2006-0004 (Colo. Office Admin. Cts. 2006).

¹⁵⁶ *Id.* at 20.

¹⁵⁷ *Id.* at 1.

¹⁵⁸ *Id.* at 1-2.

¹⁵⁹ *Id.* at 5.

¹⁶⁰ *Id.* at 6-7.

¹⁶¹ *Id.* at 7-8.

¹⁶² *Id.* at 7-8.

¹⁶³ *Id.* at 21.

¹⁶⁴ *Id.* at 21. The ALJ also fined the committee \$2,400 for late disclosure of the contribution, for a total fine of \$4,404. *Id.* at 22. The judge gave no specific reason for using the multiplier of four, but noted that “application of the campaign finance laws are [*sic*] particularly difficult in cases such as this that involve indirect contributions,” and emphasized the group’s decision “from ‘day one’ to use the . . . ads to benefit its candidate.” *Id.* at 21.

¹⁶⁵ In the Matter of Fink, Case No. OS 2006-0026 (Colo. Office Admin. Cts. 2006).

¹⁶⁶ *Id.* at 1.

¹⁶⁷ *Id.*

¹⁶⁸ *Id.* at 2-3.

¹⁶⁹ *Id.* at 3.

¹⁷⁰ *Id.* at 5.

¹⁷¹ We reviewed relevant decisions available at the State Elections Enforcement Commission’s web site dating back to 2007 and all relevant court cases available in legal databases, in addition to relevant statutes and agency rulings. We spoke with a staff member of the SEEC, who confirmed our scope of research and analysis of the law.

¹⁷² *See, e.g.*, In the Matter of a Complaint by Benjamin Ancona, File No. 2013-140, Findings and Conclusions 12 (Conn. State Elections Enforcement Comm’n June 18, 2014).

¹⁷³ CONN. STATE ELECTIONS ENFORCEMENT COMM’N, A 2014 GUIDE FOR STATEWIDE OFFICE AND GENERAL ASSEMBLY CANDIDATES NOT PARTICIPATING IN THE CITIZENS’ ELECTION PROGRAM 20, *available at* http://www.ct.gov/seec/lib/seec/2014gaandstatewide/2014_nonparticipating_guide_final_march_2014.pdf.

¹⁷⁴ CONN. GEN. STAT. ANN. § 9-613(a), (d).

¹⁷⁵ *Id.* § 9-704(a), 9-702(c).

¹⁷⁶ *Id.* § 9-601c(a).

¹⁷⁷ *Id.* § 9-601c(b).

¹⁷⁸ *Id.* § 9-601c(b)(4)-(5); 11 C.F.R. § 109.21(d)(4)-(5).

¹⁷⁹ *Id.* § 9-601c(b)(8).

¹⁸⁰ *See, e.g.*, In the Matter of a Complaint by Patrick DeAngelis, File No. 2009-055, Findings and Conclusions 3 (Conn. State Elections Enforcement Comm’n Oct. 19, 2011); In the Matter of a Complaint by Matthew Knickerbocker, File No. 2008-132, Findings and Conclusions 7-8 (Conn. State Elections Enforcement Comm’n Mar. 24, 2010); In the Matter of a Complaint by Timothy Thompson, File No. 2007-389, Consent Order Agreement (Conn. State Elections Enforcement Comm’n Apr. 9, 2008).

¹⁸¹ *See, e.g.*, In the Matter of a Complaint by Edward H. Raff, File No. 2008-141, Findings and Conclusions 10 (Conn. State Elections Enforcement Comm’n Mar. 24, 2010).

¹⁸² In the Matter of a Complaint by Benjamin Ancona, File No. 2013-140, Findings and Conclusions (Conn. State Elections Enforcement Comm’n June 18, 2014).

¹⁸³ *Id.* at 13-14.

¹⁸⁴ *Id.* at 8.

¹⁸⁵ *Id.* at 13. The ad did mention “the Governor,” however. *Id.*

¹⁸⁶ *Id.*

¹⁸⁷ *Id.* at 14.

¹⁸⁸ Democratic Governors Ass’n v. Brandi, No. 3:14-cv-00544 (JCH), 2014 WL 2589279 (D. Conn. June 10, 2014); Declaratory Ruling 2014-02 (Conn. State Elections Enforcement Comm’n March 19, 2014).

¹⁸⁹ Declaratory Ruling 2014-02 at 1. A covered transfer is “any donation, transfer or payment of funds by a person to another person if the person receiving the donation, transfer or payment makes independent expenditures or transfers funds to another person who makes independent expenditures.” CONN. GEN. STAT. ANN. § 9-601(29). The petition also clarified that the fundraising in question would be “non-earmarked,” meaning the funds raised would not be designated to promote or oppose Connecticut candidates. Declaratory Ruling 2014-02 at 3.

¹⁹⁰ Declaratory Ruling 2014-02 at 4-5. For example, it could constitute evidence of a “general understanding’ among the actors.” *Id.* at 5.

¹⁹¹ Democratic Governors Ass’n v. Brandi, 2014 WL 2589279, at *9

¹⁹² In the Matter of a Complaint by Anthony Santino, File No. 2013-042, Settlement Agreement (Conn. State Elections Enforcement Comm’n Oct. 16, 2013).

¹⁹³ *Id.* at 1-2.

¹⁹⁴ *Id.* at 3.

¹⁹⁵ *Id.* Foley was VGG’s treasurer. *Id.*

¹⁹⁶ *Id.* at 7.

¹⁹⁷ *Id.* at 8. VGG agreed to pay \$15,504 (the amount of the contribution) to the Commission, and Foley agreed to pay \$600 to the Commission and reimburse VGG \$15,504 from his personal funds. *Id.* at 11.

¹⁹⁸ In the Matter of a Complaint by Patrick DeAngelis, File No. 2009-055, Findings and Conclusions 3 (Conn. State Elections Enforcement Comm’n Oct. 19, 2011).

¹⁹⁹ *Id.* at 1.

²⁰⁰ *Id.* at 3.

²⁰¹ *Id.*

²⁰² *Id.* at 3-4.

²⁰³ In the Matter of a Complaint by Matthew Knickerbocker, File No. 2008-132, Findings and Conclusions (Conn. State Elections Enforcement Comm’n Mar. 24, 2010).

²⁰⁴ *Id.* at 1.

²⁰⁵ *Id.* at 7.

²⁰⁶ *Id.*

²⁰⁷ *Id.* at 8. The decision was made under a previous version of Connecticut’s law concerning coordinated expenditures, which is reproduced in relevant part in the opinion. *See id.* at 5. While that version of the law was similar to today’s law in many respects, it did not contain the presumption that exists in current law.

²⁰⁸ In the Matter of a Complaint by Edward H. Raff, File No. 2008-141, Findings and Conclusions (Conn. State Elections Enforcement Comm’n Mar. 24, 2010).

²⁰⁹ *Id.* at 3-4.

²¹⁰ *Id.* at 7.

²¹¹ *Id.* at 8.

²¹² *Id.* at 9.

²¹³ *Id.* at 10.

²¹⁴ In the Matter of a Complaint by Timothy Thompson, File No. 2007-389, Consent Order Agreement (Conn. State Elections Enforcement Comm’n Apr. 9, 2008).

²¹⁵ *Id.* at 3.

²¹⁶ *Id.* at 6.

²¹⁷ We reviewed all Florida agency decisions available online, a database that is searchable back to 2007, but contains at least some orders dating as far back as 1993. We reviewed administrative law judge decisions and trial court decisions available on Westlaw. Staff at the Secretary of State’s Division of Elections confirmed the scope and conclusions of our research in general terms, but declined to answer questions about specific cases.

²¹⁸ FLA. STAT. ANN. §§ 106.08(1)(a), .011(12). The same contribution limits apply to individuals and corporations. *Id.* § 106.011(14) (defining “Person” to include, *inter alia*, individuals and corporations).

²¹⁹ *Id.* § 106.011(8)(c) (“For purposes of this chapter, an expenditure made for, or in furtherance of, an electioneering communication is not considered a contribution to or on behalf of any candidate.”).

²²⁰ *Id.* § 106.011(8)(a) (defining “electioneering communication” as political advertisement that “[r]efers to or depicts a clearly identified candidate for office without expressly advocating the election or defeat of a candidate but that is susceptible of no reasonable interpretation other than an appeal to vote for or against a specific candidate”, is broadcast shortly before an election, and is targeted to the identified candidate’s electorate). Florida’s definition of electioneering communication differs from the federal definition and the typical definition in other states. Under the federal regulations, electioneering communications must refer to a clearly identified candidate shortly before an election, but under those regulations there is no requirement that the advertisement be susceptible of no reasonable interpretation other than an appeal to vote for or against a candidate. 11 C.F.R. § 100.29.

²²¹ *See, e.g.*, Scott v. Roberts, 612 F.3d 1279, 1284–85 (11th Cir. 2010) (explaining parties’ belief that Florida candidates could permissibly coordinate with groups that spend unlimited money on electioneering communications).

²²² FLA. STAT. ANN. §§ 106.011(12)(a), (b)(3). Unlike federal law, Florida law does not contain exceptions for expenditures based on material obtained from a publicly available source. *See, e.g.*, 11 C.F.R. § 109.21(d)(2).

²²³ FLA. STAT. ANN. § 106.011(12)(b)(1).

²²⁴ 11 C.F.R. § 109.21(d)(3).

²²⁵ FLA. STAT. ANN. § 106.011(12)(a) (“An expenditure for such purpose by a person having a contract with the candidate, political committee, or agent of such candidate or committee in a given election period is not an independent expenditure.”).

²²⁶ 11 C.F.R. § 109.21(d)(5).

²²⁷ *See* FLA. STAT. ANN. § 106.23 (2) (“The Division of Elections shall provide advisory opinions when requested by any . . . person or organization engaged in political activity, relating to any provisions or possible violations of Florida election laws with respect to actions such . . . person[] or organization has taken or proposes to take.”).

²²⁸ *See id.* § 106.25(1) (“Jurisdiction to investigate and determine violations of this chapter and chapter 104 is vested in the Florida Elections Commission; however, nothing in this section limits the jurisdiction of any other officers or agencies of government empowered by law to investigate, act upon, or dispose of alleged violations of this code.”); *id.* § 106.25(2) (“The commission shall investigate all violations of this chapter and chapter 104, but only after having received either a sworn complaint or information reported to it under this subsection by the Division of Elections.”).

²²⁹ FLA. STAT. ANN. § 106.24(1)(b).

²³⁰ Fla. Elections Comm’n v. Valliere, 2009 WL 1914723 (Fla. Div. Admin. Hrgs. Jul. 1, 2009). The decision was affirmed in Florida state court, but the court’s opinion did not address the coordination issues. *See* Fla. Elections Comm’n v. Valliere, 45 So. 3d 506, 507 (Fla. Dist. Ct. App. 2010).

²³¹ 2009 WL 1914723 at *5–9.

²³² *Id.* at *8. As part of this analysis, the judge explained that “if a firefighter had placed a sign in front of a strip club or abortion clinic, [the candidate] could have ‘coordinated’ with [her husband] . . . without jeopardizing the independence of the expenditures of the political committee in producing and deploying the signs.” *Id.* The basis for that conclusion is unclear.

²³³ *Id.* at *3.

²³⁴ *Id.* at *5 (internal quotation marks omitted).

²³⁵ *Beardslee v. Fla. Elections Comm’n*, 962 So. 2d 390 (Fla. Dist. Ct. App. 2007).

²³⁶ *Fla. Elections Comm’n v. Beardslee*, 2006 WL 1309956 at *6 (Fla. Div. Admin. Hrgs. May 8, 2006).

²³⁷ *Id.* at *5–*6.

²³⁸ *Id.* at *5, *aff’d*, 962 So. 2d 390 (Fla. Dist. Ct. App. 2007).

²³⁹ FLA. STAT. ANN. § 106.011(8)(a)(1).

²⁴⁰ *See id.* § 106.011(8)(c) (“For purposes of this chapter, an expenditure made for, or in furtherance of, an electioneering communication is not considered a contribution to or on behalf of any candidate.”).

²⁴¹ FLA. DEPT. OF STATE, DIV. OF ELECTIONS, DE 05-04 (June 28, 2005), *available at* <http://election.dos.state.fl.us/opinions/new/2005/de0504.pdf>.

²⁴² *Id.* at 3. The law defining electioneering communications was invalidated by a court in 2009, though the decision was unrelated to the coordination issue discussed here. *Broward Coal. of Condos., Homeowners Ass’n & Cmty. Orgs. Inc. v. Browning*, 2009 WL 1457972 at *5 (N.D. Fla. May 22, 2009). This decision created some uncertainty about the continued validity of the 2005 opinion, *see, e.g.*, *Scott v. Roberts*, 612 F.3d 1279, 1285 (11th Cir. 2010) (citing *Broward Coalition* and explaining that it “call[ed] into question whether this coordination remains legal”), but the applicable law was later reenacted verbatim and the 2005 opinion likely remains sound. 2011 Fla. Sess. Law Serv. Ch. 2011-6 (reenacting, *inter alia*, FLA. STAT. ANN. § 106.011(18)(c), later redesignated § 106.011(8)(c) by 2013 Fla. Sess. Law Serv. Ch. 2013-37).

²⁴³ *Fla. Elections Comm’n v. Parrish*, 2006 WL 1320731 (Fla. Div. Admin. Hrgs. May 12, 2006); *Fla. Elections Comm’n v. Water Taxi, Inc., Consent Order*, FEC 04-405 (Fla. Elections Comm’n Aug. 26, 2005), *available at* [http://www.fec.state.fl.us/FECWebFi.nsf/0/2AC9CCC43D67587685257C24005DD104/\\$file/175.pdf](http://www.fec.state.fl.us/FECWebFi.nsf/0/2AC9CCC43D67587685257C24005DD104/$file/175.pdf).

²⁴⁴ *Parrish* at *12.

²⁴⁵ *Water Taxi* at 3–4.

²⁴⁶ *Parrish* at *10.

²⁴⁷ *See* FLA. STAT. ANN. § 106.011(5)(a) (defining “Contribution” to include “contributions in kind having an attributable monetary value in any form”). Florida increased limits on contributions to individual candidates from \$500 to \$1,000 per election in 2013. *See* 2013 Fla. Sess. Law Serv. Ch. 2013-37.

²⁴⁸ *Water Taxi* at 6.

²⁴⁹ *Id.* at 3.

²⁵⁰ *Id.* at 3–4.

²⁵¹ *Parrish* at *24.

²⁵² The Commission accepted the judge’s conclusion. *Fla. Elections Comm’n v. Parrish*, Final Order, FEC 04-315 (Fla. Elections Comm’n Nov. 15, 2006), *available at* [http://www.fec.state.fl.us/FECWebFi.nsf/0/D5038C80C5593DC685257C0E006CF6A1/\\$file/219.pdf](http://www.fec.state.fl.us/FECWebFi.nsf/0/D5038C80C5593DC685257C0E006CF6A1/$file/219.pdf). The conflicting outcomes in these actions may result from the water taxi company’s stipulation that sufficient evidence existed to show his coordination with the candidate.

²⁵³ *In re Douglas Farrell and DLF Media Consultants, Inc., Order of No Probable Cause and Statement of Findings*, FEC 01-038 (Fla. Elections Comm’n Feb. 1, 2002), *available at* [http://www.fec.state.fl.us/FECWebFi.nsf/0/42AE12D5896DF95885257CB700597DC3/\\$file/02-031.pdf](http://www.fec.state.fl.us/FECWebFi.nsf/0/42AE12D5896DF95885257CB700597DC3/$file/02-031.pdf).

²⁵⁴ *Farrell*, Statement of Findings at 1–2.

²⁵⁵ *Id.* at 4.

²⁵⁶ *Id.* at 7.

²⁵⁷ The agency memoranda relied upon for this report were gathered principally from the website for the Maine Commission on Governmental Ethics and Election Practices. The agency does not provide a public database of its enforcement actions addressing coordination; we found these through internet searches and by following up on references in the Commission’s meeting minutes. The Commission usually does not issue written opinions for campaign finance decision, but posts the results of its votes are on its website. The information contained in this report comes principally from reports and memoranda issued by the Commission’s executive director in addition to the Commission’s meeting minutes. There are no court decisions addressing Maine coordination law. We confirmed the scope and conclusions of our research with agency staff.

²⁵⁸ ME. REV. STAT. tit. 21-A, § 1015(5).

²⁵⁹ ME. COMM’N ON GOVERNMENTAL ETHICS & ELECTION PRACTICES, 2014 CANDIDATE’S GUIDE: RUNNING FOR OFFICE IN MAINE 7, *available at* http://www.maine.gov/ethics/pdf/2014TFGuideFinal_003.pdf; ME. COMM’N ON GOVERNMENTAL ETHICS & ELECTION PRACTICES, 2014 GUBERNATORIAL CANDIDATE’S GUIDE: RUNNING FOR OFFICE IN MAINE 5, *available at* http://www.maine.gov/ethics/pdf/2014GuberGuide_TF_FINAL.pdf; ME. REV. STAT.

tit. 21-A, § 1125(6). Publicly financed candidates must raise a certain amount of “seed money,” but cannot accept contributions after that point. *Id.* tit. 21-A, § 1125(2).

²⁶⁰ *Id.* tit. 21-A, § 1004-A(2).

²⁶¹ 94-270 ME. CODE R. ch. 1 §6(9).

²⁶² 94-270 *id.* ch. 1 §6(9)(A).

²⁶³ *See id.*; 11 C.F.R. § 109.21(d)(2)-(3).

²⁶⁴ 94-270 ME. CODE R. ch. 1 §6(9)(B)(1). The federal rule has a similar provision, but does not create a presumption, only looks at the preceding 120 days, and also requires that the former employee share or use certain types of strategic information. 11 C.F.R. § 109.21(d)(5).

²⁶⁵ ME. REV. STAT. tit. 21-A, § 1015(4).

²⁶⁶ Fed. Election Comm’n, Advisory Opinion 2011-12 (June 30, 2011).

²⁶⁷ ME. REV. STAT. tit. 1, § 1002(1-A).

²⁶⁸ Me. Comm’n on Governmental Ethics & Election Practices, Meeting Minutes, Meeting of June 4, 2014 at 7.

²⁶⁹ Me. Comm’n on Governmental Ethics & Election Practices, Memorandum from Commission Staff to Commissioners re PAC Supporting Opponent 4-5 (June 4, 2014).

²⁷⁰ *See id.* at 5.

²⁷¹ *Id.*

²⁷² Me. Comm’n on Governmental Ethics & Election Practices, Meeting Minutes, Meeting of June 4, 2014 at 3-5.

²⁷³ *Id.* at 7.

²⁷⁴ Me. Comm’n on Governmental Ethics & Election Practices, Commission Actions, Meeting of Aug. 23, 2013.

²⁷⁵ Me. Comm’n on Governmental Ethics & Election Practices, Draft Commission Determination 1, 7, (Aug. 19, 2013). The draft determination was accepted by the Commission at its August 23 meeting. Comm’n Actions, Meeting of Aug. 23, 2013, *supra* note 17.

²⁷⁶ Comm’n Actions, Meeting of Aug. 23, 2013, *supra* note 17.

²⁷⁷ Draft Comm’n Determination, *supra* note 18, at 11, 13.

²⁷⁸ *Id.* at 5-6.

²⁷⁹ *Id.* at 4-6.

²⁸⁰ *Id.* at 11-12.

²⁸¹ *Id.* at 12-13.

²⁸² Comm’n Actions, Meeting of Aug. 23, 2013, *supra* note 17.

²⁸³ *See* Me. Comm’n on Governmental Ethics & Election Practices, Memorandum from Executive Director Jonathan Wayne to Commissioners re Farnham — Television Spending by PAC 17 (Oct. 24, 2012).

²⁸⁴ *Id.* at 4.

²⁸⁵ *Id.* at 13-16. The Commission did assess a \$250 fine against the PAC for failing to update its registration to show the actual decisionmakers. *See* Me. Comm’n on Governmental Ethics & Election Practices, Meeting Minutes, Meeting of Oct. 31, 2012, at 10-12.

²⁸⁶ Memorandum re Farnham, *supra* note 26, at 16.

²⁸⁷ *Id.* at 17.

²⁸⁸ Comm’n Actions, Meeting of Oct. 31, 2012, *supra* note 28.

²⁸⁹ Me. Comm’n on Governmental Ethics & Election Practices, Memorandum from Executive Director Jonathan Wayne to Commissioners re Lachowicz 1-2 (Oct. 24, 2012).

²⁹⁰ *Id.* at 2.

²⁹¹ *Id.* at 3.

²⁹² *Id.* at 10.

²⁹³ *Id.* at 11.

²⁹⁴ *Id.* at 6, 11.

²⁹⁵ *Id.* at 7.

²⁹⁶ *Id.* at 11.

²⁹⁷ Me. Comm’n on Governmental Ethics & Election Practices, Preliminary Memorandum from Executive Director Jonathan Wayne to Commissioners re VoteVets.Org 1 (Oct. 9, 2008).

²⁹⁸ *Id.* at 2 (emphasis omitted).

²⁹⁹ *Id.* at 3. The Commission apparently took no formal action with respect to this matter because no complaint had been filed. An individual had simply asked the Commission to look at this possible loophole. Me. Comm’n on Governmental Ethics & Election Practices, Meeting Minutes, Meeting of Oct. 17, 2008, at 12.

³⁰⁰ ME. COMM’N ON GOVERNMENTAL ETHICS & ELECTION PRACTICES, 2014 CANDIDATE’S GUIDE: RUNNING FOR OFFICE IN MAINE 11, available at http://www.maine.gov/ethics/pdf/2014TFGuideFinal_003.pdf.

³⁰¹ We reviewed compliance guidance materials the Secretary of State provides for outside political committees, along with all relevant statutes and rules promulgated by that office. We reviewed all relevant court decisions available on Westlaw, and the interpretive statements and records of complaints published online by the Secretary of State. We confirmed the scope and conclusions of our research with agency staff.

³⁰² MICH. COMP. LAWS § 169.209(2).

³⁰³ 2 U.S.C. § 431(17)(B).

³⁰⁴ Mich. Chamber of Commerce v. Land, 725 F. Supp. 2d 665, 700 (W.D. Mich. 2010). *See also* Letter from Mich. Sec’y of State to Todd R. Perkins 4 (Feb. 13, 2014), *available at* http://www.michigan.gov/documents/sos/Detroit_Forward_v_Duggan_and_Turnaround_Detroit_458906_7.pdf (dismissing a coordination complaint upon finding that neither the Michigan standard nor the federal three-prong test for coordination had been met).

³⁰⁵ MICH. COMP. LAWS § 169.252. Michigan restricts contributions to candidates in various ways. Corporations and unions are prohibited from contributing general treasury funds. *Id.* at § 169.254(1). Individuals are limited to contributing \$6,800 to candidates for statewide office, \$2,000 to candidates for state senator, and \$1,000 to candidates for state representative per election cycle. *Id.* at § 169.252(1). *See also* MICH. DEP’T OF STATE, BUREAU OF ELECTIONS, ELECTION CYCLE CAMPAIGN FINANCE CONTRIBUTION LIMITS FOR STATE LEVEL OFFICE, LOCAL LEVEL OFFICE, JUDICIAL AND CAUCUS COMMITTEE PACS (Jan. 2014), *available at* http://www.michigan.gov/documents/sos/2014_Contribution_Limits_443582_7.pdf.

³⁰⁶ *See* Letter from Mich. Sec’y of State to Robert S. LaBrant 2 (May 30, 2003), *available at* http://www.michigan.gov/documents/sos/LaBrant_2003_428429_7.pdf.

³⁰⁷ *Id.* at 3.

³⁰⁸ *Id.*

³⁰⁹ *Id.*

³¹⁰ *Id.*

³¹¹ *Id.*

³¹² *Id.* at 2.

³¹³ *Id.* at 2–3.

³¹⁴ Letter from Mich. Sec’y of State to Howard Braun 3 (July 25, 2013), *available at* http://www.michigan.gov/documents/sos/Alexander_v_Braun_444456_7.pdf (*see* p.79 of the PDF).

³¹⁵ *Id.* at 4 (*see* p. 80 of the PDF).

³¹⁶ Mich. Chamber of Commerce v. Land, 725 F. Supp. 2d 665 (W.D. Mich. 2010).

³¹⁷ *Id.* at 696.

³¹⁸ *Id.* at 700. The court appears to view the Michigan and federal definitions of “independent expenditure” not as subsets, with the Michigan standard entirely subsumed by the federal standard, but rather as partially overlapping sets. While recognizing the standards are “not entirely coterminous,” the court also observes that “some expenditures will meet both the federal and state definitions . . . ; other expenditures will meet one definition but not the other; and other expenditures still will meet neither” *Id.* at 694. Accordingly, satisfaction of *either* standard (as opposed to the broader federal standard) is sufficient to destroy the independence of an expenditure.

³¹⁹ *See* MICH. DEP’T OF STATE, BUREAU OF ELECTIONS, STATEMENT OF ORGANIZATION FORM FOR INDEPENDENT, POLITICAL AND INDEPENDENT EXPENDITURE COMMITTEES (PACs) (revised Jan. 2014) (“Independent Expenditure PACs (Super PACs) - This committee is organized exclusively for the purpose of making independent expenditures that are not in any way directly or indirectly “coordinated” with any candidate, candidate committee, political party, or political party committee, consistent with applicable case law, including but not limited to [*Mich. Chamber of Commerce*].”), *available at* http://www.michigan.gov/documents/PACSofoWithEF_71513_7.pdf#20130816112359.

³²⁰ Letter from Mich. Sec’y of State to Todd R. Perkins, *supra* note 304.

³²¹ Letter from Mich. Sec’y of State to Elliot S. Berke 3 (July 10, 2013), *available at* http://www.michigan.gov/documents/sos/Declaratory_Ruling_Response_2013-1_426842_7.pdf.

³²² *Id.* at 3.

³²³ Letter from Mich. Sec’y of State to Howard Braun, *supra* note 314, at 3 (*see* p.79 of the PDF).

³²⁴ Letter from Howard Braun to Mich. Sec’y of State 1 (June 25, 2013), *available at* http://www.michigan.gov/documents/sos/Alexander_v_Braun_444456_7.pdf (*see* p.75 of the PDF).

³²⁵ Letter from Mich. Sec’y of State to Howard Braun, *supra* note 314, at 3 (*see* p.79 of the PDF).

³²⁶ Letter from Mich. Sec’y of State to Robert S. LaBrant, *supra* note 306, at 3.

³²⁷ *Id.* at 2.

³²⁸ *Id.* at 3.

³²⁹ *Id.* at 1.

³³⁰ *Id.* at 1–2.

³³¹ We reviewed literature that the Minnesota Campaign Finance and Public Disclosure Board provides to candidates and outside spenders: the Legislative and Constitutional Office Candidate Handbook³³¹ and Political Committee and Political Fund Handbook.³³¹ See Minn. Campaign Fin. & Pub. Disclosure Bd., Legislative and Constitutional Office Candidate Handbook (last revised Sep. 19, 2014), available at http://www.cfboard.state.mn.us/handbook/handbook_const_leg_candidates.pdf and Minn. Campaign Fin. & Pub. Disclosure Bd., Political Committee and Political Fund Handbook (last revised Sep. 19, 2014), available at http://www.cfboard.state.mn.us/handbook/handbook_const_leg_candidates.pdf. We reviewed the relevant statutes, rules, and advisory opinions issued by the Board. We reviewed relevant court cases available from Westlaw and Lexis. Finally, we spoke with officials at the Minnesota Campaign Finance and Disclosure Board to confirm our understanding of the law.

³³² Minn. Campaign Fin. & Pub. Disclosure Bd., Advisory Opinion 437, at 3 (Feb. 11, 2014), available at <http://www.cfboard.state.mn.us/ao/AO437.pdf>.

³³³ Except for criminal offenses, which are prosecuted by the city and county attorneys. See Minn. Stat. § 10A.02(11) (2013) (as amended by 2014 Minn. Laws Ch. 309 (H.F. No. 2531)).

³³⁴ Minn. Campaign Fin. & Pub. Disclosure Bd., Advisory Opinion 437, at 3. The Board explained that “an expenditure is not an independent expenditure if any one of the following is true: the expenditure is made with the express consent of the candidate, the expenditure is made with the implied consent of the candidate, the expenditure is made with the authorization of the candidate, the expenditure is made with the cooperation of the candidate, the expenditure is made in concert with the candidate, the expenditure is made at the request of the candidate, or the expenditure is made at the suggestion of the candidate.” Minn. Campaign Fin. & Pub. Disclosure Bd., Findings, Order, and Memorandum in the Matter of the Investigation of Expenditures Made by the Minnesota DFL Senate Caucus Party Unit 6 (Dec. 17, 2013) [hereinafter *DFL Findings*], available at http://www.cfboard.state.mn.us/bdinfo/investigation/12_17_2013_DFL_Senate_Caucus_Findings.pdf.

³³⁵ See 11 C.F.R. § 109.21 (defining standard for coordination); Fed. Election Comm’n, Advisory Opinion 2011–12, at 3, available at <http://saos.fec.gov/aodocs/AO%202011-12.pdf> (allowing federal candidates to fundraise for independent expenditure-only political committees (super PACs) so long as they do not solicit contributions in excess of the candidate solicitation limit, which is currently \$5,000 per year (52 U.S.C. § 30125(e)(1)). However, this limitation is without effect because super PACs can still accept unlimited contributions. The FEC deadlocked on the question of whether a candidate appearance in an issue ad outside the electioneering communications window would be considered a coordinated expenditure. See American Crossroads, FEC Advisory Opinion Request 2011-23, available at <http://saos.nictusa.com/aodocs/1188794.pdf>; Certification re: FEC Advisory Opinion Request 2011-23, available at <http://saos.nictusa.com/aodocs/1189803.pdf>.

³³⁶ Minn. Stat. § 10A.01(4). See also *DFL Findings*, *supra* note 334, at 5 (“[a]n expenditure to a third party that is not an independent expenditure is typically an approved expenditure”).

³³⁷ Minn. Stat. § 10A.01(9). The precise reach of this provision is unclear. Although a 2005 Minnesota Supreme Court case interpreted the phrase “to influence” in different provisions to reach only express advocacy, that case concerned entities that were entirely uncoordinated with candidates. There is no official guidance regarding whether this interpretation would still hold when a candidate cooperated with an outside spender. See *Minn. Citizens Concerned for Life, Inc. v. Kelley*, 698 N.W.2d 424, 430 (Minn. 2005) (narrowly construing the phrase “to influence the nomination or election of a candidate” to mean express advocacy).

³³⁸ Minn. Stat. § 10A.01(4); Minn. Stat. § 10A.27(1). See also Minn. Stat. § 10A.01(16) (defining “election cycle”).

³³⁹ Minn. Campaign Fin. & Pub. Disclosure Bd., Advisory Opinion 437, at 1.

³⁴⁰ *Id.* at 5.

³⁴¹ *Id.* at 1–2, 4.

³⁴² *DFL Findings*, *supra* note 334, at 1, 20;

³⁴³ *Id.* at 15.

³⁴⁴ *Id.* at 8.

³⁴⁵ *Id.* at 17.

³⁴⁶ Minn. Campaign Fin. & Pub. Disclosure Bd., Advisory Opinion 436, at 4 (Nov. 5, 2013), available at <http://www.cfboard.state.mn.us/ao/AO436.pdf>.

³⁴⁷ Minn. Campaign Fin. & Pub. Disclosure Bd., Advisory Opinion 412, at 2 (Oct. 5, 2010), available at <http://www.cfboard.state.mn.us/ao/AO412.pdf>.

³⁴⁸ Minn. Campaign Fin. & Pub. Disclosure Bd., Advisory Opinion 410, at 2–3 (Sep. 7, 2010), available at <http://www.cfboard.state.mn.us/ao/AO410.pdf>.

³⁴⁹ *Id.* at 3.

³⁵⁰ *Id.*

³⁵¹ *Id.* at 4.

³⁵² *Id.*

³⁵³ *Id.* at 5.

³⁵⁴ *Id.* at 6–7.

³⁵⁵ *Id.* at 7 (citing Minn. Campaign Fin. & Pub. Disclosure Bd., Advisory Opinion 400, at 3–4 (Jul. 22, 2008), available at <http://www.cfboard.state.mn.us/ao/AO400.pdf>).

³⁵⁶ Minn. Campaign Fin. & Pub. Disclosure Bd., Conciliation Agreement in the Matter of the (Thomas) Emmer for State Representative Committee, Registration No. 16088, at 3 (Sep. 14, 2009), available at http://www.cfboard.state.mn.us/bdinfo/Con_Agr/091409_Emmer.pdf. Notably, the candidate’s committee “acknowledge[d], but disagree[d] with” this finding. *Id.*

³⁵⁷ Minn. Campaign Fin. & Pub. Disclosure Bd., Findings in the Matter of the Complaint against the Thomas Emmer for State Representative Committee and Franklin Outdoor Advertising 6 (Sep. 1, 2009) [hereinafter *Emmer Findings*], available at http://www.cfboard.state.mn.us/bdinfo/investigation/090109_Emmer_Franklin.pdf.

³⁵⁸ *Emmer Findings*, *supra* note 357, at 6–7.

³⁵⁹ *Id.*

³⁶⁰ *Id.* at 7 (“There is the question of whether the conversation in 2006 between Mr. Franklin and Mr. Emmer affects the classification of the expenditures for the signs displayed in 2008. The Board finds nothing in the definition or reporting requirements for independent expenditures to indicate that providing an in-kind donation in one election cycle precludes the opportunity to make an independent expenditure of similar goods or services in a subsequent election cycle.”). *Id.*

³⁶¹ Minn. Campaign Fin. & Pub. Disclosure Bd., Advisory Opinion 400, at 2–3.

³⁶² Minn. Campaign Fin. & Pub. Disclosure Bd., Advisory Opinion 365, at 1–2 (Feb. 22, 2005), available at <http://www.cfboard.state.mn.us/ao/AO365.pdf>.

³⁶³ Minn. Campaign Fin. & Pub. Disclosure Bd., Findings in the Matter of a Complaint Regarding the Tim Pawlenty for Governor Campaign and the Republican Party of Minnesota 3 (Oct. 10, 2002) [hereinafter *Pawlenty Findings*], available at http://www.cfboard.state.mn.us/bdinfo/investigation/021010_Pawlenty.pdf.

³⁶⁴ *Pawlenty Findings*, *supra* note 363, at 4.

³⁶⁵ *Id.*

³⁶⁶ *Id.*

³⁶⁷ *Id.* at 4–5.

³⁶⁸ Minn. Campaign Fin. & Pub. Disclosure Bd., Conciliation Agreement In the Matter of the (Tim) Pawlenty for Governor Committee, 15475, at 2 (Oct. 21, 2002) [hereinafter *Pawlenty Conciliation Agreement*], available at http://www.cfboard.state.mn.us/bdinfo/Con_Agr/Pawlenty_Tim_102502.pdf. See also *Pawlenty Findings*, *supra* note 363, at 5–6.

³⁶⁹ *Pawlenty Conciliation Agreement*, *supra* note 368, at 3–4.

³⁷⁰ *Pawlenty Findings*, *supra* note 363, at 6.

³⁷¹ *Pawlenty Conciliation Agreement*, *supra* note 368, at 5.

³⁷² Minn. Campaign Fin. & Pub. Disclosure Bd., Findings in the Matter of a Complaint Regarding Representative Knobloch and the House Republican Campaign Committee (Aug. 28, 2002), available at <http://www.cfboard.state.mn.us/bdinfo/investigation/KNOBLACH%20FINDINGS%20FINAL.htm>.

³⁷³ We reviewed all relevant enforcement cases and advisory opinions, dating back to 2008, available at the Commissioner of Political Practices (COPP) website; the database contains an unusually high volume of decisions. COPP staff confirmed the conclusions and scope of our research, explaining that there are no relevant court decisions but that as of July 25 ten coordination cases were pending in state trial court.

³⁷⁴ *Bonogofsky v. Kennedy*, No. COPP-2013-CFP-0015, at Ex. 2 at 2 (Mont. Comm’ner of Political Practices Oct. 16, 2013).

³⁷⁵ MONT. ADMIN. R. 44.10.323(4).

³⁷⁶ MONT. CODE § 13-35-227; MONT. COMM’NER OF POLITICAL PRACTICES, STATE OF MONTANA POLITICAL CAMPAIGN CONTRIBUTION LIMITS SUMMARY – APPLICABLE TO 2014 CAMPAIGNS (Mar. 19, 2014), available at <http://politicalpractices.mt.gov/content/5campaignfinance/2014ContributionLimitSummary>.

³⁷⁷ *Ponte v. MT BASE*, No. COPP 2014-CFP-012, at 5 (Mont. Comm’ner of Political Practices Apr. 15, 2014).

³⁷⁸ See *Bonogofsky v. Kennedy*, No. COPP-2013-CFP-0015, at 5 (Mont. Comm’ner of Political Practices listing numerous recent decisions).

³⁷⁹ *Miller v. Van Dyk*, No. COPP 2014-CFP-002, at 9-10 (Mont. Comm’ner of Political Practices July 1, 2014).

³⁸⁰ Mont. Comm’ner of Political Practices, Advisory Opinion, COPP-2014-AO-009, at 11 (May 19, 2014).

³⁸¹ MONT. CODE § 13-1-101(11)(a).

³⁸² *Fletcher v. Montanans for Veracity, Diversity & Work*, No. COPP 2014-CFP-028 (Mont. Comm’ner of Political Practices July 16, 2014).

³⁸³ *Id.* at 3-5.

³⁸⁴ *Id.* at 8-9.

³⁸⁵ *Id.* at 9.

³⁸⁶ *Miller v. Van Dyk*, No. COPP 2014-CFP-002 (Mont. Comm’ner of Political Practices July 1, 2014).

³⁸⁷ *Id.* at 1.

³⁸⁸ *Id.* at 8-9.

³⁸⁹ *Id.* at 9-10.

³⁹⁰ *Id.* at 10.

³⁹¹ Mont. Comm’ner of Political Practices, Advisory Opinion, COPP-2014-AO-009, at 10-11 (May 19, 2014).

³⁹² *Id.* at 11.

³⁹³ *Id.* at 9.

³⁹⁴ *Id.* at 11.

³⁹⁵ Mont. Comm’ner of Political Practices, Advisory Opinion, COPP-2014-AO-008, at 2 (Apr. 8, 2014) (emphasis in original).

³⁹⁶ *Id.* at 2.

³⁹⁷ Those cases are: *Madin v. Kitts*, No. COPP-2013-CFP-001 (Mont. Comm’ner of Political Practices July 8, 2014); *Madin v. Sales*, No. COPP-2010-CFP-029 (Mont. Comm’ner of Political Practices Apr. 7, 2014); *Bonogofsky v. Wagman*, No. COPP-2010-CFP-035 (Mont. Comm’ner of Political Practices Apr. 2, 2014); *Bonogofsky v. Prouse*, No. COPP-2010-CFP-033 (Mont. Comm’ner of Political Practices Mar. 31, 2014); *Bonogofsky v. Wittich*, No. COPP-2010-CFP-031 (Mont. Comm’ner of Political Practices Mar. 31, 2014); *Madin v. Burnett* No. COPP-2012-CFP-052 (Mont. Comm’ner of Political Practices Feb. 5, 2014); *Clark v. Bannan*, No. COPP-2010-CFP-023 (Mont. Comm’ner of Political Practices Jan. 22, 2014); *Bonogofsky v. Boniek*, No. COPP-2010-CFP-027 (Mont. Comm’ner of Political Practices Jan. 22, 2014); *Ward v. Miller*, No. COPP-2010-CFP-021 (Mont. Comm’ner of Political Practices Dec. 18, 2013); *Washburn v. Murray*, No. COPP-2010-CFP-0019 (Mont. Comm’ner of Political Practices Dec. 18, 2013); *Bonogofsky v. Kennedy*, No. COPP 2013-CFP-0015 (Mont. Comm’ner of Political Practices Oct. 16, 2013).

³⁹⁸ *Bonogofsky v. Kennedy*, No. COPP-2-13-CFP-0015 (Mont. Comm’ner of Political Practices Oct. 16, 2013). *Kennedy* and the other WTP decisions often refer to an entity called Direct Mail rather than WTP, but the COPP concluded that “[t]here is a direct relationship between Direct Mail and WTP, making the two indistinguishable” for purposes of the decisions. *Id.* at 25.

³⁹⁹ *Id.* at 9-17.

⁴⁰⁰ *Id.* at 16, 19.

⁴⁰¹ *Id.* Under state law, the Commissioner must notify the appropriate county attorney if civil prosecution is justified. If the county attorney takes no action within thirty days, the Commissioner may bring a civil action. MONT. CODE § 13-37-124. Civil prosecution triggers a range of potential consequences, depending on the violation. The case at issue involved illegal corporate contributions, which can be fined at \$500 or three times the amount of the contribution, whichever is greater. Mont. Code Ann. § 13-37-128. A candidate who is convicted may be prevented from taking office or removed from office. Mont. Code Ann. § 13-35-106.

⁴⁰² *Bonogofsky v. Kennedy*, No. COPP-2-13-CFP-0015, at 15-16, 18-19.

⁴⁰³ *Id.* at 21.

⁴⁰⁴ *Id.* at 31.

⁴⁰⁵ *Id.* at 30-31.

⁴⁰⁶ *Id.* at 31. The decision also addressed similar letters sent by the National Gun Owner’s Alliance (NGOA), but found that there was not sufficient evidence of coordination because Kennedy had not collaborated with the NGOA on other letters and there was “no document linking WTP or Candidate Kennedy” to the organization. The decision did explain that “a Virginia based non-profit would have to be in contact with someone in Montana to send a properly timed and appropriate letter in an obscure Montana primary election,” but past Commission decisions had refused to find coordination even when “there was extensive crossover in personnel and activity.” *Id.* at 33.

⁴⁰⁷ *Ponte v. Buttrey*, No. COPP 2014-CFP-007 (Mont. Comm’ner of Political Practices Apr. 21, 2014).

⁴⁰⁸ *Id.* at 10.

⁴⁰⁹ *Id.*

⁴¹⁰ *Id.* at 11.

⁴¹¹ *Id.* at 12-15.

⁴¹² *Id.* at 16.

⁴¹³ Ponte v. MT BASE, No. COPP 2014-CFP-012, at 8 (Mont. Comm’ner of Political Practices Apr. 15, 2014).

⁴¹⁴ *Id.* The decision provides no further details about the party.

⁴¹⁵ *Id.*

⁴¹⁶ *Id.* at 8 n.3.

⁴¹⁷ *Id.* at 5.

⁴¹⁸ Madin v. Burnett, No. COPP 2012-CFP-052, at 2-4 (Mont. Comm’ner of Political Practices Feb. 5, 2014).

⁴¹⁹ *Id.* at 2-3.

⁴²⁰ *Id.* at 4.

⁴²¹ *Id.* at 4-5.

⁴²² Letter from Jim Murry, Mont. Comm’ner of Political Practices, to Sen. Brad Hamlett, Re: Complaint Against Wendy McKamey 2 (Feb. 28, 2013).

⁴²³ *Id.*

⁴²⁴ Keane v. Montanans for a True Democrat Club, Summary of Facts and Statement of Findings [no case number] (Mont. Comm’ner of Political Practices Apr. 2, 2008).

⁴²⁵ *Id.* at 1, 4.

⁴²⁶ *Id.* at 2.

⁴²⁷ *Id.* at 3.

⁴²⁸ *Id.* at 2.

⁴²⁹ *Id.* at 3-4.

⁴³⁰ *Id.* at 3, 5.

⁴³¹ *Id.* at 9.

⁴³² *Id.*

⁴³³ *Id.*

⁴³⁴ *Id.* at 9-10.

⁴³⁵ Close v. People for Responsible Government, Summary of Facts and Statement of Findings [no case number] (Mont. Comm’ner of Political Practices Dec. 15, 2005).

⁴³⁶ *Id.* at 1, 9.

⁴³⁷ *Id.* at 10-11.

⁴³⁸ *Id.* at 10-11, 13.

⁴³⁹ Little v. Progressive Missoula, Summary of Facts and Statement of Findings [no case number] (Mont. Comm’ner of Political Practices July 22, 2004).

⁴⁴⁰ *Id.* at 4-6. Fletcher, one of the Progressive Missoula board members, emailed the candidate, “I’ve got some ‘dirty tricks’ ideas but you don’t want to hear about them. That’s why we have PM [Progressive Missoula].” The candidate later emailed, “I’d like our campaign to be about kids on bikes, brightly colored balloons, . . . being very positive about what we stand for, . . . Anyone who wants to take the gloves off on my behalf is more than welcome.” *Id.* at 5-6.

⁴⁴¹ *Id.* at 7.

⁴⁴² *Id.* at 8-9.

⁴⁴³ *Id.* at 16-18.

⁴⁴⁴ *Id.* at 18.

⁴⁴⁵ *Id.*

⁴⁴⁶ *Id.* at 18, 20-21. The case was never taken to court. The COPP reached a settlement with the defendant. Telephone interview with Commissioner Jonathan Motl, July 25, 2014.

⁴⁴⁷ We confirmed the scope of our research and our legal conclusions with staff at the New Mexico Secretary of State’s Office.

⁴⁴⁸ See, e.g., N.M. SEC’Y OF STATE’S OFFICE, GUIDE TO CAMPAIGN FINANCE AND CAMPAIGN REPORTING FOR CANDIDATES AND CAMPAIGN COMMITTEES 26 (2014), available at http://www.sos.state.nm.us/Elections_Data/default.aspx (follow “Guidelines of Candidates and Campaign Committees: associated with Proposed Rule-Campaign Finance” hyperlink) (hereinafter “N.M. Candidate Guide”) (“The New Mexico Campaign Reporting Act does not define ‘coordinated communications’ or ‘independent expenditures’”).

⁴⁴⁹ Thomas J. Cole, *Super PACs go unchecked*, ALBUQUERQUE JOURNAL, Sept. 1, 2014, <http://www.abqjournal.com/455149/politics/super-pacs-go-unchecked-coordination-undefined.html> (“Three times since 2011, the state Senate has approved legislation sponsored by Sen. Peter Wirth, D-Santa Fe, to define a coordinated expenditure, but it has died in the House.”).

⁴⁵⁰ N.M. Candidate Guide, *supra* note 448, at 26–30.

⁴⁵¹ Cole, *supra* note 449 (“In mid-August, the AG’s Office provided [the Secretary of State]’s office with a proposed advisory opinion concerning independent and coordinated expenditures. The proposed opinion advises New Mexico political committees to use the federal standards for coordination.”).

⁴⁵² *See id.* (“‘We can’t make up the statutes,’ [the Secretary of State] says. ‘The Legislature needs to address the issue.’”).

⁴⁵³ N.M. Attorney Gen. Op. No. 10-03, at 1 (Nov. 10, 2010), *available at* <http://www.sos.state.nm.us/uploads/FileLinks/ca39fa62c82b4aa18c995f8740bcce9e/AGOonCampaignContributions.pdf>.

⁴⁵⁴ *Id.* at 5. But if the product of the independent expenditure, such as the results of an opinion poll, were later given to the candidate, that would constitute an in-kind contribution. *Id.*

⁴⁵⁵ We reviewed all relevant statutes and regulations. We confirmed with staff at the Ohio Elections Commission that it had never received a complaint, issued an advisory opinion, or otherwise formally addressed the issue of coordinated campaign expenses in non-judicial elections. Agency staff confirmed that the reasoning of the *Spicer* decision probably would apply to candidates for legislative or executive office, but was unaware of any such application.

⁴⁵⁶ OHIO REV. CODE ANN. § 3517.01(A)(16)–(17). Unlike the federal rules, the Ohio law does not contain exceptions for expenditures based on material obtained from a publicly available source. *See, e.g.*, 11 C.F.R. § 109.21(d)(2).

⁴⁵⁷ OHIO REV. CODE ANN. § 3517.01(A)(17)(d).

⁴⁵⁸ *Id.* § 3517.102. The figures provided herein are effective until February 2015. OHIO SECRETARY OF STATE, 2013 ADJUSTED CAMPAIGN CONTRIBUTION LIMITS app. B (Jan. 2013), *available at* <http://www.sos.state.oh.us/sos/upload/news/20130225.pdf>. Contribution limits are adjusted biennially based upon the consumer price index. OHIO REV. CODE ANN. § 3517.104.

⁴⁵⁹ 2 U.S.C. 441b(a); *see also* 11 C.F.R. § 114.2(a).

⁴⁶⁰ OHIO REV. CODE ANN. § 3599.03(A)(1).

⁴⁶¹ *Id.* § 3599.03(A)(2).

⁴⁶² *Id.* § 3517.1011(A)(7) and (G); *see also* 11 C.F.R. § 109.21(c).

⁴⁶³ OHIO REV. CODE ANN. § 3517.01(A)(17)(d); *see also* 11 C.F.R. § 109.21(d). Ohio law presumes coordination exists if the spending was done by someone who had certain involvement with the candidate at any time, *id.*, while the federal law finds coordination only if the involvement with the candidate occurred within 120 days of the spending and only if the person has shared certain information with the spending entity. 11 C.F.R. § 109.21(d)(5).

⁴⁶⁴ OHIO REV. CODE ANN. § 3517.01(A)(17)(d).

⁴⁶⁵ *Disciplinary Counsel v. Spicer*, 106 Ohio St. 3d 247, 252 (2005) (interpreting Ohio’s judicial code of conduct, which contains language very similar to Ohio’s coordination statutes).

⁴⁶⁶ OHIO REV. CODE ANN. § 3517.152(A)(1).

⁴⁶⁷ 106 Ohio St. 3d 247.

⁴⁶⁸ *Cf.*, Ohio Code of Judicial Conduct Canon 7(A)(4) *with* Ohio Rev. Code Ann. § 3517.01(A)(17)(d).

⁴⁶⁹ *Spicer*, 106 Ohio St. 3d at 252. Outside of judicial elections, Ohio law deems outside-group ads to be coordinated if they are rebroadcasts of a candidate’s ads. OHIO REV. CODE ANN. § 3517.01(A)(16).

⁴⁷⁰ *Spicer*, 106 Ohio St. 3d at 249. It is conceivable that the Court reached its decision because of the judge’s apparent reliance on the Court’s advice.

⁴⁷¹ *Id.*

⁴⁷² *Id.* at 252.

⁴⁷³ *Id.* Much of the Court’s coordination analysis rested on the decision in *Fed. Election Comm’n v. Christian Coalition*, 52 F. Supp. 2d 45, 92 (D.D.C. 1999).

⁴⁷⁴ *Spicer*, 106 Ohio St. 3d at 253–54.

⁴⁷⁵ OHIO REV. CODE ANN. § 3517.01(A)(16).

⁴⁷⁶ OHIO ADMIN. CODE 111-3-02(C). It does not appear that this provision has ever been enforced, and its constitutional validity has not been tested.

⁴⁷⁷ No relevant court decisions appear in legal databases. We confirmed the scope and conclusions of our research with staff at the Pennsylvania Department of State, which has the authority to administer campaign finance laws, and at the Attorney General’s office, which has the authority to enforce the campaign finance law.

⁴⁷⁸ 25 PA. STAT. ANN. § 3241(e).

⁴⁷⁹ 25 PA. STAT. ANN. § 3253(a) provides that corporations may not make contributions or expenditures, but the ban on expenditures may not be enforced after *Citizens United*. *See, e.g.*, *Gen. Majority PAC v. Aichele*, No. 1:14–CV–332, 2014 WL 3955079, at *4 (M.D. Pa. Aug. 13, 2014). Corporations that make illegal contributions may be fined up to \$10,000. 25 PA. STAT. ANN. § 3543.

⁴⁸⁰ We reviewed the Secretary’s Guide to Vermont’s Campaign Finance Law, all relevant statutes and rules promulgated by the Secretary of State, relevant court decisions available at Westlaw, and the attorney general’s 2012 Guidance

Regarding Independent Expenditure Committees. We confirmed our understanding of the law with the Secretary of State's office.

⁴⁸¹ See 11 C.F.R. § 109.21.

⁴⁸² The 2014 Vermont law defines an “independent expenditure-only political committee” as “a political committee that conducts its activities *entirely independent of candidates*; does not give contributions to candidates, political committees, or political parties; does not make related expenditures; and is not closely related to a political party or to a political committee that makes contributions to candidates or makes related expenditures.” VT. STAT. ANN. tit. 17, § 2901(10) (emphasis added). See also Fed. Election Comm’n Advisory Opinion 2010-11; 11 C.F.R. § 109.21.

⁴⁸³ VT. STAT. ANN. tit. 17, § 2805(a) (repealed 2014); Vt. Att’y Gen., Formal Opinion #2014-1, at 4 (May 13, 2014), available at <https://www.sec.state.vt.us/media/497980/Act-90-Opinion.pdf> (explaining that repealed contribution limits apply to 2013-2014 election cycle); OFFICE OF THE VT. SEC’Y OF STATE, GUIDE TO VERMONT’S CAMPAIGN FINANCE LAW 2 (2014), available at <https://www.sec.state.vt.us/media/502743/2014-CF-Guide.pdf>. This limit will rise to \$4,000 in 2015. VT. STAT. ANN. tit. 17, § 2941(a)(4). See 2013 Vt. Pub. L. No. 90 (S. 82), § 8(a)(2).

⁴⁸⁴ VT. STAT. ANN. tit. 17, § 2944(b).

⁴⁸⁵ *Id.* § 2944(a); *id.* § 2963; OFFICE OF THE VT. SEC’Y OF STATE, GUIDE TO VERMONT’S CAMPAIGN FINANCE LAW 11 (2014). There is a rebuttable presumption that an expenditure by a political party is a related expenditure if it benefits six or fewer candidates. VT. STAT. ANN. tit. 17, § 2944(c); see also Vt. Sec’y of State, Admin. Rule 2000-1(3) (as quoted in VT. SEC’Y OF STATE, GUIDE TO VERMONT’S CAMPAIGN FINANCE LAW, Appendix H (2014), (further refining the presumption); *Landell v. Sorrell*, 382 F.3d 91, 146 (2d Cir. 2002), *rev’d on other grounds by* *Randall v. Sorrell*, 548 U.S. 230 (2006) (upholding the rebuttable presumption that party expenditures supporting six or fewer candidates are related expenditures).

⁴⁸⁶ *Landell* 382 F.3d at 145, *rev’d on other grounds by* *Randall v. Sorrell*, 548 U.S. 230 (2006). See also Vt. Sec’y of State, Admin. Rule 2000-1(2)(b) (defining “intentionally facilitated” as meaning “for a candidate . . . to consciously, and not accidentally, have done an action to make the activity or expenditure possible”).

⁴⁸⁷ VT. STAT. ANN. tit. 17, § 2907.

⁴⁸⁸ Vt. Sec’y of State, Admin. Rule 2000-1(2)(a) (as quoted in VT. SEC’Y OF STATE, GUIDE TO VERMONT’S CAMPAIGN FINANCE LAW, Appendix H (2014), available at <https://www.sec.state.vt.us/media/333336/2014-CF-Guide4-10.pdf>). The version of the rule in the 2014 Campaign Finance Guide cites to the Secretary’s powers under the old statute, VT. STAT. ANN. tit. 17, § 2809(f), rather than his identical powers under the new law, VT. STAT. ANN. tit. 17, § 2944(f). Since the new law retains the Secretary’s rulemaking power in this area, presumably the old rules still apply, the citation error notwithstanding.

⁴⁸⁹ Vt. Sec’y of State, Admin. Rule 2000-1(2)(d).

⁴⁹⁰ See 11 C.F.R. § 109.21 (defining standard for coordination).

⁴⁹¹ Because the super PAC definition is new, state regulators and courts have yet to issue interpretations to illustrate in what ways a group might lose its independent status. In guidance that predates the new law, the state’s attorney general declared that, “if investigation reveals . . . that a PAC’s political activities are not conducted entirely independently of candidates, the PAC will continue to be subject to Vermont’s contribution limits.” See Vermont Attorney General’s Guidance Regarding Independent Expenditure Committees (July 25, 2012), available at <https://web.archive.org/web/20140409113456/http://vermont-elections.org/elections1/Independent%20Expenditure%20Guidance-%2007-25-12-%20-%20HKT2L87.pdf>. In July 2014, the Second Circuit held that the contributions received by a would-be super PAC could be restricted to the state’s contribution limits for ordinary PACs because that group was too closely intertwined with an ordinary PAC that worked directly with candidates. See *Vt. Right to Life Comm., Inc. v. Sorrell*, 758 F.3d 118, 145 (2d Cir. 2014), *aff’d* 875 F. Supp. 2d 376 (D. Vt. 2012).

⁴⁹² VT. STAT. ANN. tit. 17, § 2903(c).

⁴⁹³ VT. STAT. ANN. tit. 17, § 2944(e)(1). (“A candidate may seek a determination that an expenditure is a related expenditure made on behalf of an opposing candidate by filing a petition with the Superior Court of the county in which either candidate resides.”); *Id.* § 2944(e)(3). (“The findings and determination of the court shall be prima facie evidence in any proceedings brought for violation of this chapter.”).

⁴⁹⁴ *Vt. Right to Life*, 758 F.3d at 145.

⁴⁹⁵ *Id.* at 144; see also 875 F. Supp. 2d at 386 (explaining state’s uncontested evidence that the two PACs were “deeply interrelated, making it unclear whether contributions to [the purported super PAC] are spent on independent expenditures or contributions to candidates”).

⁴⁹⁶ 758 F.3d at 145 (internal citation and quotation marks omitted); see also 875 F. Supp. 2d at 405 (“The issue of independence from candidates is the touchstone of the contribution limit’s constitutionality.”).

⁴⁹⁷ 758 F.3d at 145.

⁴⁹⁸ See *State v. Republican Governors Ass'n*, No. 762-12-11 Wncv (Vt. Super. Ct. Apr. 30, 2013) (Crawford, J.), available at <http://www.atg.state.vt.us/assets/files/State%20v%20RGA%20and%20Dubie%20Fully%20Executed%20Stip%20Order.pdf>.

⁴⁹⁹ *Id.* at 2.

⁵⁰⁰ *Id.*

⁵⁰¹ *Id.* at 4. Donations to the Vermont Food Bank are apparently a common remedy in settlements with the state. Nat Rudarakanchana, *State Settles with Brian Dubie over 2011 Campaign Finance Lawsuit; RGA Must Pay \$30,000, Dubie \$20,000*, VTDIGGER (Apr. 19, 2013), <http://vtdigger.org/2013/04/19/state-settles-with-brian-dubie-over-2011-campaign-finance-lawsuit-rga-must-pay-30000-dubie-20000/>.

⁵⁰² *Id.*

⁵⁰³ See *McMullen v. Comm. for Justice & Fairness*, No. 1246-10-12 Cncv, 2013 WL 592027 (Vt. Super. Ct. Jan. 28, 2013).

⁵⁰⁴ *Id.* at 2.

⁵⁰⁵ *Id.* at 5.

⁵⁰⁶ *Id.*

⁵⁰⁷ We reviewed all relevant state and federal court decisions available at Westlaw. We also reviewed all accessible opinions from the GAB web site, but the database appears to be incomplete. We confirmed our analysis of the law with staff of the GAB.

⁵⁰⁸ WIS. STAT. § 11.06(7).

⁵⁰⁹ Advisory Opinion 00-2 at 9 (Wis. Elections Bd. 2000), available at <http://elections.state.wi.us/docview.asp?docid=4757&locid=47>, reaff'd Mar. 26, 2008 (see http://gab.wi.gov/sites/default/files/opinions/29/00_02opelbd_pdf_17587.pdf).

⁵¹⁰ WIS. ADM. CODE GAB 1.42(6).

⁵¹¹ *O'Keefe v. Schmitz*, No. 14-C-139, 2014 WL 1795139, at *9–10 (E.D. Wis. May 6, 2014). This interpretation is contrary to existing precedent that allowed coordination regulation to reach all political contributions. *Wis. Coal. for Voter Partic., Inc. v. State Elections Bd.*, 231 Wis. 2d 670, 680 (Ct. App. 1999).

⁵¹² *Id.*

⁵¹³ *O'Keefe v. Chisholm*, Nos. 14-1822 et al. (7th Cir. Sep. 24, 2014).

⁵¹⁴ WIS. STAT. § 11.26(1).

⁵¹⁵ *Id.* § 11.60(3). An intentional violation exceeding \$100 is a felony. *Id.* § 11.61(1)(b).

⁵¹⁶ *O'Keefe*, Nos. 14-1822 et al. (7th Cir. Sep. 24, 2014).

⁵¹⁷ *O'Keefe*, 2014 WL 1795139, at *1–2.

⁵¹⁸ *Id.* at *9–10.

⁵¹⁹ *O'Keefe*, Nos. 14-1822 et al., slip op. at 6 (7th Cir. Sep. 24, 2014).

⁵²⁰ *Wisc. Right to Life v. Barland*, 751 F.3d 804 (7th Cir. 2014).

⁵²¹ *Id.* at 843.

⁵²² *Id.* at 843 n.26.

⁵²³ *In re Sandy Pasch and Wisconsin Citizen Action*, Case #2011-25, Memorandum at 1–2 (Wis. Gov't Accountability Bd. 2011) (on file with The Brennan Center). The memorandum and summary here reflect the GAB staff's recommendation. The GAB accepted the recommendation in the memorandum. *Id.* at 1.

⁵²⁴ *Id.* at 2.

⁵²⁵ *Id.*

⁵²⁶ *In re Keep Our North Strong PAC, et al.*, Report of Investigation at 2, Case #2008-40 (Wis. Gov't Accountability Bd. 2008); *Id.*, Preliminary Findings of Fact and Conclusions at 2 (on file with The Brennan Center).

⁵²⁷ *Id.*, Report of Investigation at 3.

⁵²⁸ *Id.*

⁵²⁹ *Id.*, Preliminary Findings of Fact and Conclusions at 2.

⁵³⁰ Advisory Opinion 00-2 (Wis. Elections Bd. 2000).

⁵³¹ *Id.* at 8–9 (emphasis in original).

⁵³² *Id.* at 11.

⁵³³ *Id.* at 12.

⁵³⁴ *Id.* at 12–13.

⁵³⁵ *Wis. Coal. for Voter Partic.*, 231 Wis. 2d at 680.

⁵³⁶ *Id.* at 675–76.

⁵³⁷ *Id.* at 674, 687.

⁵³⁸ *Id.* at 679. The court also expressed its agreement with the GAB’s statement that “if the mailing and the message were done in consultation with or coordinated with the Justice Wilcox campaign, the [content of the message] is immaterial.” *Id.* at 682 (internal quotation marks omitted) (alteration in original).

⁵³⁹ *Id.* at 683.