Super PAC Recognition

Since the country's founding, Americans coming together, pooling their resources, and speaking to other Americans has been a fundamental part of our political culture. These groups encourage voters to support candidates they believe in and oppose candidates they don't. Their speech is the most basic political expression and deserves the highest protection under the First Amendment.

In our contemporary politics, this speech is epitomized by the super PAC. A "super PAC" is a political committee that only makes expenditures *independent* of candidates; they do not and legally cannot contribute to or coordinate with candidates or political parties.[196]

At the federal level, super PACs came about as a result of the unanimous 2010 decision of the Court of Appeals for the District of Columbia Circuit in *SpeechNow.org v. Federal Election Commission*.[197] Earlier that year, the Supreme Court held that the government had no anti-corruption interest in limiting independent expenditures.[198] Accordingly, the D.C. Circuit reasoned that because expenditures by independent organizations are not corrupt, it followed that the government had no anti-corruption interest in limiting contributions from individuals to these independent expenditure groups either.[199] With this decision, the federal super PAC was born.[200]

Because they speak without coordinating with candidates or political parties, there is no limitation on how much citizens can contribute to super PACs. Accordingly, super PACs, unlike campaigns, are free to raise funds for their political speech without amounts being restricted by the government.

Despite the fact that independent speech by super PACs is constitutionally protected, some state statutes continue to limit contributions to such groups. State laws that limit contributions to super PACs continue to be challenged in court, and every court that has considered such a challenge has ruled that these restrictions violate the First Amendment.

Maintaining unconstitutional laws on the books is, nevertheless, confusing to the average citizen. Furthering the problem, many state campaign enforcement agencies publish no clarifying guidance. This creates two potential First Amendment harms. First, groups looking to talk about candidates and groups in campaigns may be deterred from doing so in states where statutes have not been updated to reflect court rulings on the First Amendment protections guaranteed to such groups. Second, some groups may continue to abide unnecessarily by state contribution limits, despite engaging in solely independent speech, because state code does not recognize super PACs as unique entities. In such instances, these groups would be artificially producing less political speech than they desire in an unnecessary effort to follow an unconstitutional statute.

Every group that wants to speak about politics should not have to hire a lawyer first. Accordingly, formally recognizing super PACs in state campaign finance law provides potential independent expenditure groups with the information needed to create their organization and fully exercise their First Amendment rights. Many

states have recognized the need to update their laws. For example, Illinois law specifically provides for independent expenditure committees[201] and allows them to "accept contributions in any amount from any source."[202] But statutes in some states, including Alaska, New Jersey, Rhode Island, and South Dakota, provide no express authority for the creation of super PACs.

This variable is a good proxy for whether a state has updated its campaign finance laws to reflect court rulings. States have had the ability to recognize super PACs since 2010. Regardless of whether enforcement occurs, laws that violate the First Amendment should not remain on the books.

False Statement Laws

False Statement laws, as the name implies, are statutes that prohibit supposedly "false" speech about candidates or public officials, including their voting records or other official acts.[203] Under such laws, the task of deciding what campaign speech is true and what is false is decided by government officials. In effect, these laws create a "truth police" to decide what can be said about a candidate or officeholder.

Such laws strike at the very heart of the First Amendment's protection of free speech. The Supreme Court has long recognized that "there is practically universal agreement that a major purpose of that Amendment was to protect the free discussion of governmental affairs."[204] This "includes discussions of candidates" and "all such matters relating to political processes."[205] The rough-and-tumble world of politics is where First Amendment protections are at their highest and most needed.[206]

These laws are unconstitutional. As the Court noted in 2012:

> [There is no] general exception to the First Amendment for false statements. This comports with the common understanding that some false statements are inevitable if there is to be an open and vigorous expression of views in public and private conversation, expression the First Amendment seeks to guarantee.[207]

This is particularly true in the political context, where truth and falsity are hotly debated, and such laws can be weaponized against political opponents. In *Susan B. Anthony List v. Driehaus*,[208] for instance, a unanimous Court struck down an Ohio false statement law. The Ohio Elections Commission attempted to enforce the law against Susan B. Anthony List, a pro-life group, after it issued a press release and planned to run a billboard ad criticizing a local congressman, Representative Steve Driehaus, for a vote the organization viewed as pro-abortion. The Ohio Elections Commission acted based on a complaint from Congressman Driehaus.

Courts have consistently confirmed that political debates about truth and falsity should be argued in the political arena and not decided by government officials. Ohio, Massachusetts, Minnesota, and Washington state have all seen false statements laws struck down on First Amendment grounds.[209] As one court held, "[t]

he notion that the government, rather than the people, may be the final arbiter of truth in political debate is fundamentally at odds with the First Amendment."[210]

Despite this, some states continue to enact or keep false statement laws that subject speakers to stiff penalties and lengthy and expensive legal battles. The threat of fines or litigation resulting from these laws chills political speech. Take Colorado, for example, where:

> No person shall knowingly make, publish, broadcast, or circulate or cause to be made, published, broadcasted, or circulated in any letter, circular, advertisement, or poster or in any other communication any false statement designed to affect the vote on any issue submitted to the electors at any election or relating to any candidate for election to public office.[211]

Any speaker who violates this statute is in danger of being criminally charged and punished with up to 18 months in prison and/or up to a $5,000 fine.[212] If the state finds that a speaker was merely "reckless" in what they said, the speaker still faces up to 12 months in jail and/or a possible $1,000 fine.[213]

False statement laws like Colorado's are incompatible with the Constitution's protection for free speech and are likely to fail in court. But few Americans have the financial resources to bring such costly legal challenges. The Supreme Court has held that "[t]he First Amendment does not permit laws that force speakers to retain a campaign finance attorney" to "seek declaratory rulings before discussing the most salient political issues of our day."[214] Instead, states should remove these unconstitutional laws from their books.

States should not attempt to outlaw or police allegedly false campaign speech. As Justice Kennedy said, "[t]he remedy for speech that is false is speech that is true. This is the ordinary course in a free society."[215] Therefore, this Index acknowledges states without burdensome false statement laws. States with such laws on the books should consider repealing them to comport with the First Amendment.

Private Enforcement of Campaign Laws

Some states allow *anyone* to seek to enforce campaign finance laws, regardless of whether government officials believe the law has been broken. This is First Amendment restriction by lawsuit. In these states, any citizen with a grudge – even a speaker's political opponents – can allege a violation and hale a speaker into court.

Americans should not have to risk litigious retribution for engaging in campaigns and speaking about issues. Complaints waste time, effort, and impose a significant expense on speakers. Even when a speaker is vindicated, the process creates a punishment for speaking. Time in court, anxiety from pending litigation, and being compelled to hire often expensive legal representation all discourage individuals and groups from speaking during campaigns. For these reasons, private enforcement of campaign laws is harmful to the First Amendment.

The Supreme Court has recognized the danger of such enforcement schemes. In *Susan B. Anthony List v. Driehaus*,[216] the unanimous Supreme Court

held that a law's private enforcement provisions "bolstered" the threat to First Amendment activity from campaign finance laws.[217] The Supreme Court held that, "[b]ecause the universe of potential complainants is not restricted to state officials who are constrained by explicit guidelines or ethical obligations, there is a real risk of complaints from, for example, political opponents."[218] By expanding the number of people who could bring a claim, the law created serious "burdens . . . on electoral speech."[219]

If the claim is meritless, it nonetheless forces "the target of a . . . complaint . . . to divert significant time and resources to hire legal counsel and respond to discovery requests in the crucial days leading up to an election."[220] This will undoubtedly chill speech, particularly controversial or contentious speech. Private rights of action for enforcing speech restrictions make it easy to game the system for unfair advantage or merely to punish one's ideological opponents.

This, unfortunately, has happened. Colorado law authorized private citizens to bring campaign finance enforcement actions.[221] Anyone could force a speaker into an administrative proceeding – with all the accompanying time, effort, and expense – simply by filing a complaint.[222] Some used this process to harass their political opponents.

During the 2012 primary for the Regent at Large of the University of Colorado – a down-ballot race that usually does not garner much attention – some political groups were punished by private enforcement actions. Organizations favoring the winning candidate were sued by a supporter of the losing candidate, alleging various inconsequential campaign finance violations.[223] Resolution of the multiple complaints that were filed took years. Groups were forced to pay substantial amounts of money to hire attorneys to fight the politically motivated complaints, in this case for supporting a candidate for University Regent.

Eventually, the federal courts stepped in to protect the First Amendment rights of Coloradans speaking during an election. In *Holland v. Williams*, the federal district court held that private enforcement provisions "reduce[] the overall quantum of speech available to the electorate" by silencing speakers who fear such complaints.[224] The *Holland* court found Colorado's private enforcement system facially unconstitutional.[225] The Colorado General Assembly subsequently passed a statute to remove gamesmanship from the process by giving greater enforcement oversight to the Colorado Secretary of State.[226]

Despite this First Amendment victory in Colorado, the state's story is not unique. Too many states continue to allow private actors to bring enforcement actions for campaign finance laws. For example, Massachusetts still allows any person to file a complaint with a state district court "alleging that reasonable grounds exist for believing that any law relating to . . . primaries, caucuses, conventions and elections, or to any matters pertaining thereto, has been violated."[227]

A handful of states allow private enforcement only on very narrow claims.[228] For example, Missouri allows private enforcement actions for contribution limit violations but nothing else.[229]

In contrast, thirty-eight states reserve campaign finance enforcement only to officials who must act in the public good, often subject to various codes of ethics (such as lawyers who are subject to rules of professional conduct). For example, Arizona vests civil and criminal campaign finance

enforcement authority only with government prosecutors like the attorney general in races for state office and local prosecutors in local races.[230] New Hampshire routes all complaints and subsequent investigations through the state's attorney general.[231]

In this Index, states with no private enforcement statutes receive full credit for protecting First Amendment activity in this area. States that have limited private enforcement actions receive partial credit. Finally, states that put speakers fully at risk of complaints from private political actors fail to protect speakers and their speech from frivolous, arbitrary, and harmful private enforcement of campaign laws and receive no credit in this area of the Index.