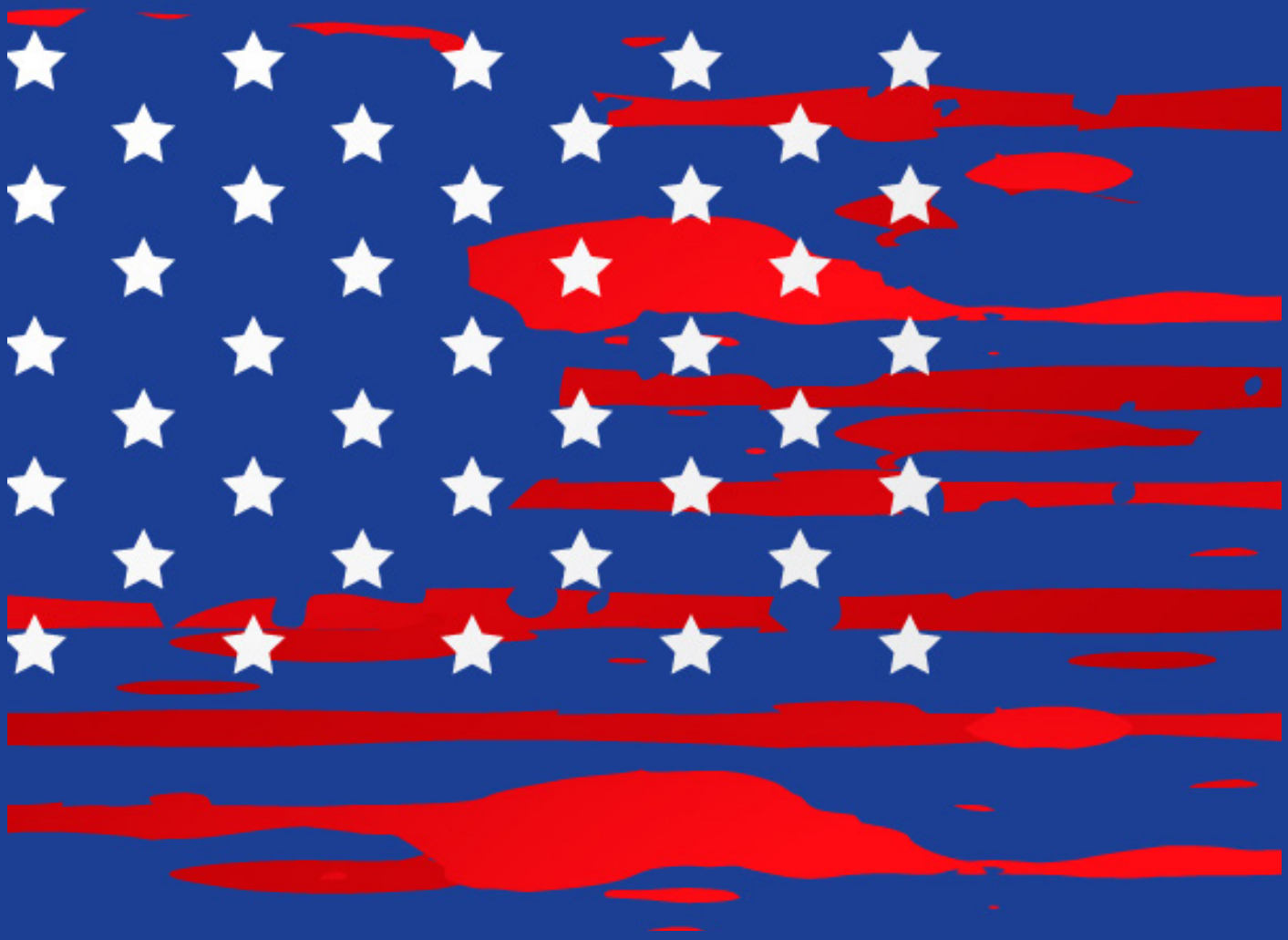

Free Speech, Electioneering, and Constitutionality: *The Debate in South Carolina*

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HOW A BILL IN THE S.C. SENATE WOULD RUN UP AGAINST THE U.S. CONSTITUTION AND U.S. SUPREME COURT PRECEDENT

The South Carolina legislature is poised to pass new regulations of political speech. While the proposed law is being spun as perfunctory regulation of election ads, it actually would go much farther than mere campaign ads to potentially cover virtually all communications critical of public officials during a broad window before an election.

The proposals offered by both the House and Senate are clearly unconstitutional, appear designed to capture all communications critical of elected officials, and would almost certainly result in a federal court challenge. The bill under consideration is House bill 3722. (See also this Senate version, a bill that's widely thought to be dead but may not be).

This bill would clash with multiple rulings by the U.S. Supreme Court that have clearly protected political speech under the First Amendment. As the Citizens United Court said, "[b]ecause speech is an essential mechanism of democracy – it is the means to hold officials accountable to the people – political speech must prevail against laws that would suppress it by design or inadvertence."

The South Carolina legislature is re-writing the laws governing campaign speech as a result of a 2010 federal court ruling that the existing laws were unconstitutional. The question citizens must expect lawmakers to ask is not when the people are entitled to protection of their First Amendment right, but the exact opposite: when is there a compelling reason for government to regulate otherwise protected political speech?

The legislature knows – or certainly should know – that the Supreme Court has ruled consistently to protect political free speech. Therefore, lawmakers should be treading carefully and exercising restraint with regulatory powers that courts have ruled must be narrowly limited for the purpose of allowing the public to discern corruption regarding substantial expenditures related to the election of a clearly identified candidate.

Disclosure requirements are in part justified based on the government's interest in providing the electorate with information about the sources of election-related spending because it may deter actual corruption and avoid the appearance of corruption by exposing large expenditures to the light of publicity. In that case, government has a compelling reason to protect the public by requiring the disclosure of "electioneering" expenditures and the identities of those who fund them – only then can the public discern the corruption that is likely from a quid pro quo that emerges from a heavy financial investment in an election of a specific candidate.

Beyond the compelling government interest in protecting the public from corruption that could result from quid pro quo, there is a greater risk to the public from regulating free speech that merely engages in criticism of a politician's position on issues.

THE COURTS HAVE RULED IN FAVOR OF CITIZENS' FREE SPEECH

Multiple court rulings address the line between protected free speech and speech that clearly seeks to influence the outcome of a specific election through a financial investment. In his 2010 ruling, Judge Terry Wooten outlined and quoted from several landmark Supreme Court cases and the Fourth Circuit of Appeals, both of which are "controlling" courts in that South Carolina is subject to their rulings.

The cases:

Buckley v. Valeo, which struck down several provisions governing campaign spending as unconstitutional, was decided in 1976 and still stands. Among other things, the Supreme Court said in *Buckley* that:

- The right of citizens and organizations to speak out on public policy issues and to hold their government officials accountable is protected by the First Amendment. The First Amendment does not permit regulation or disclosure of speech that is not campaign-related.
- Mandatory disclosure requirements were only permissible when applied to contributions made for communications that "expressly advocate the election or defeat of a clearly identified candidate."
- Only actions "Unambiguously related to the campaign of a particular…candidate" could be regulated by campaign finance laws.
- The government interest in regulating political speech was related to corruption, defined as large contributions "given to secure a political quid pro quo from current and potential office holders."
- That the definition of political committee "need only encompass organizations that are under the control of a candidate or the major purpose of which is the nomination or election of a candidate."

McConnell v. Federal Election Commission ruled that speech could be also regulated that was "the functional equivalent of express advocacy."

- *Federal Election Commission v. Wisconsin Right to Life* clarified definition of "functional equivalent, ruling:
- "A court should find that an ad is the functional equivalent of express advocacy only if the ad is susceptible of no reasonable interpretation other than as an appeal to vote for or against a specific candidate."
- "Discussion of issues cannot be suppressed simply because the issues may also be pertinent in an election."
- "Where the First Amendment is implicated, the tie goes to the speaker, not the censor."

The Fourth Circuit noted in North Carolina *Right to Life v. Leake* that:

- The *Buckley* ruling on speech is based on the recognition that "only unambiguously campaign related communications have sufficiently close relationships to the government's acknowledged interest in preventing corruption to be constitutionally regulable."
- "[t]o date, the Court has only recognized two categories of activity that fit within *Buckley's* unambiguously campaign related standard: a) "'communications that in express terms advocate the election or defeat of a clearly identified candidate for' public office"; and b) "campaign communications that are the 'functional equivalent of express advocacy.'"

Citizens United v. Federal Election Commission:

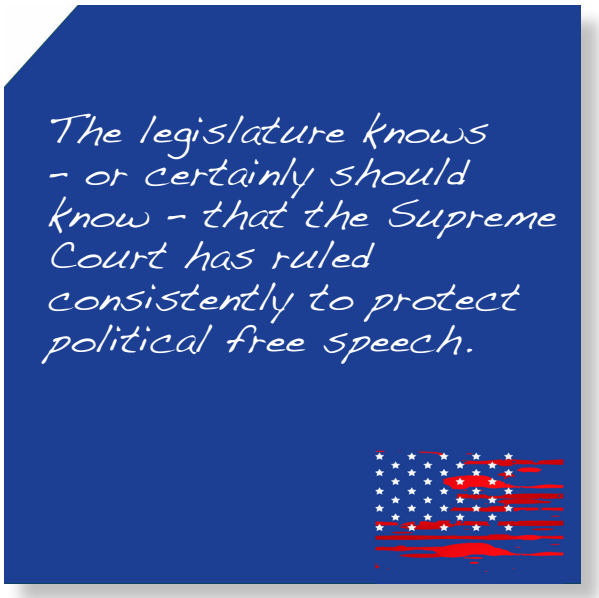
- Ruled that "Because speech is an essential mechanism of democracy – it is the means to hold officials accountable to the people – political speech must prevail against laws that would suppress it by design or inadvertence. Laws burdening such speech are subject to strict scrutiny, which requires the Government to prove that the restriction 'furthers a compelling interest and is narrowly tailored to achieve that interest.' [quoting WRTL]

- Noted that *Buckley* upheld certain limits "recognizing a governmental interest in prohibiting *quid pro quo corruption*."

- Rejected the contention that "disclosure requirements must be limited to speech that is the functional equivalent of express advocacy," but also noted that any regulation testing the boundaries would be subject to exact scrutiny of the courts which "requires a 'substantial relation' between the disclosure requirement and a 'sufficiently important' governmental interest."

WHERE DO THE COURT RULINGS LEAVE SOUTH CAROLINA?

Judge Terry Wooten, relying on the above precedents, ruled in 2010 in *South Carolina Citizens for Life v. Krawcheck* that the state's definition of "committee" was "overbroad" and thus unconstitutional. In his ruling, Judge Wooten noted that the proper starting point was the *Buckley* case, which addressed numerous challenges to the restrictions contained in the Federal Election Campaign Act. Wooten noted that "The 'unambiguously campaign related' standard was of particular significance in determining the scope of regulations directed at political committees." Wooten relied upon the "major purpose" test identified in *Buckley* in ruling that South Carolina definition of "committee" was too broad and "contains constitutional infirmities similar to those addressed by the Fourth Circuit in *Leake*."



Judge Wooten did not rule on plaintiff's other causes that included the contention that the state's definition of "influencing" the outcome of an election was overbroad and also that it was vague. The judge pointed out that he had already ruled on the definition of "committee," which he said encompassed the "influencing" language.

However, Judge Wooten did comment on the matter. He noted that while the Fourth Circuit ruling that only two categories of speech under *Buckley* were regulable, the *Citizens United* case had declined to limit the definition of "unambiguously campaign related" to just express advocacy and the functional equivalent thereof. As a result, Wooten said he believed it possible that the definition of influencing in place at the time could have passed constitutional muster.

It's important to note that the *Citizens United* Court did not rule that the definitions of express advocacy and functional equivalent were not the limits, but rather that the Court disagreed that they "must" be the limits. The Court emphasized that any regulation of speech outside the realm of what had been ruled regulable would be subject to exact scrutiny and must be based on a clear government interest, which the same Court defined as preventing corruption.

In addition to the Wooten ruling, a ruling by Judge Margaret Seymour also concluded that SC's definitions of "committee" were unconstitutional, citing the Fourth Circuit's ruling in *Leake*. Judge Seymour also noted that "states cannot use a gross dollar amount – e.g., campaign-related expenditures totaling $500 – as a proxy for an organization's 'major purpose…'"

Both courts cited prior Court rulings that made it clear states must be cautious and tread lightly when attempting to regulate political speech.

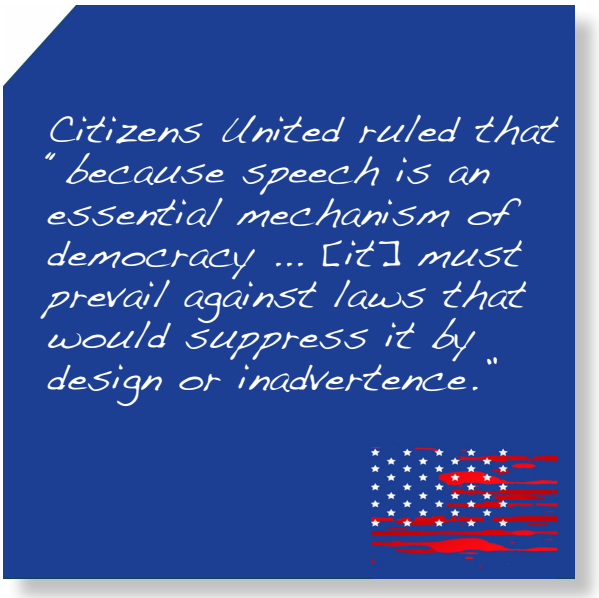
HOW CAN SOUTH CAROLINA LAWMAKERS SAFEGUARD FREE SPEECH AND CONSTITUTIONALLY REGULATE ELECTIONEERING?

Whether an electioneering communication law reaches only express advocacy or its functional equivalent or attempts to go beyond that line, it is clear that non-electoral speech cannot be regulated. States wishing to avoid constitutional challenges need to avoid including speech that does not influence an election, as well as avoid overly burdensome disclosure requirements. Exceptions for communications to members, non-partisan voter guides and get-out-the-vote efforts, communications by 501(c)(3) organizations, communications that do not reference elections, voting or the fact that someone is a candidate, will help to avoid an unconstitutional definition.

South Carolina lawmakers should tread carefully. The *Buckley* ruling that speech may only be regulated if is is "unambiguously related" to the election of a clearly identified candidate still stands. Under that test, only "express advocacy" and its "functional equivalent" have been clearly ruled as regulable speech by the government. And while it's true that the *Citizens United* Court did not rule that states must be limited to those definitions of "unambiguously related," the definitions nonetheless stand as the only ones that have been ruled on firm constitutional ground.

The current proposals are arguably less narrowly drawn than the prior laws addressed by Judge Wooten. For example, the senate proposal has no threshold by which to gauge when a contribution was substantial enough to trigger a governmental interest. Wooten referenced this problem in his ruling, citing cases that noted a low threshold for triggering regulation – such as $500, which was the previous threshold – would subvert the major purpose test. Judge Seymour commented similarly.

It isn't fair to use such a low threshold when $500 would likely not constitute the major spending of an organization. By the same token, applying such a standard even to individuals would trigger heavy burdens for a minimal investment. The federal government has a $10,000 threshold before election-



eering regulations take effect. South Carolina should set a high threshold of at least half the federal threshold to avoid burdening citizens and organizations that engage in minor communications that do not constitute a substantial threat of corruption.

Again, the right to engage in free political speech must not be infringed upon except in the case of a substantial government interest in protecting the public, which would apply in the case of allowing the public to discern a quid pro quo from a financer of a direct engagement in the election of a clearly identified candidate.

To be safe, South Carolina lawmakers should simply define electioneering as any express advocacy or its functional equivalent. To go beyond the already-established regulable speech would risk a court challenge, and to go beyond that standard with the current proposal would guarantee such a challenge.

The current proposal merely says an electioneering communication can be defined as that which references a clearly identified candidate for office and is made within sixty days of a general election, thirty days of a primary election. The few exceptions do

not protect issue advocacy such as the distribution of non-partisan candidates' voting records or communications critical of a candidate's position on specific issues or bills. Neither directly seeks to influence the outcome of an election but rather to educate the public on candidates' positions. The court has ruled that discussion of issues is protected and cannot be chilled simply because it may also be pertinent to an election.

The proposal would effectively force groups to either abstain from any criticism of politicians before an election or risk exposing their donors to intimidation from powerful legislators.

Not only would that cause a chilling effect, the law could constitute prior restraint by forcing citizens and organizations to request rulings and consult attorneys before making an otherwise ordinary communication referencing a politician who also happens to be running for office.

If the legislature chooses to further restrict protected political speech, beyond what the courts have ruled clearly constitutional, then it must go as far as possible to protect free speech. Below are some ways in which lawmakers could take extra steps to protect citizens' First Amendment right and from the damage of a long court battle:

The electioneering communication definition should be narrowly defined, and stick to those provisions that the Court has ruled acceptable, such as:

- Limiting electioneering communications to the federal definition that includes any broadcast, cable or satellite communication which is aired, broadcast, cablecast or otherwise disseminated through the facilities of a television station, radio station, cable television system or satellite system. This definition does not include mail or phone because both are difficult to track and fully control, and therefore an undue burden could be imposed on citizens.

- Limiting regulated communications to those made sixty days before a general election for the office sought by a clearly identified candidate or within thirty days of a primary sought by a clearly identified candidate.

- Ensuring that only those communications targeted to the relevant electorate for that office are included as "electioneering communications." Otherwise, mailings that are sent to a much broader audience that happens to include a specific district could be challenged.

- Set a threshold for the cost of electioneering communications to be more than $5,000 – such thresholds are protection for citizens who merely engage in the election process through communicating with friends, neighbors and other groups – this is precisely the type of communication that is endangered by allowing mail communications to be included. Setting a threshold would also ensure that the government does indeed have a compelling interest in disclosure to guard against corruption, which would be less likely at lower amounts spent in an election.

- Define "functional equivalent" to meet court-applied definitions, such as that the communication cannot reasonably be susceptible to any other reasonable interpretation other than as an appeal to vote for or against a specific candidate. In determining whether a communication is the function equivalent of express advocacy, it shall be judged by its plain language, not by an "intent and effect" test or other contextual factors.

It should make clear exceptions for communications that:

- Are from any organization operating under Section 501(c)(3) of the Internal Revenue Code of 1986. Such groups are already prohibited by the Internal Revenue Service from engaging in electioneering.

- A communication that is publicly disseminated through a means of communication other than a broadcast, cable, or satellite television, radio station. This would protect the Internet, the mail or telephone – all of which are virtually impossible to regulate, and thus place a heavy burden on the citizen or group to "control" completely who receives the communication (all but impossible for the Internet).

- A communication that is paid for by a candidate for federal office in connection with an election to federal office, provided that the communica-

tion does not promote, support, attack or oppose any state candidate.

- Any news, commentary, or editorial programming or article, or communication to an organization's own members – citizens are entitled to communicate with members of a private organization.

The First Amendment clearly protects the right of citizens to engage in unregulated political speech, whether critical or supportive of public officials and regardless of the timing of an election. That citizens may do so is not in question. Rather, what the South Carolina legislature is contemplating now is under what circumstances it may regulate otherwise protected political speech. Fortunately, the Supreme Court has answered this question clearly in multiple rulings: the state may regulate political speech only when it is "unambiguously" related to an election of a clearly identified candidate, and the investment in contributions or election-related expenditures is at a reasonably high threshold so as not to subvert the "major purpose" test. In that narrow instance, the danger of a "quid pro quo" is a compelling reason for government to require certain reporting information to empower the public to discern corruption. Otherwise there is no compelling government interest in regulating protected political speech, including issue advocacy that comments on an official's positions and voting record.

The current proposal would effectively force groups to either abstain from any criticism of politicians before an election or risk exposing their donors to intimidation from powerful legislators.

If lawmakers' goal is truly to regulate political speech only for the very narrow purpose of protecting the public from the corruption of a quid pro quo, to vigilantly protect citizens' First Amendment right to free speech and to remain on strong constitutional ground so as to avoid another court challenge, then it has a clear path to doing so by strictly adhering to the rulings of the U.S. Supreme Court.

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