SCPC LIMITED GOVERNMENT | FREE ENTERPRISE | INDIVIDUAL LIBERTY & RESPONSIBILITY
SCPOLICYCOUNCIL.ORG

Fast Facts:

Free Speech, Electioneering, and Constitutionality – The Debate in South Carolina

The South Carolina legislature is about to pass new regulations of political speech that go well beyond perfunctory regulation of specific election advertising, and that would have a chilling effect on constitutionally protected political speech. (See the sections of **House bill 3722** dealing with "electioneering.") Lawmakers are proposing aggressive regulations of free speech that would be flatly unconstitutional and almost certainly result in a federal court battle. Two federal judges already ruled South Carolina's prior laws unconstitutional, so the risk of a court challenge is real.

Lawmakers' bills to regulate free speech are unconstitutional. The U.S. Supreme Court has clearly ruled that political speech is fully protected except in the narrowest of circumstances.

Legislators have written new campaign laws in their so-called "ethics reform," a dense omnibus bill that contains multiple dangerous provisions, including unconstitutional regulation of free speech. If passed, the law would:

- Create a broad definition of "electioneering communication" that will regulate virtually all communications critical of politicians in the months before their elections.
- Force organizations engaged in protected non-election issue advocacy to either stop criticizing politicians or disclose their donors and expose them to intimidation.
- Regulate mail and telephone communications that are almost impossible to track.
- Force "prior restraint" on groups and citizens to request government rulings and engage legal counsel before risking exercising free speech.

When may lawmakers regulate political speech?

South Carolina legislators clearly believe they have the right to regulate political speech by forcing burdensome reporting and disclosure requirements on anyone engaged in communications that refer to a candidate 60 days before a general election, 30 days before a primary.

Lawmakers are wrong to believe they can regulate any speech except that which has been very narrowly ruled "regulable" by the courts. Supreme Court rulings on campaign finance heavily favor protection of political speech, with very narrow exceptions.

The Supreme Court ruled in 1976 (*Buckley v. Valeo*) that political speech is protected by the First Amendment and thus may not be regulated unless the speech is "unambiguously related" to a specific campaign of a particular candidate *and* raises a strong compelling reason for the government to protect the public from corruption through disclosure and reporting of the financers to discern a *quid pro quo*.

How does the Supreme Court define a communication to be "unambiguously related" to a campaign? If it is either:

- The express advocacy for or against a particular candidate; or
- The functional equivalent of "express advocacy."

Those are the *only two clear definitions* offered by the Supreme Court. Legislators may only regulate actions/communications that either (a) call for the election or defeat of a clearly identified candidate in a specific election, or (b) so obviously intend to do so that it can't reasonably be interpreted any other way. Any other regulation of any other type of communication will be subject to the courts' "exacting scrutiny."

While the Supreme Court has declined to rule that states *must* limit the definition of "unambiguously related" to those two instances, it *is* clear that the definition must fall under the category of "unambiguously related" to specific campaigns and present a clear need to protect the public from *quid pro quo* corruption.

Examples of communications that courts have ruled may be regulated:

- Ads that use terms such as "vote for" or "defeat" in reference to a clearly identified candidate, or that are clearly intended to say the same.
- Ads funded by either candidates' campaign committees or organizations that have as their "major purpose" the election or defeat of candidates – meaning the majority of their resources must be spent for that purpose.
- Communications unambiguously related to campaigns that spend above a threshold triggering compelling interest to protect public from quid quo pro corruption

What is protected speech?

- Issue advocacy, such as discussions that do not engage directly in elections but that raise candidates' positions/behavior on issues: *e.g.* candidate surveys and voter guides.
- Minor communications that may engage in electioneering but do not trigger compelling government interest in relation to corruption (the federal threshold is $10,000).