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**STATE LEGISLATIVE “RESPONSES” TO *CITIZENS UNITED*: FIVE YEARS LATER**

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INTRODUCTION

*Citizens United v. FEC* was a significant decision from the U.S. Supreme Court.<sup>1</sup> However, while the logic behind the decision is not as remarkable as the decision has been described in the press, the case has spurred significant public discussion about campaign finance and led to a significant number of state law changes.

The logic behind *Citizens United* is straightforward. Since *Buckley v. Valeo*, it has been clearly held that individuals had a constitutional right to engage in independent expenditures (IEs).<sup>2</sup> The Court in *Citizens United* extended this right to corporations—and by analogy also to other structures such as partnerships, unions, and associations.<sup>3</sup> Just a few months later, this decision was followed by *SpeechNow v. FEC*, from the D.C. Circuit, which similarly concluded that individuals may engage in unlimited independent expenditures when they join

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1. *See Citizens United v. FEC*, 558 U.S. 310 (2010).

2. *Buckley v. Valeo*, 424 U.S. 1, 14–15 (1976), *superseded by statute*, scattered sections of Federal Election Campaign Act of 1971, Pub. L. No. 92-225, 86 Stat. 3 (codified as amended at 2 U.S.C.), *as recognized in McConnell v. FEC*, 540 U.S. 93, 120–22 (2003), *partially overruled by Citizens United*, 558 U.S. at 365.

3. *Citizens United*, 558 U.S. at 342–43.

together in the form of an unincorporated association.<sup>4</sup>

What *Citizens United* did not do—contrary to media reports or the impressions that many seem to have of the decision—is authorize corporations to give money directly to candidates or spending in coordination with candidates without limitations or disclosure. Additionally, *SpeechNow* and *Citizens United* did not eliminate donor disclosure requirements for political committees. Rather, all receipts and disbursements through federal “independent expenditure only political committees” are reported regularly and publicly through the Federal Election Committee (FEC).<sup>5</sup> And the Court in *Citizens United* upheld the existing disclaimer and disclosure requirements that apply to non-committees against a constitutional challenge.<sup>6</sup>

In this Article, we focus on a survey of how the states have acted or reacted to *Citizens United*, on the notion of constitutionally permissible corporate spending on independent expenditures, and on the notion that individuals and other entities can form and create political committees that pool resources without limitation for the purpose of engaging in express advocacy.

Generally, the changes can be broken down into the following four categories: (1) contribution limit changes; (2) expanded definitions of “political committee”; (3) new “electioneering communications” rules; and (4) expanded disclosure rules for entities that are not political committees. We review how various states have approached these options and highlight the trends and unique features that some states are implementing.

We anticipate that this laboratory of democracy will continue as states around the country continue to introduce bills, pass laws, implement and propose regulations, face court challenges, and react to judicial decisions governing this area. We hope that this survey of changes is useful to scholars, journalists, and practitioners as they review the landscape of campaign finance regulation following *Citizens United* and *SpeechNow*.

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4. 599 F.3d 686, 697–98 (D.C. Cir. 2010).

5. Although there is no federal regulation about independent expenditure only political action committees at the federal level, the Federal Election Commission determined in an advisory opinion that any independent expenditure only political action committee whose primary purpose is to influence federal elections should register and report with the Federal Election Commission rather than the Internal Revenue Service (IRS). See FED. ELECTIONS COMM’N, ADVISORY OPINION 2010-11 (July 22, 2010), <http://saos.fec.gov/aodocs/AO%202010-11.pdf> (regarding Commonsense Ten).

6. See *Citizens United*, 558 U.S. at 367.

## I. CONTRIBUTION LIMIT CHANGES

In part because following *Citizens United* groups that are not associated with candidates and party committees could raise and spend unlimited funds in races, legislators in a number of states decided to increase contribution limits to candidates, political party committees, and traditional political action committees (PACs) in an attempt to even the proverbial playing field.

For example, Arizona’s contribution limits from individuals increased—first to \$2500 per election for legislative and statewide candidates from \$488 and \$1010, respectively—then to \$6250 from all except certified political committees, which can give \$12,500.<sup>7</sup> Arizona’s contribution limits from PACs increased from \$2000 to \$5000 per election for legislative and statewide candidates.<sup>8</sup>

Wyoming increased contribution limits from individuals to candidates from \$1000 per election to \$1500 for legislative candidates and \$2500 for statewide candidates.<sup>9</sup> The legislation also limited contributions from PACs to non-statewide candidates to \$5000 per election for legislative candidates and unlimited contributions to statewide candidates.<sup>10</sup> Like Wyoming, Minnesota also increased contribution limits from individuals and political committees from \$2000 per election to \$4000 for candidates for governor and lieutenant governor, and from \$1000 per election to \$2500 for candidates for attorney general, secretary of state, and state auditor.<sup>11</sup>

Other states increased limits that went beyond simply increasing the limits to candidates. In Florida, the legislature changed the law to increase contribution limits to candidates from \$500 per election to \$3000 per election for statewide candidates from the same \$500 per

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7. Act of Apr. 13, 2015, ch. 286 (Ariz.), [http://www.azleg.gov/FormatDocument.asp?inDoc=/legtext/52leg/1R/laws/0286.htm&Session\\_ID=114](http://www.azleg.gov/FormatDocument.asp?inDoc=/legtext/52leg/1R/laws/0286.htm&Session_ID=114); ARIZ. REV. STAT. ANN. § 16-905 (2015).

8. Act of Apr. 13, 2015; ARIZ. REV. STAT. ANN. § 16-905. Arizona had an interesting challenge to the increased limits not applicable to other states. *See* Ariz. Citizens Clean Elections Comm’n v. Brain, 322 P.3d 139 (Ariz. 2014). The Arizona Citizens Clean Elections Commission—established in 1998 as a result of a ballot initiative to administer a public financing system—challenged the increased limits pursuant to state law related to ballot initiatives. *Id.* at 140–41. The Arizona Supreme Court eventually determined that the increased contribution limitations did not in fact violate state law with respect to ballot initiatives. *Id.* at 143–44.

9. Act effective Jan. 1, 2015, ch. 189, 2013 Wyo. Sess. Laws 481, 482; WYO. STAT. ANN. § 22-25-102(c) (2015).

10. WYO. STAT. ANN. § 22-25-102(m).

11. Act of May 24, 2013, ch. 138, 2013 Minn. Laws 2353, 2370; MINN. STAT. ANN. § 10A.27(a) (West 2015).

election to \$1000 per election for legislative and local candidates.<sup>12</sup> Florida eliminated caps on contributions to political committees that make contributions to candidates.<sup>13</sup>

In Illinois, contributions are regularly indexed to inflation.<sup>14</sup> Following *Citizens United*, and in a clear recognition of the power of independent expenditures, Illinois designed and implemented a unique provision not found in any other state that completely *eliminates* contribution limits for candidates in statewide elections in which over \$250,000 of independent expenditures are made and for candidates in all other Illinois elections in which over \$100,000 of independent expenditures are made.<sup>15</sup> This provision has been invoked several times recently at both the local and statewide levels, including in the most recent gubernatorial race.<sup>16</sup>

Maryland's individual contribution limits increased from \$4000 to \$6000 to any single campaign finance entity (including parties, PACs, and candidates).<sup>17</sup> Maryland also increased its then existing aggregate contribution cap from \$10,000 to \$24,000 to all campaign finance entities.<sup>18</sup> Following the Supreme Court's decision in *McCutcheon v. FEC*,<sup>19</sup> Maryland's State Board of Elections determined and publicly announced that its aggregate limit—even after the increase in limits—was no longer enforceable.<sup>20</sup>

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12. Act of May 1, 2013, ch. 37, 2013 Fla. Laws 436, 465; FLA. STAT. ANN. § 106.08(1)(a) (West 2015).

13. Act of May 1, 2013, ch. 37, 2013 Fla. Laws 436, 465; FLA. STAT. ANN. § 106.08(1)(b).

14. Act of Dec. 9, 2009, Pub. Act 96-0832, 2009 Ill. Laws 8196, 8213; 10 ILL. COMP. STAT. ANN. 5/9-8.5(g) (2010). Prior to the conviction of Governor Blagojevich, Illinois did not have contribution limits. Contribution limits took effect in Illinois on January 1, 2011. *Id.*

15. Act of July 29, 2013, Pub. Act 98-0115, 2013 Ill. Laws 2890, 2949–50; 10 ILL. COMP. STAT. ANN. 5/9-8.5(h-10).

16. *Contribution Limits Off Search*, ILL. ST. BOARD ELECTIONS, <http://www.elections.il.gov/campaigndisclosure/contributionlimitoffelecselect.aspx> (last visited Jan. 17, 2016).

17. Act of May 2, 2013, ch. 419, 2013 Md. Laws 3713, 3723; MD. CODE ANN., ELEC. LAW § 13-226(b)(1) (LexisNexis Supp. 2015).

18. Act of May 2, 2013, ch. 419, 2013 Md. Laws 3713, 3723; MD. CODE ANN., ELEC. LAW § 13-226(b)(2).

19. *See generally* 134 S. Ct. 1434 (2014).

20. Md. State Bd. of Elections, Opinion Letter on Contribution Limits (Apr. 11, 2014), [http://www.elections.state.md.us/campaign\\_finance/documents/Aggregate\\_limits\\_04112014\\_final.pdf](http://www.elections.state.md.us/campaign_finance/documents/Aggregate_limits_04112014_final.pdf).

## II. CONTRIBUTION AND EXPENDITURE REPORTING CHANGES

With respect to contribution and expenditure reporting changes, states had widely varied reactions from no changes in states that already had independent expenditure reporting regimes to dramatic changes in other states. The changes varied as to dollar thresholds and frequency, but the general trend appears to indicate that states are moving toward more frequent reporting at lower thresholds of activity.

For example, Arizona significantly changed its independent expenditure reporting regime in early 2010, passing “emergency” legislation requiring corporations and labor organizations that make independent expenditures to file reports within twenty-four hours, after the decision in *Citizens United* invalidated the state’s prohibition on corporations and labor organizations making independent expenditures.<sup>21</sup>

The Illinois General Assembly passed a public act in the summer of 2010 amending the Election Code to provide for the disclosure of independent expenditures.<sup>22</sup> Entities other than natural persons are required to register as an Independent Expenditure Committee upon making independent expenditures aggregating more than \$3000 in a twelve-month period.<sup>23</sup> Before this change, independent expenditures were treated as in-kind contributions.

A non-partisan Advisory Committee on Campaign Finance reviewed Maryland’s existing campaign finance laws in 2010 and recommended that the General Assembly require enhanced disclosure of independent expenditures moving forward.<sup>24</sup> The General Assembly responded by enacting legislation requiring any organization making independent expenditures that are public communications or electioneering communications aggregating more than \$10,000 to file forty-eight-hour reports each time they spend more than \$10,000.<sup>25</sup> Maryland Independent Expenditure-Only PACs are also subject to this forty-eight-hour reporting requirement.<sup>26</sup> Finally, “out-of-state political

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21. Act of Apr. 1, 2010, ch. 4, 2010 Ariz. Sess. Laws 5, 5–11; ARIZ. REV. STAT. ANN. § 16-914.02(A) (2015).

22. Act of Dec. 9, 2009, Pub. Act 96-0832, 2009 Ill. Laws 8196, 8196; 10 ILL. COMP. STAT. ANN. 5/9-8.6(c) (West 2015).

23. 10 ILL. COMP. STAT. ANN. 5/9-8.6(b) (West 2015).

24. MD. ATTORNEY GEN.’S ADVISORY COMM. ON CAMPAIGN FIN., CAMPAIGN FINANCE REFORM 27 (2011), [www.oag.state.md.us/reports/campaignfinance.pdf](http://www.oag.state.md.us/reports/campaignfinance.pdf).

25. Act of May 2, 2013, ch. 419, 2013 Md. Laws 3713, 3736, 3742; MD. CODE ANN., ELEC. LAW §§ 13-306(c), 13-307(c) (LexisNexis Supp. 2015).

26. Act of May 2, 2013, ch. 419, 2013 Md. Laws 3713, 3748; MD. CODE ANN., ELEC. LAW § 13-309.1(e) (LexisNexis Supp. 2015).

committees”<sup>27</sup> and “participating organizations”<sup>28</sup> are required to file contribution and expenditure reports with the State Board of Elections and provide access to the campaign finance reports filed in the state where the committee is registered or with the state or FEC.<sup>29</sup>

Although Kentucky’s ban on corporate independent expenditures is still on the books, the Kentucky Registry of Election Finance has declared the provision invalid, and the opinion noted that the state’s disclosure provisions already in effect for other entities would extend to independent expenditures.<sup>30</sup>

In the months following the *Citizens United* decision, Wisconsin’s Government Accountability Board passed an emergency administrative rule requiring disclosure of independent expenditures over twenty-five dollars, an action that prompted litigation resulting in the Board’s agreement not to enforce the rule.<sup>31</sup> Though the court determined that such reporting requirements are okay for organizations that have the major purpose of express advocacy, the Board has yet to issue guidance on new reporting requirements.<sup>32</sup> At the time this Article went to print, there were no enforceable independent expenditure reporting requirements in Wisconsin. In states that already required independent expenditure reporting, some raised the threshold for reportable expenditures. In Florida, the threshold raised from \$100 to \$5000.<sup>33</sup> Iowa raised the threshold from \$100 to \$750.<sup>34</sup> Nevada raised the

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27. “Out-of-state” political committee means a non-federal political committee organized under the law of another state that directly or indirectly makes transfers in a cumulative amount of \$6000 or more in an election cycle to one or more state campaign finance entities. MD. CODE ANN., ELEC. LAW §13-301(a)–(b) (LexisNexis Supp. 2015).

28. “Participating organizations” are those organized under § 501(c)(4), § 501(c)(6), or § 527 of the Internal Revenue Code that make (1) contributions to campaign finance entities for the express purpose of causing the entity to make a disbursement in the state; (2) a donation to a person for the express purpose of causing the person to make an independent expenditure or disbursement for electioneering communication in the state; or (3) a donation to an out-of-state political committee for the express purpose of causing the political committee to make a disbursement in the state. MD. CODE ANN., ELEC. LAW § 13-309.2(a).

29. Act of May 2, 2013, ch. 419, 2013 Md. Laws 3713, 3730–31, 3749; MD. CODE ANN., ELEC. LAW §§ 13.301(b)–(c), 13-309.2(b).

30. Ky. Registry of Election Fin., Advisory Opinion 2010-001 on Intent of Kentucky Chamber of Commerce, Inc. to Engage in Express Advocacy in 2010 Elections (Mar. 24, 2010), [http://kref.ky.gov/Corporations/2010\\_001\\_Opinion.pdf](http://kref.ky.gov/Corporations/2010_001_Opinion.pdf).

31. WIS. ADMIN. CODE GAB § 1.91(3) (2015).

32. *Wis. Right to Life, Inc. v. Barland*, No. 10-C-0669, 2015 U.S. Dist. LEXIS 11012, at \*6–8 (E.D. Wis. Jan. 30, 2015).

33. Act of May 28, 2010, ch. 167, 2010 Fla. Laws 2075, 2102; FLA. STAT. § 106.071(1) (West 2015).

34. Act of Apr. 8, 2010, ch. 1119, 2010 Iowa Acts 435, 436; IOWA CODE ANN. § 68A.404(4) (West 2012); IOWA ADMIN. CODE r. 351-4.1 (2009).

threshold for reporting independent expenditures from \$100 to \$1000.<sup>35</sup>

### III. EXPANDED DEFINITIONS OF “POLITICAL COMMITTEE”

Some states have moved toward a broader definition of “political committee.” In Arizona, the types of committees included in the definition of political committee were changed to include an association or combination of persons that is organized for the primary purpose of influencing an election *and* knowingly received contributions or made expenditures of more than \$500 in connection with any election.<sup>36</sup> The Arizona Citizens Clean Elections Commission adopted rules<sup>37</sup> that modified the definition of “political committee” to provide that no organization “shall be presumed to be a political committee” “unless, a preponderance of the evidence establishes that during a two-year legislative election cycle, the total reportable contributions made by the entity plus the total reportable expenditures made by the entity exceeds both \$500 and fifty percent (50%) of the entity’s total spending during the election cycle.”<sup>38</sup>

Illinois created a type of political committee referred to as an “independent expenditure committee” for entities making independent expenditures exceeding \$5000 during any twelve-month period.<sup>39</sup> An independent expenditure committee is defined under Illinois law as any entity other than an individual formed for the exclusive purpose of making independent expenditures or non-coordinated “electioneering communications” during any twelve-month period in an aggregate amount exceeding \$5000.<sup>40</sup> Notably, nonprofit corporations lacking a major purpose of influencing elections must register as a political action committee or an independent expenditure committee if they make in excess of \$5000 in expenditures or electioneering communications in a twelve-month period.<sup>41</sup>

Montana crafted a subtype of political committee denoted as an

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35. Act of June 6, 2013, ch. 425, 2013 Nev. Stat. 2369, 2396; NEV. REV. STAT. ANN. § 294A.210 (LexisNexis 2013).

36. ARIZ. REV. STAT. ANN. § 16-901(20) (West Supp. 2015).

37. See CITIZENS CLEAN ELECTIONS COMM’N, CITIZENS CLEAN ELECTIONS ACT & RULES MANUAL 8–9 (2015), <http://www.azcleanelections.gov/CmsItem/File/37> (defining “political committee”).

38. ARIZ. ADMIN. CODE § R2-20-109 (2013) (Reporting Requirements).

39. 10 ILL. COMP. STAT. 5/9-1.8(f) (Supp. 2015).

40. 10 ILL. COMP. STAT. 5/9-1.8(f), 5/9-8.6(b) (Supp. 2015).

41. *Ctr. for Individual Freedom v. Madigan*, 697 F.3d 464, 491 (7th Cir. 2012) (upholding requirement that nonprofits lacking major purpose register as PAC or IE committee after making in excess of \$5000 in expenditures or electioneering communications within twelve-month period).

“incidental committee.” Under Montana law, organizations that do not have a primary purpose of supporting or opposing candidates or ballot issues may nonetheless become incidental committees by receiving a contribution or making an expenditure. These organizations are required to register and report as such upon making an expenditure or authorizing another to make an expenditure on their behalf.<sup>42</sup> Incidental committee reports must disclose the name, mailing address, occupation, and employer of each donor who has made aggregate contributions during the reporting period of thirty-five dollars or more if the donor (1) made earmarked contributions (i.e., contributions “that are designated by the donor for a specified candidate, ballot issue, or petition for nomination”), or (2) made contributions “in response to an appeal by the incidental committee for contributions to support incidental committee election activity, including in-kind expenditures, independent expenditures, election communications, or electioneering communications.”<sup>43</sup>

Following the Court’s ruling in *Citizens United*, the Tenth Circuit struck down New Mexico’s previous limits on contributions to political committees.<sup>44</sup> As of the writing of this Article, the New Mexico legislature has done nothing to replace the repealed provisions, but the New Mexico Secretary of State’s office is promulgating a rulemaking defining an “independent expenditure” and expanding the definition of a “political committee” to include committees that make independent expenditures in excess of \$500.<sup>45</sup>

#### IV. NEW “ELECTIONEERING COMMUNICATIONS” RULES

In Florida, a group that spends more than \$5000 on electioneering communications and whose election-related activity in the state is limited to electioneering communications must register in the state as an “electioneering communication organization” (ECO).<sup>46</sup> An ECO is required to register within twenty-four hours of receiving or expending funds for electioneering communications in excess of \$5000 if the

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42. MONT. ADMIN. R. 44.10.327(2)(c) (2015).

43. MONT. CODE ANN. § 13-37-232(1) (2015).

44. Republican Party of N.M. v. King, 741 F.3d 1089, 1103 (10th Cir. 2013).

45. N.M. Sec’y of State Proposed Rule (proposed Sept. 29, 2015) (to be codified at N.M. CODE R. § 1.10.13), <http://www.sos.state.nm.us/uploads/files/1%2010%2013%20NMAC%20v3.pdf>.

46. FLA. STAT. ANN. §§ 106.011(9), 106.03(1)(b) (West 2015); *see also* Nat’l Org. for Marriage v. Roberts, 753 F. Supp. 2d 1217, 1222–23 (N.D. Fla. 2010) (upholding the constitutionality of the provision). If an entity’s election-related activities are not limited to making electioneering communications, the entity may have to register as a political committee. *Id.* §§ 106.011(9), 106.03(1)(b).



expenditures are made within the thirty days before a primary or within the sixty days before another election.<sup>47</sup> ECOs must file reports on a schedule similar to that of a political committee.<sup>48</sup>

In 2013, Connecticut enacted new legislation in response to *Citizens United* and in an attempt to address the “influx of new money into our system, reset the playing field and make other improvements to our campaign finance laws” by increasing disclosure requirements for independent expenditure activity.<sup>49</sup> Under the new law, Connecticut independent expenditure committees that makes expenditures within 180 days of a primary or general election involving a Connecticut statewide elected official or state legislator must disclose the source and amount of any donation aggregating \$5000 or more during the twelve-month period prior to the election.<sup>50</sup>

Illinois requires entities (other than individuals) that spend more than \$5000 on electioneering communications in a twelve-month period to register as a PAC or as an IE committee.<sup>51</sup> An “electioneering communication” means

any broadcast, cable, or satellite communication, including radio, television, or Internet communication, that (1) refers to a clearly identified candidate[(s)] . . . who will appear on the ballot . . . [or] a clearly identified political party, . . . (2) is made within . . . [sixty] days before a general election . . . or . . . [thirty] days before a primary election, (3) is targeted to the relevant electorate, and (4) is susceptible to no reasonable interpretation other than as an appeal to vote for or against a clearly identified candidate . . . [or] political party . . . .<sup>52</sup>

Maryland nearly mirrored the federal rules when it defined “electioneering communication” as a broadcast, cable, or satellite communication that includes a “clearly identified candidate or ballot issue . . . made within [sixty] days of an election . . . [that] is capable of being received by . . . 50,000 or more individuals in the constituency . . . [and] is not made in coordination with, or at the request or suggestion

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47. See *id.* §§ 106.011(9), 106.03(1)(b)(1).

48. *Id.* § 106.0703(1)(b).

49. See generally Act of June 18, 2013, Pub. Act No. 13-180, 2013 CONN. ACTS 718 (Reg. Sess.) (providing for disclosure of independent expenditures); 56 H.R. Proc., Pt. 25, 2013 Sess., p. 8404 (May 31, 2013) (Remarks of Rep. Ed Jutila), [http://ctstatelibrary.org/wp-content/lh-bills/2013\\_PA180\\_HB6580.pdf](http://ctstatelibrary.org/wp-content/lh-bills/2013_PA180_HB6580.pdf).

50. CONN. GEN. STAT. ANN. § 9-601d(f)(1) (West Supp. 2015).

51. 10 ILL. COMP. STAT. ANN. 5/9-1.8 (West Supp. 2015).

52. See *id.* 5/9-1.14(a) (West 2010). There are exceptions for communications made by section 501(c)(3) organizations; communications between a labor organization and its members; and communications between an organization formed under I.R.C. § 501(c)(6) and its members. *Id.* 5/9-1.14(b).

of, a candidate . . . or . . . ballot [question] committee.”<sup>53</sup> Additional electioneering reports are due each time the person makes aggregate disbursements of \$5000 or more for electioneering communications.<sup>54</sup>

Florida extended its definition of electioneering communications beyond what Illinois and Maryland did by expanding the range of communication media covered by the definition. Florida defines an “electioneering communication” as a:

communication that is publicly distributed by a television station, radio station, cable television system, satellite system, newspaper, magazine, direct mail, or telephone and that:

1. refers 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;
2. . . . made within [thirty] days before a primary or special primary election or [sixty] days before any other election for the office sought by the candidate; and
3. [i]s targeted to the relevant electorate in the geographic area the candidate would represent if elected.<sup>55</sup>

Florida now requires that electioneering communications organizations file a Statement of Organization only after they receive contributions or make expenditures aggregating more than \$5000.<sup>56</sup> A Statement of Organization used to be required merely for anticipating receiving contributions or making expenditures of any amount.<sup>57</sup> Electioneering communications organizations are also required to file regular reports of all contributions received and expenditures made by or on behalf of the organization.<sup>58</sup> Of note, and different from Maryland, these “electioneering communications organizations” in Florida are not prohibited from coordinating their activities with political candidates or ballot measure committees.<sup>59</sup>

Hawaii started regulating electioneering communications, requiring persons making disbursements for electioneering communications aggregating more than \$2000 to file a statement of

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53. MD. CODE ANN., ELEC. LAW § 13-307(a)(3) (LexisNexis Supp. 2015).

54. *Id.* § 13-307(b) (LexisNexis Supp. 2015).

55. FLA. STAT. ANN. § 106.011(8)(a) (West 2015).

56. *Id.* § 106.03(1)(b)(1) (West 2015).

57. Act effective July 1, 2006, ch. 300, § 106.03(1)(b), 2006 Fla. Laws 3015, 3020 (codified as amended at FLA. STAT. ANN. § 106.03(1)(b)(1)).

58. FLA. STAT. ANN. § 106.0703.

59. *Id.* § 106.03.

information within twenty-four hours.<sup>60</sup> Hawaii defines an “electioneering communication” as:

any advertisement that is broadcast from a cable, satellite, television, or radio broadcast station; published in any periodical or newspaper or by electronic means; or sent by mail at a bulk rate, and that:

- (1) [r]efers to a clearly identifiable candidate;
- (2) [i]s made, or scheduled to be made, either within thirty days prior to a primary or initial special election or within sixty days prior to a general or special election; and
- (3) [i]s not susceptible to any reasonable interpretation other than as an appeal to vote for or against a specific candidate.<sup>61</sup>

Hawaii requires that each statement of information contain significant information about the organization making the electioneering communication, including the identification of individuals involved in controlling the entity, details on the expenditures made, identification of all persons who donate to the group for the purpose of its electioneering communications, and identification of the top three contributors in certain types of advertising.<sup>62</sup>

Under Hawaii law, “top contributor” means a contributor who has contributed an aggregate amount of \$10,000 or more to a non-candidate committee within a twelve-month period prior to the purchase of an advertisement without regard to purpose.<sup>63</sup> An advertisement is required to contain notice in a prominent location if the advertisement is broadcast, televised, circulated, or published, including by electronic means, and is paid for by a non-candidate committee that certifies to the commission that it makes only independent expenditures. This only applies to electioneering communications if they are made by an independent expenditure committee.<sup>64</sup>

Oklahoma’s Ethics Commission has enacted regulations requiring disclosure of electioneering communications.<sup>65</sup> Those making electioneering communications aggregating \$5000 or more made at least fifteen days before an election are required to file a report with the

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60. An Act Relating to Campaign Financing, No. 211, § 11-Z, 2010 Haw. Sess. Laws 681, 696–98; HAW. REV. STAT. ANN. § 11-341 (West Supp. 2014).

61. HAW. REV. STAT. ANN. § 11-341(d).

62. *Id.* § 11-341(b)(1)–(9).

63. *Id.* § 11-393 (West Supp. 2014).

64. *Id.* Hawaii law does contain an exemption for “short duration” broadcasts that would permit the top three donors to be omitted from the communication. *Id.*

65. OKLA. ETHICS COMM’N r. 2.108 (2015), <https://www.ok.gov/ethics/documents/2015%20ETHICS%20COMMISSION%20RULES%20FINAL.pdf>.

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Commission when candidate committees are required to file pre-election reports for the applicable election.<sup>66</sup> Within fourteen days of an election, reports are due within twenty-four hours.<sup>67</sup> Oklahoma defines an electioneering communication as:

any communication or series of communications that is sent by Internet advertising, direct mail, broadcast by radio, television, cable or satellite, or appears in a newspaper or magazine that (a) refers to a clearly identified candidate for state office, is made within sixty . . . days before a general election . . . or thirty . . . days before a primary or runoff primary election . . . for the office sought by the candidate, (c) that is targeted to the relevant electorate and (d) does not explicitly advocate the election or defeat of any candidate.<sup>68</sup>

Vermont broadly defines electioneering communication to include all communications about a public official in paid media, whether or not that public official is up for election:

“Electioneering communication” means any communication that refers to a clearly identified candidate for office and that promotes or supports a candidate for that office or attacks or opposes a candidate for that office, regardless of whether the communication expressly advocates a vote for or against a candidate, including communications published in any newspaper or periodical or broadcast on radio or television or over the Internet or any public address system; placed on any billboards, outdoor facilities, buttons, or printed material attached to motor vehicles, window displays, posters, cards, pamphlets, leaflets, flyers, or other circulars; or contained in any direct mailing, robotic phone calls, or mass e-mails.<sup>69</sup>

Perhaps the most striking aspect of Vermont’s law is that it contains no time limitation period. For example, a communication “attacking” or “supporting” someone even *after* an election could still be considered an electioneering communication under Vermont law. This sets Vermont drastically apart from most other states—essentially any time someone communicates about a public official in paid media, they are subject to the rule unless they are not “promoting or supporting” or “attacking or opposing” a candidate. So, for example, a communication saying “call Representative Smith and tell him to support the tax bill” could qualify as an electioneering communication in Vermont, even if it aired the day after Representative Smith’s election to the legislature.

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66. *Id.* r. 2.108(A).

67. *Id.* r. 2.108(B).

68. *Id.* r. 2.2(7).

69. VT. STAT. ANN. tit. 17, § 2901(6) (Supp. 2015).

In *Vermont Right to Life Committee, Inc. v. Sorrell*, the Second Circuit affirmed the District Court’s ruling in favor of the state, holding that (1) “the ‘electioneering communication’ definition, which triggers disclosure requirements, uses the words ‘promotes,’ ‘supports,’ ‘attacks,’ and ‘opposes’” is not “impermissibly vague” and is “sufficiently precise”<sup>70</sup> because it “clearly set forth the confines within which potential party speakers must act in order to avoid triggering the provision”;<sup>71</sup> (2) “the Vermont statutes’ extension beyond express advocacy does not render them unconstitutional” because the Supreme Court in *Citizens United* expressly rejected the “contention that the disclosure requirements must be limited to speech that is the functional equivalent of express advocacy”;<sup>72</sup> and (3) the same campaign contribution “limits may constitutionally apply” to a political action committee that only made independent expenditures as to a political action committee where the two are “functionally indistinguishable.”<sup>73</sup>

Washington lowered the threshold for reportable electioneering communications—from \$5000 to \$1000.<sup>74</sup> An “electioneering communication” is defined broadly as any “broadcast, cable, or satellite television or radio transmission, United States Postal Service mailing, billboard, newspaper, or periodical” that (subject to some exceptions):

- “Clearly identifies a candidate for a state, local, or judicial office either by specifically naming the candidate, or identifying the candidate without using the candidate’s name;”
- Appears “within sixty days before any election for that office in the jurisdiction in which the candidate is seeking election;” and
- “Either alone, or in combination with one or more communications identifying the candidate by the same sponsor during the thirty days before an election, has a fair market value of [\$1000] or more.”<sup>75</sup> Any sponsor of an electioneering communication must “report within twenty-four hours of, or on the first working day after, the date the electioneering communication is broadcast, mailed, or otherwise published”—regardless of whether the sponsor paid for all or a portion of the

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70. *Vt. Right to Life Comm., Inc. v. Sorrell*, 758 F.3d 118, 128 (2d Cir. 2014).

71. *Id.* (citing *McConnell v. FEC*, 540 U.S. 93, 170 n.64 (2003), *overruled by Citizens United v. FEC*, 558 U.S. 310 (2010)).

72. *Id.* at 132 (citing *Citizens United*, 558 U.S. at 369).

73. *Id.* at 145.

74. WASH. REV. CODE ANN. § 42.17A.005(19) (LexisNexis through 2015 3d. Special Sess. and 2015 election); Act of Apr. 22, 2011, ch. 145, sec. 2, § 42.17A.005(19), 2010 Wash. Sess. Laws 1076, 1079–80.

75. WASH. REV. CODE § 42.17A.005(19)(a).

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costs of the communication.<sup>76</sup>

#### V. EXPANDED DISCLOSURE RULES FOR ENTITIES THAT ARE NOT POLITICAL COMMITTEES

Several states expanded their disclosure rules to capture spending by entities that are not included in the state's definition of political committee.

While Iowa repealed its ban on corporate independent expenditures, it requires corporations making independent expenditures to obtain approval from their boards of directors.<sup>77</sup> Moreover, a political organization that is required to file reports with the Internal Revenue Service under § 527 of the Internal Revenue Code and that receives or expects to receive \$25,000 or more in gross receipts in any taxable year must file copies of its Form 8872 reports with the Board if it creates or disseminates an issue advocacy communication in Iowa.<sup>78</sup> For purposes of this rule, an issue advocacy communication is "any print, radio, televised, telephonic, or electronic communication . . . [that] is disseminated to the general public or a segment of the general public . . . [and] that refers to a clearly identified candidate for the general assembly or statewide office."<sup>79</sup>

Montana repealed its ban on corporate independent expenditures after a court struck it down,<sup>80</sup> but does require that corporations or unions making independent expenditures establish a fund consisting only of funds solicited from non-corporate and non-union sources for making political contributions.<sup>81</sup>

#### CONCLUSION

About the only certainty in campaign finance law is the lack of a long-term, stable status quo. The changes detailed in this Article are from a variety of states in just the five years since one Supreme Court decision changed the analysis surrounding the pooling of funds for independent expenditures. As the federal, state, and local governments

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76. *Id.* § 42.17A.305(2).

77. IOWA CODE ANN. § 68A.404(2) (West 2012); Act of Apr. 8, 2010, ch. 1119, sec. 3, § 68A.404(2), 2010 Iowa Acts 435, 436.

78. *See* IOWA CODE ANN. § 68A.401A(1)(b) (West 2012).

79. *Id.* § 68A.401A(4).

80. *See* Am. Traditional P'ship, Inc. v. Bullock, 132 S. Ct. 2490, 2491 (2012) (holding that Montana's ban on corporate independent expenditures is unconstitutional in light of *Citizens United*).

81. S.B. 289, 2015 Leg., Reg. Sess. (Mont. 2015); MONT. CODE ANN. § 13-35-227(4) (West 2015).

proceed through the next five years of elections under this changed paradigm, we expect to see more changes along the lines outlined in this Article, and likely other changes not yet even contemplated as lawmakers react to the variety of changed circumstances regularly faced in the field of campaign finance regulation.