How States Can Improve

This section contains general recommendations for those interested in improving their state's score in future editions of this version of the Free Speech Index. To see where your state lost points, see the State Report Cards beginning on page 71. Specific recommendations on model policies appear on the second page of each State Report Card. Following those model policies will lead to substantial improvements in each state's law to better conform with Supreme Court precedents and better fulfill the spirit of the First Amendment.

A complete listing of all the variables graded and the points assigned to each is available in the Methodology beginning on page 175.

I. Follow the Constitution

The easiest way for states to embrace a First Amendment-friendly approach is to simply repeal or amend statutes that are clearly unconstitutional. Forty-five states have statutes that are of questionable constitutionality and would likely not survive, if challenged in court. Many of these statutes have *already* been ruled unconstitutional, yet they remain on the books, chilling potential speech and activity. Eliminating these provisions will improve the ability of groups and citizens to make their views known. Further, repealing unconstitutional provisions will save a state time and money when offending provisions are challenged and the state loses in court. The Institute for Free Speech recommends several First Amendment-friendly changes to remove unconstitutional provisions seen in many states.

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Raise severely low monetary thresholds for political committee registration and reporting. Thresholds under $1,000 have repeatedly been struck down by courts. As one court put it, "the informational interest" of reports from such small groups "is outweighed by the substantial and serious burdens"[1] that such reports entail. Yet 34 states have thresholds for political committee registration below this level. These limits should be raised dramatically.

Follow Supreme Court guidance for defining the term "expenditure." In *Buckley v. Valeo,* the Supreme Court allowed for the limited regulation of spending on campaign speech that specifically and overtly "advocate[s] the election or defeat of a clearly identified candidate."[2] For 45 years, states have pushed the envelope – attempting to regulate more and more speech by expanding what speech qualifies as an expenditure. State regimes with broad definitions of "expenditure" have regularly been found by courts to unconstitutionally restrict too much speech. States should heed this case law

and hew their laws to only the narrow, Supreme Court-sanctioned definition.

Legalize super PACs. For over a decade it has been clear that it is unconstitutional to limit contributions to independent expenditure-only political committees, more commonly known as "super PACs." In 2010, the en banc United States Court of Appeals for the District of Columbia Circuit struck down analogous federal limits in *SpeechNow.org v FEC*.[3] Since that ruling, at least five more federal courts of appeals have considered this issue, and in each case the ruling was the same – such restrictions are unconstitutional. Yet 22 states still have laws restricting these contributions. These unconstitutional statutes should be repealed, and formal recognition of super PACs should be enacted.

Repeal false statement laws. The Supreme Court has long affirmed that the government cannot decide what is true or false. Specifically, in the political context, such laws were unequivocally found to be unconstitutional in 2014.[4] Yet 19 states still have laws prohibiting false political speech, as determined by politicians and regulators. These statutes should be repealed.

Exempt public information from coordination rules. Publishing information, whether in pamphlets or on websites, is protected by the Constitution. But because of the incredible complexity and invasiveness of some laws regulating campaign speech, that right has been violated by states' bans on coordination between independent groups and campaigns. States should fix these statutes and make clear that using publicly available information in communications is not evidence of illegal coordination. Only ten states currently have statutes protecting against this constitutional violation.

II. Protect Citizen Privacy

To best protect free speech, states must understand the essential link between citizens' right to privacy and citizens' speech. If an individual's personal information is reported to the government and then published on the internet for all to see forever, they are less likely to contribute to groups or causes. This is especially true when the speech they are supporting is unpopular, controversial, or disfavored by those in power. Strict disclosure rules lead to a climate with less free and open speech. In the 1950s, the Supreme Court ruled that Alabama's disclosure demands aimed at exposing the NAACP's membership were a violation of the First Amendment.[5] Unfortunately, privacy from government disclosure laws for those engaged in issue speech is increasingly under attack in many states. The Institute for Free Speech suggests several First Amendment-friendly changes to better protect citizens' privacy.

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Eliminate donor reporting for groups whose main purpose is not campaign speech. Maximizing speech means making it easy for groups to exist and speak out in the manner of their choosing. For some groups, that means engaging in issue speech most of the time, but occasionally speaking to urge the election or defeat of certain candidates. By demanding donor reporting for such groups, states limit

their ability to speak and wrongly risk the harassment of their supporters. Twenty-seven states make some effort to protect the privacy of these donors and the speech rights of these groups. But all states should recognize the value of this speech.

Reject grassroots advocacy regulation. Citizens have a right to talk about policy issues and legislation without fear of reprisal or harassment for their views. Such protections for advocacy, particular for advocacy of unpopular or dissenting opinions, should be celebrated by legislators as a cornerstone of democracy. Nineteen states allow full freedom for groups to push for social change. Unfortunately, 31 states regulate this speech, forcing speakers to register with the government before engaging in issue speech. Worse, 12 states go one step further, forcing supporters of these speakers to also be reported to the government. Such laws should be repealed to protect citizens' privacy and create a speech-friendly environment where civic debate can thrive.

Raise thresholds for all donor reporting. Public reporting of donors has been allowed by the Supreme Court to protect against corruption and its appearance. States that require any donor reporting should make this justification the sole focus of their statute. To that end, does a $50 contribution corrupt? Or $25 to a political committee? What about a single dollar given by a citizen to a candidate, which is the threshold in some states? Subjecting donors of such small amounts to the risks of public disclosure must be weighed against the benefit of reducing corruption. Incredibly, 44 states have at least one donor reporting threshold below $200.

Limit reported contributions to those specified for the speech. Inevitably, some state lawmakers will remain convinced that the informational interest of disclosure outweighs the privacy concerns with donor reporting. Even pro-disclosure policymakers can, however, make some strides to protect both interests. By limiting reporting of contributions solely to donations earmarked for speech – that is, specifically donated for a particular purpose – lawmakers can protect the privacy of donors that give generally. This has the additional benefit of avoiding junk disclosure that misattributes contributions to speech that a donor did not fund. Eighteen states already limit some reporting rules to only earmarked contributions.

Eliminate employer disclosure. Some lawmakers continue to push for public disclosure of a contributor's employer, arguing that these laws inform the public. Many of these laws, however, have the opposite effect, creating misinformation and misleading the public about the source of a candidate or group's support. These reports allow media outlets, either through ignorance or to further a desired narrative, to misattribute a contribution from an individual to their employer. This disclosure incentivizes the creation of stories like "Candidate Jones receives the most money from Big Tech" when it was, in fact, illegal for the candidate to take any money from those corporations, and the campaign instead received individual donations from employees of a company. Over 30 states require some form of employer disclosure, but even legislators who otherwise believe in the informational value of reporting should look to eliminate these provisions to prevent misinformation.

Eliminate donor disclosure on disclaimers. The harms of donor reporting are well-established: by making Americans' personal information public, these laws make speakers vulnerable to harassment and retribution. But

ten states go even further, compelling groups to list certain donors on ads that they run. Such measures significantly amplify the risks associated with public disclosure and are obviously meant to dissuade contributors to disfavored causes. These rules also force a speaker to pay to broadcast this mandatory invitation for harassment of their supporters. Some laws are so severe that up to half a 30-second ad can be taken up by disclaimers with donor disclosure. These laws should be repealed.

III. Think Speech First

The most fundamental change all policymakers need to make in this area is to think first and foremost about the impacts on speech. When lawmakers write an "expenditure" definition, they should understand they are defining what spending on *speech* will be regulated. When policymakers seek to regulate the activity of committees, they are regulating the *speech* of the citizens who make up that committee. When lawmakers advocate for new campaign finance laws for the internet, new laws close to an election, or more disclosure rules for certain types of groups, they are regulating groups and individuals based on their *speech*. This realization is crucial to understanding the impact these laws have and should encourage lawmakers to legislate with a light hand. The Institute for Free Speech advocates for several policy changes that prioritize speech.

Narrow overly broad expenditure and coordination definitions. The majority of expenditures by political and issue groups, from bumper stickers to campaign events to television ads, go toward speech. When a state has a broad expenditure definition, it necessarily captures more speech. Expansive definitions often force groups to hire expensive attorneys to provide guidance on when and how to follow the law, and if the law applies at all. The end result is more groups, farther afield from the law's intended targets, are regulated and burdened. The same is true when defining what spending counts as "coordination." Only six states think about the speech consequences first and have an expenditure definition narrow enough to not unnecessarily burden more speech than needed.

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Ensure laws regulating when a group becomes a political committee capture only those groups engaged in campaign speech. In a flourishing democracy, anyone should be able to speak in whatever form they think is most effective. That means some groups will want to talk about candidates exclusively, some will want to focus on issues, and some will do a mix of both. But legislators often ignore the speech implications of defining which group is or is not "political." The result is definitions that are confusing, vague, and contradictory. If groups don't know where the lines are drawn, it is more difficult to speak about the causes they seek to promote. Lawmakers should simplify these rules, making sure that regulation affects only the intended speakers and no one else.

Eliminate so-called "electioneering communications" laws, or at least limit their reach to specific times and circumstances. Speech about public policy is among

the most valuable speech that exists in a democracy. Such speech, however, will inevitably entail mentioning the names of current officeholders, whether their action is needed to turn an idea into law, they are famous for their opposition to an issue, or they've simply attached their name to a piece of legislation. And discussing policy when the public is most focused on political debate – near elections – is also the most effective advocacy. Despite this, 26 states impose burdens on this type of speech. Some lawmakers view such regulations as an extension of campaign rules but are woefully ignorant of the harms to issue speech. In some states, policymakers have extended these regulations to encompass nearly the entire year of an election and any mention of any candidate. This is a serious mistake. Legislators should consider the speech implications of these statutes and limit or repeal them.

Make disclaimers simple. Disclaimers on ads are the government's words that citizens have to pay for. This should be the framework that lawmakers use when thinking about disclaimers – they are compelled speech. Given this reality, lawmakers should strive to minimize their impact on speakers. Disclaimers should be short, unbiased, and flexible to allow for different types of speech and yet unseen methods of technological innovation. Successful implementation will inform voters about the source of a message while keeping compliance burdens manageable for speakers. By not thinking about the nature of compelling others to carry the government's message, nearly all states' disclaimer rules are too proscriptive and burdensome.

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Adjust all monetary thresholds for inflation. A dollar today is worth less than a dollar in the past. Nevertheless, many states set monetary thresholds in legislation nearly fifty years ago and have not updated their laws since. These thresholds run the gamut, from how much spending triggers registration and reporting requirements for different types of committees to how large a contribution must be to require reporting of a contributor's personal information. As a result of this system, regulations unnecessarily capture ever smaller groups, more private information, and more speech over time. Adjusting these thresholds for inflation is a simple and uncontroversial way for states to acknowledge that small speakers and contributors do not need to be regulated by the government.