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Campaign Finance Advisory Opinions at the State Level

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CAMPAIGN FINANCE ADVISORY OPINIONS AT THE STATE LEVEL

Allen Dickerson & Zac Morgan***

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INTRODUCTION

Campaign finance law is famously complex. At the federal level, “[c]ampaign finance regulations . . . impose unique and complex rules on 71 distinct entities . . . subject to separate rules for 33 different types of political speech.”¹ But the federal component is but one part of the overall system. Each of the fifty states, and numerous municipalities, has its own often-idiosyncratic regime.

Many areas of the law feature interlocking state and federal regulations, and sophisticated entities regularly employ legal counsel to help them navigate those requirements. But most areas of the law do not regulate activity “at the heart of the First Amendment.”² Nor do they purport to cover unsophisticated individuals and small groups. By contrast, many state systems impose registration and

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1. *Citizens United v. Fed. Election Comm’n*, 130 S. Ct. 876, 895 (2010) (internal quotation marks omitted).

2. *First Nat’l Bank of Bos. v. Bellotti*, 435 U.S. 765, 776 (1978).

reporting requirements on groups raising and spending far less than a thousand dollars.³

Of course, there is always the danger that civically-minded individuals will not foresee the dangers of noncompliance involved with soliciting \$20 donations,⁴ accepting donated materials for fliers,⁵ or receiving *pro bono* legal advice.⁶ But even where individuals or groups are aware of the need to determine and comply with local campaign finance rules, they may find that those rules are unclear or overwhelmingly complex.

This complexity poses a constitutional difficulty because “[p]rolix laws chill speech for the same reason that vague laws chill speech: People of common intelligence must necessarily guess at the law’s meaning and differ as to its application.”⁷ This is why the Supreme Court has noted that “rigorous adherence [to the promotion of bright-line rules] . . . is necessary to ensure that ambiguity does not chill protected speech.”⁸

There has been substantial and controversial litigation concerning the scope and interpretation of state and federal campaign finance laws. But litigation is expensive, and not all speakers wish to bear the burdens or notoriety associated with constitutional challenges. Some—indeed most—simply wish to know what is required of them, with every intention of studiously complying with their legal duties. If they cannot gain concrete guidance, they may not speak. This is especially true given the severe penalties provided by many state campaign finance systems, and the prevalence of private rights of action (often used by political opponents),⁹ which together make the costs of legal errors potentially orders of magnitude greater than the value of the original activity.¹⁰

3. *E.g.*, FLA. STAT. § 106.011(1)(A) (2012) (\$500); GA. CODE ANN. § 21-5-34(2)(A) (2012) (\$500); MICH. COMP. LAWS § 169.203(4) (2012) (\$500); R.I. GEN. LAWS § 17-25-3(10) (2012) (\$10).

4. *See* COLO. REV. STAT. § 1-45-108(1)(a)(I) (2012).

5. *See* Sampson v. Buescher, 625 F.3d 1247 (10th Cir. 2010).

6. *See* Farris v. Seabrook, 677 F.3d 858 (9th Cir. 2012).

7. Citizens United v. Fed. Election Comm’n, 130 S. Ct. 876, 899 (2010) (internal quotation marks omitted).

8. FCC v. Fox Television Stations, Inc., 132 S. Ct. 2307, 2317 (2012).

9. *See, e.g.*, Sampson, 625 F.3d at 1251.

10. In Florida, failure to report a required contribution makes any candidate, treasurer, or PAC officer “subject to a civil penalty equal to three times the amount involved in the illegal act.” FLA. STAT. § 106.19(2) (2012). In Colorado, fines start at \$50 per day (including holidays and weekends) and continue for perpetuity until any deficiencies are resolved. COLO. CONST. art XXVIII, § 10(2)(a).

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At the federal level, this concern is somewhat ameliorated by the FEC's ability to provide advisory opinions. There have been hundreds of these opinions written to date.¹¹ An advisory opinion request, however, will not always be granted. This is because there are six commissioners, four of whom must vote to approve an advisory opinion, and no more than three commissioners may be of the same political party.¹² Tie votes on advisory opinions do occur.¹³ But obtaining an advisory opinion conveys a number of advantages. Most importantly, abiding by the opinion immunizes the requester against legal liability.

The states should consider the federal system, in this instance, as a model. By creating advisory opinion mechanisms that concretely advise potential speakers as to their rights and responsibilities, state and local governments can eliminate a major constitutional infirmity: vague, unclear, and prolix statutes that do not provide adequate guidance and force risk-averse speakers to be silent.

State systems should borrow three elements from the federal model. First, there should be a single officer or agency empowered with the interpretation of campaign finance laws and with the authority to issue advisory opinions concerning their operation. Second, that agency should be the same entity charged with enforcing the campaign finance laws. And third, there should be complete legal immunity for any requester, or similarly-situated person or entity, that follows the guidance given in an advisory opinion.

Table 1 categorizes each of the fifty states based on their adherence to this model. By our count, thirteen states have systems that closely conform to the federal model. The remaining states have one or more deficiencies. In some cases, states have no advisory opinion mechanism at all and provide little guidance and no safe harbor for activists and political committees wishing to understand the requirements of local law.

11. On the other hand, the sheer number of Advisory Opinions (AOs) issued by the Commission, and the Commission's tendency to use them as precedent for subsequent action, also pose a danger. The FEC may be developing a body of law too complex to give adequate guidance to individuals and groups wishing to discuss federal issues and candidates.

12. See 2 U.S.C. § 437c(a)(1) (2006).

13. R. SAM GARRETT, CONG. RESEARCH SERV., R40779, DEADLOCKED VOTES AMONG MEMBERS OF THE FEDERAL ELECTION COMMISSION (FEC): OVERVIEW AND POTENTIAL CONSIDERATIONS FOR CONGRESS (2009), available at http://www.bradblog.com/wp-content/uploads/CRS_FEC_Deadlocks.pdf.

This Article summarizes these results and the lessons learned from them. In particular, we examine a number of ways in which states have failed to develop comprehensive advisory opinion mechanisms. Indeed, despite the large volume of legislation designed to tighten campaign finance laws, and the resulting complexity seen at the state level, most states seem to have entirely overlooked the importance of a comprehensive advisory opinion mechanism.

I. THE FEC'S ADVISORY OPINION SYSTEM

The Federal Election Commission (FEC) is the administrative agency charged with enforcing the federal campaign finance laws.¹⁴ It is a troubled entity: the last few years have seen a string of major decisions deadlock on partisan 3-3 votes;¹⁵ an inability to nominate and confirm new commissioners has led to all serving commissioners staying beyond their assigned terms;¹⁶ and the agency's rules have on occasion been invalidated by federal courts.¹⁷ Yet because the alternative to an independent commission is enforcement of campaign finance laws by politically-entangled entities, the FEC appears to be here to stay.¹⁸

Despite its weaknesses, the Commission has an important and praiseworthy role. The agency's advisory opinion power allows it to expeditiously clarify what the federal campaign finance regime requires, helping to limit the law's troubling ambiguity. Under the current system, any party that plans to engage in some activity that may brush against the campaign finance system may petition the FEC

14. See *About the FEC*, FED. ELECTION COMMISSION, <http://www.fec.gov/about.shtml> (last visited Mar. 29, 2013).

15. See, e.g., Press Release, Campaign Legal Ctr., FEC Deadlocks On Attempted Evasion of Disclosure Laws (June 14, 2012), available at http://www.campaignlegalcenter.org/index.php?option=com_content&view=article&id=1766:june-14-2012-fec-deadlocks-on-attempted-evasion-of-disclosure-laws&catid=63:legal-center-press-releases&Itemid=61; Rick Hasen, *FEC Deadlocks 3-3 on Ruling Whether Super PAC's Ads Copied Campaign Ads*, ELECTION L. BLOG (Feb. 27, 2012), <http://electionlawblog.org/?p=30648>.

16. Alex Knott, *More FEC Terms Expire, but Replacements Unlikely*, ROLL CALL (Apr. 5, 2011), http://www.rollcall.com/issues/56_105/-204592-1.html ("The only commissioner who will be serving an unexpired term . . . is Republican Caroline C. Hunter . . . for a term that expires in April 2013.").

17. See, e.g., *Citizens United v. Fed. Election Comm'n*, 130 S. Ct. 876 (2010).

18. See Robert A. Bicks & Howard I. Friedman, *Regulation of Federal Election Finance: A Case of Misguided Morality*, 28 N.Y.U. L. REV. 975, 1000 (1953) (noting that campaign finance disclosures were initially handled in-house by "the Clerk of the House and the Secretary of the Senate").

for such an opinion.¹⁹ The Commission must act on these advisory opinion requests (AORs),²⁰ often within thirty days.²¹ More importantly, the Commission's answer on an AOR is binding on the agency in that the FEC may not bring an enforcement action against an entity for engaging in conduct that the advisory opinion blessed.²²

One high-profile example of the AOR process in action involved the activities of late-night comedian Stephen Colbert. Mr. Colbert successfully procured an advisory opinion shielding *The Colbert Report's* parent company, Viacom, from having to open its books to the Commission when the *Report* "reported" on the activities of Colbert's farcical independent- expenditure-only committee ("Super PAC") Americans For a Better Tomorrow, Tomorrow.²³ Thanks to the FEC's advisory opinion system, Stephen Colbert and more serious entities can ensure that their actions will not initiate a multiyear FEC investigation with the possibility of fines and the certainty of legal fees. Such risks are significant for entities like Viacom, but they are devastating for smaller groups that simply cannot run the risk of costs that would total many times their operating budgets. Allowing entities to check with the FEC—rather than gambling on the advice of a lawyer or a lay reading of the law—provides the type of bright-line guidance necessary when dealing with political speech and associational rights. As Justice Kennedy wrote in *Citizens United*, "[t]he First Amendment does not permit laws that force speakers to retain a campaign finance attorney, conduct demographic marketing research, or seek declaratory rulings before discussing the most salient political issues of our day."²⁴

In practice, of course, many entities and individuals—especially those involved with resource-intensive federal elections—are represented by counsel. But the FEC's advisory opinion power still remains a model. By and large the states have not implemented systems that offer the same level of certainty or flexibility.²⁵ This

19. See 2 U.S.C. § 437f(a)(1) (2006).

20. *Id.* § 437f(c)(2).

21. See Nat'l Def. Comm., AO 2012-27 (F.E.C. Aug. 24, 2012) (advisory opinion) (issued after being requested on July 26, 2012).

22. See 2 U.S.C. § 437f(c)(2).

23. See Colbert, AO 2011-11 (F.E.C. June 30, 2011) (advisory opinion).

24. *Citizens United v. Fed. Election Comm'n*, 130 S. Ct. 876, 889 (2010).

25. Another important issue in many states stems from the lack of any rulemaking procedure that allows statutes to be conformed to constitutional rulings of the Supreme Court. Such decisions often alter elements of state campaign finance systems, but legislation or a court order is necessary before those alterations are

places would-be actors in the awkward position of either not speaking or being forced to sue in order to ascertain their rights. The Center for Competitive Politics is currently representing one such client, the Coalition for Secular Government, in such a case in Colorado.²⁶ The result is precisely the situation that Justice Kennedy inveighed against: a small organization not knowing what it can and cannot do, and having no option short of litigation for finding out.

Unfortunately, thirty-eight states—nearly three-quarters of the Union—have failed to replicate the FEC’s advisory opinion system.²⁷ Instead, many states offer either no such mechanism—forcing speakers to guess as to what is permitted—or have created complex systems that render any guidance illusory.²⁸ These failures actively chill speech by making attorneys indispensable to organizations, many of which are small and cannot pay experienced counsel, that must understand state regulatory systems.

To demonstrate the wide diversity of state advisory opinion regimes, we have selected a sampling of states from our survey. Some states, such as Vermont and North Dakota, simply have no route for authoritative guidance aside from suing a state agency for a declaratory judgment. It is impossible to obtain an advisory opinion in those states. Others, such as Florida, have systems which, despite having all the necessary components, have crippled the overall system’s effectiveness by spreading its various functions across multiple agencies. And in Colorado, elements of an advisory opinion system exist, but there is no mechanism that grants the procurer of a favorable opinion any safe harbor. Other states, such as Alabama and Texas, combine these errors in various ways. Finally, a small

accepted. For instance, in the aftermath of the *SpeechNow.org v. FEC*, 599 F.3d 686 (D.C. Cir. 2010), case which permitted the creation of so-called “Super PACs,” some states provided no avenue for determining whether such groups were permitted by state law. The result is that agencies are still forced to abide by plainly unconstitutional laws placing contribution limits on, or outright prohibiting, committees structured purely for independent expenditures.

26. *Coal. for Secular Gov’t v. Gessler*, No. 1:12-cv-01708-JLM-KLM (D. Colo. Sept. 20, 2012).

27. Alabama, Arizona, Arkansas, California, Colorado, Connecticut, Florida, Idaho, Illinois, Indiana, Iowa, Kentucky, Louisiana, Maine, Maryland, Massachusetts, Mississippi, Montana, Nebraska, Nevada, New Hampshire, New Jersey, New Mexico, New York, North Dakota, Oklahoma, Oregon, Pennsylvania, Rhode Island, South Dakota, Texas, Utah, Vermont, Virginia, Washington State, West Virginia, Wisconsin, and Wyoming. *See infra* Table 1.

28. *See supra* note 27.

vanguard of states, including Delaware, have emulated—or even improved upon—the federal model.

II. COLORADO: A TOOTHLESS ADVISORY SYSTEM

The bulk of Colorado's campaign finance requirements may be found in Article XXVIII of the state constitution.²⁹ These are complex, and have been the subject of significant litigation.³⁰ But there is one point of clarity: a single state officer, the Secretary of State, is charged with enforcement of the law.³¹ State statutes make this clear, providing the Secretary with a number of significant powers relevant to elections. These include making “uniform interpretations of [the election] code” (with the assistance of the Attorney General) and enforcing the election laws through suits for injunctive action.³²

But here the Colorado system first diverges from that of the FEC. For although the Secretary issues advisory opinions, it is not a common practice and there is no statutory basis for doing so.³³ Indeed, the system is decidedly informal: one recent advisory opinion request, submitted through counsel, expressed confusion as to whether the Secretary of State or the Attorney General should issue an opinion, and refers to “conversations”—not legal authority—designating the former.³⁴

This informal monopoly may contribute to the principal flaw in the Colorado system. While the Secretary appears to be the only officer providing advisory opinions on campaign finance topics, and while he has been assigned by the state constitution to conduct rulemakings and otherwise serve as the authoritative interpreter of state elections laws,³⁵ he is not the sole enforcer of those provisions.

29. *See* COLO. CONST. art. XXVIII, § 1.

30. *See, e.g.*, *Sampson v. Buescher*, 625 F.3d 1247 (10th Cir. 2010); *Coal. for Secular Gov't v. Gessler*, 12-cv-01708-JLK-KLM (D. Colo. Sept. 20, 2012); *Independence Inst. v. Coffman*, 209 P.3d 1130 (Colo. Ct. App. 2008).

31. The exception is for cases involving the Secretary of State him or herself, which are referred to the Attorney General. COLO. CONST. art. XXVIII, § 9(1)(f).

32. COLO. REV. STAT. § 1-1-107(1)(c), (2)(d) (2012).

33. It appears that the Secretary has issued nineteen opinions since 2010. *See Advisory Opinions, Agency Decisions and Litigation*, COLO. SECRETARY ST., <http://www.sos.state.co.us/pubs/elections/CampaignFinance/opinion.html> (last visited Mar. 7, 2013).

34. Letter from Steven Gold, Gen. Counsel, ActBlue, to Paris Nelson, Elections Divs., Colo. Sec'y of State's Office (Jan. 21, 2011), *available at* <http://www.sos.state.co.us/pubs/elections/CampaignFinance/files/ActBlueAO.pdf>.

35. COLO. CONST. art. XXVIII, § 9(1)(b).

The Colorado Constitution specifically provides for complaints to be made to the Secretary of State by “any person” who believes Colorado’s campaign finance laws have been violated.³⁶ The Secretary then “shall” refer such complaints to an administrative law judge who “shall” hold a hearing and issue a ruling.³⁷ Any appeals are made, not to the Secretary, but to the Court of Appeals.³⁸ And while the Secretary is instructed to file an enforcement action following such a ruling, should he fail to do so, a private right of action exists for the complainant to do so directly.³⁹

While not involving a formal advisory opinion, at least one organization sought the advice of the Secretary of State, acted upon that advice, and was subsequently found to have violated Colorado law as a result of a private action brought by an advocacy group. In 2009, a group called Clear the Bench was formed to advocate for the removal of state supreme court justices up for their retention votes.⁴⁰ It originally applied to be a political committee—one that advocates for or against candidates for election and, consequently, one that may accept only limited contributions.⁴¹ But on the advice of the Secretary of State’s staff, Clear the Bench registered as an issue committee, which may accept unlimited contributions.⁴² This decision was later successfully challenged in a state administrative proceeding brought by Colorado Ethics Watch, an advocacy organization dedicated to stiffening campaign finance regulations in Colorado.⁴³ That opinion was upheld on appeal, with the court specifically noting that the views of the Secretary of State (who participated as *amicus curiae* in favor of Clear the Bench) were not entitled to deference because there had

36. COLO CONST. art. XXVIII, § 9(2)(a). While technically limited to certain violations, the relevant provisions cover the vast majority of campaign finance rules found in the state constitution.

37. *Id.*

38. *Id.*

39. *Id.* That Colorado allows *anyone* to enforce its campaign finance laws, including advocacy groups that would not have standing to do so in federal court, only compounds the problem.

40. *About CTBC*, CLEAR THE BENCH COLO., <http://www.clearthebenchcolorado.org/about/> (last visited Mar. 7, 2013).

41. *Colo. Ethics Watch v. Clear the Bench Colo.*, 277 P.3d 931, 933 (Colo. App. 2012); see also Joseph Boven, *Colorado SOS Staff Advised Clear the Bench to File as an Issue Committee*, COLO. INDEP. (May 10, 2010), <http://coloradoindependent.com/52966/colorado-sos-advised-clear-the-bench-to-file-as-an-issues-committee> (linking to email from the Secretary’s staff to Clear the Bench).

42. Boven, *supra* note 41.

43. See *Colo. Ethics Watch*, 277 P.3d at 931.

been no formal adjudication or rulemaking⁴⁴—precisely the function that would be served by a formal advisory opinion rendered pursuant to statute. Indeed, the advice of the Secretary’s staff was not even found to be “persuasive” authority.⁴⁵

Clear the Bench is a notable ruling for another, simpler reason. The Colorado Court of Appeals ruled that Clear the Bench was a political committee.⁴⁶ But the Secretary of State had advised it differently, and appeared before the court as *amicus curiae* to say so.⁴⁷ A binding advisory opinion power would have avoided this unfortunate conflict. But, more concretely, what sensible organization would ignore the opinion of the Secretary—the state’s sole campaign finance authority—and instead guess as to the future opinion of a state court?

In short, the Colorado Secretary of State may issue advisory opinions, but those opinions have no force of law, and do not, if followed, immunize requesters from legal harm. And there are real costs to this uncertainty: Colorado’s civil penalties are draconian, reaching up to five times the value of illegal contributions, or fines of \$50 per day (including weekends and holidays) for late reports.⁴⁸ For those individuals and groups functioning under the ambiguous rule of Colorado’s campaign finance laws, there can be no safe harbor, short of that provided by a lawsuit.

III. FLORIDA: TOO MANY MOVING PARTS

In Florida, the problem is not that there is no advisory opinion system. One exists, run out of the state’s Division of Elections.⁴⁹ The difficulty is that the Division of Elections is not the state’s only elections agency.

The Division (which is housed within Florida’s Department of State) may issue opinions that “until amended or revoked, shall be binding on any person or organization who sought the opinion or with reference to whom the opinion was sought.”⁵⁰ And unlike some states

44. *Id.* at 937.

45. *Id.*

46. *Id.* at 932.

47. *See id.*

48. COLO. CONST. art. XXVIII, § 10(2).

49. *Division of Election Advisory Opinions*, FLA. DIVISION ELECTIONS, http://doe.dos.state.fl.us/opinions/TOC_Opinions.shtml (last visited Mar. 7, 2013).

50. FLA. STAT. § 106.23(2) (2012).

that restrict advisory opinions to constitutional officers,⁵¹ the Division issues advisory opinions “when requested by any supervisor of elections, candidate, local officer having election-related duties, political party, . . . political committee, committee of continuous existence, or other person or organization engaged in political activity, relating to any provisions or possible violations of Florida election laws.”⁵² Florida’s advisory opinions are considered binding on the Division and other parties “and a court is not authorized to overturn the agency’s determination unless it is contrary to the language of the statute or clearly erroneous.”⁵³

But Florida fails to conform to the federal model because it has divided its enforcement and advisory opinion authorities. While the Division of Elections has authority to run elections, it is the Florida Elections Commission (somewhat-confusingly abbreviated “FEC”) that has “[j]urisdiction to investigate and determine violations of [the campaign finance statutes].”⁵⁴ The FEC is technically housed within the Attorney General’s office, but its enabling statutes make its independence clear.⁵⁵ The Commission’s members are appointed by the state’s governor with input from the state house and state senate leadership.⁵⁶ Florida’s own FEC may not give advisory opinions, and must “adhere to statutory law and advisory opinions of the division.”⁵⁷

At first glance, having two separate entities to regulate campaign finance seems defensible as a means to provide checks and balances in an inherently political environment. But there is a significant structural problem with the Division/FEC divide. The Division of Elections is largely structured by statute for handling ballot access and voting registration. Yet it has the vestigial responsibility of issuing advisory opinions and referring potential violations of the law to the FEC, which is somewhat more independent than the Secretary

51. *E.g.*, ALASKA STAT. § 44.23.020(7) (2012).

52. FLA. STAT. § 106.23(2).

53. *Smith v. Crawford*, 645 So. 2d 513, 521 (Fla. Dist. Ct. App. 1994) (quoting *Greyhound Lines Inc. v. Yarborough*, 275 So. 2d 1, 3 (Fla. 1973)).

54. FLA. STAT. § 106.25(1).

55. *Id.* § 106.24(1)(a) (“The commission shall not be subject to control, supervision, or direction by the Department of Legal Affairs or the Attorney General in the performance of its duties, including, but not limited to, personnel, purchasing transactions involving real or personal property, and budgetary matters.”).

56. *Id.* § 106.24(1)(b).

57. *See id.* § 106.26(13); *see also Frequently Asked Questions*, FLA. ELECTIONS COMMISSION, <http://www.fec.state.fl.us/FECWebFi.nsf/pages/FAQs> (last visited Mar. 7, 2013).

of State, who is merely appointed by the Governor.⁵⁸ Furthermore, as a result of this division, committees are expected to keep their books open to both the Division of Elections (which can refer potential violations to the FEC) and the Commission itself, which does the actual investigations. The agencies' "right of inspection may be enforced by appropriate writ issued by any court of competent jurisdiction."⁵⁹

While this may seem like a marginal inconvenience, repeated dealings with state agencies requesting books and information (all while determining whether an accidental violation will trigger penalties) can serve as a real impediment to smaller groups. As the Colorado examples make clear,⁶⁰ small entities with little sophistication deserve a system that is as straightforward and non-duplicative as possible. This goal would be helped by the Florida legislature folding the advisory opinion and campaign finance wings of the State Department into the FEC.

Additionally, the statutes make clear that the FEC is not the only entity that may enforce the campaign finance laws. The statute does not "limit[] the jurisdiction of any other officers or agencies of government empowered by law to investigate, act upon, or dispose of alleged violations of this code."⁶¹ This should be clarified to, at minimum, require other such agencies—to the extent feasible—to give due deference to the safe harbor that an advisory opinion creates.

In short, Florida's principal flaw is that its system is overly complex and provides no clear legal safe harbor for advisory opinion requesters. But there is statutory basis for such opinions, and they are entitled to some deference as a result.

IV. VERMONT AND NORTH DAKOTA: NO GUIDANCE WHATSOEVER

As messy as Colorado's private right of action regime and as duplicative as Florida's divided system may be, there are states that simply provide political speakers with no clear way to obtain authoritative advice. Both Vermont and North Dakota lack advisory

58. Steve Bousquest & Jeffrey S. Solocheck, *Kurt Browning Resigns as Florida's Secretary of State*, TAMPA BAY TIMES, Jan. 12, 2012, <http://www.tampabay.com/news/education/k12/kurt-browning-resigns-as-floridas-secretary-of-state/1210128>.

59. FLA. STAT. § 106.04(6).

60. See, e.g., *supra* note 30.

61. FLA. STAT. § 106.25(1).

opinion systems, and North Dakota maintains an enforcement method that seems particularly ripe for abuse.

While both states offer campaign finance guides to help committees and candidates walk through their systems,⁶² they also both disclaim that the guides offer any legal safe harbor.⁶³ The North Dakota campaign finance guide encourages would-be players to abide only by the North Dakota Century Code, the state's formal collection of statutes.⁶⁴ Both states' Attorneys General profess to offer advisory opinions, which—at first glance—seem to solve the problem of uncertainty. But North Dakota's constitution limits the recipients of such opinions to a list of state constitutional officers. And Vermont's Attorney General is permitted to “advise the elective and appointive state officers on questions of law relating to their official duties and shall furnish a written opinion on such matters, when so requested.”⁶⁵ While the office is not statutorily compelled to offer opinions to others outside of the state's officers, it will “in those rare instances where the opinion may resolve a major dispute or uncertainty in the law and where large numbers of people may be affected.”⁶⁶ But the state has not issued an opinion since 2008, and has only issued eleven opinions since 2000.⁶⁷ And the state has *never* promulgated such an opinion in answer to a question from a grassroots committee or an election campaign.⁶⁸

Both Vermont and North Dakota place their campaign finance officials within the office of the Secretary of State.⁶⁹ And while a committee treasurer or inexperienced candidate might be able to get guidance from a phone call to either state's agency, there is no safe harbor of the type offered by an advisory opinion.

62. See OFFICE OF VT.'S SEC'Y OF STATE, GUIDE TO VERMONT'S CAMPAIGN FINANCE LAW (2012), available at <http://vermont-elections.org/elections1/2012%20CF%20Guide%204.12.12.pdf>; N.D. SEC'Y OF STATE, HELPFUL CAMPAIGN PRACTICES (2011), available at <https://vip.sos.nd.gov/pdfs/Portals/camp-help-pract.pdf>.

63. See N.D. SEC'Y OF STATE, *supra* note 62 at 2.

64. *Id.*

65. VT. STAT. ANN. tit. 3, § 159 (2012).

66. *Attorney General Opinions*, OFFICE ATT'Y GEN., <http://www.atg.state.vt.us/issues/attorney-general-opinions.php> (last visited Mar. 7, 2013).

67. *Id.*

68. *Id.*

69. See *Elections & Campaign Finance Division*, VT. SECRETARY ST., <http://vermont-elections.org/> (last visited Mar. 7, 2013); *Campaign Financial Disclosure*, N.D. SECRETARY ST., <http://www.nd.gov/sos/campfinance/> (last visited Mar. 7, 2013).

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Disclosure reports and the like are filed with the Secretary of State's office in North Dakota:

State's Attorneys in North Dakota are charged with the primary statutory authority to prosecute [campaign finance] violations. Yet North Dakota State's attorneys, as elected officials, are often affiliated with one of the major political parties. Consequently, a State's Attorney charged with authority to prosecute a campaign contribution violation is subject to political pressure to prosecute or not to prosecute, depending upon which party the offending candidate belongs to.⁷⁰

In short, the state-level reporting requirements are enforced by local officials with partisan affiliations. The differences with the federal system, overseen by an evenly-divided board, are clear.

Similarly, Vermont imposes penalties for violating campaign finance laws that include fines and the possibility of up to half a year in prison.⁷¹ "In addition to the other penalties . . . , a state's attorney or the attorney general may institute any appropriate action, injunction, or other proceeding to prevent, restrain, correct or abate any violation" of the campaign finance reporting and contribution limits sections of the law.⁷² As in North Dakota, Vermont's Attorney General and State's Attorneys are elected officials. That North Dakota and Vermont have such limited opportunities for committees and candidates to obtain binding advisory opinions from a single campaign finance entity indicates that such a process has not been viewed as necessary. Similarly, the laws of both states indicate a high degree of trust in their elected prosecutors.

But as the Institute for Justice and Dr. Jeffrey Milyo have demonstrated, correctly interpreting campaign finance forms is difficult, with many of those who attempt to file disclosure reports asserting that the system is worse than filing taxes with the IRS, and that a lawyer is necessary to handle all of the requirements and to guide filers through the many hurdles to a successful filing.⁷³ And

70. Bruce Schoenwald, *A Conundrum in a Quagmire: Unraveling North Dakota's Campaign Finance Law*, 82 N.D. L. REV. 1, 21–22 (2006). This understanding was verified in a conversation between David Silvers of the Center for Competitive Politics and the Elections Division of the North Dakota Secretary of State on September 4, 2012.

71. VT. STAT. ANN. tit. 17, § 2806(a) (2012).

72. *Id.* § 2806(c).

73. Jeffrey Milyo, *Campaign Finance Red Tape: Strangling Free Speech & Political Debate*, INST. JUST. (Oct. 2007), http://www.ij.org/images/pdf_folder/

serious questions regarding the scope of statutes must be answered before organizations are faced with fines or forced to rely upon the tender mercies of a partisan State's Attorney—particularly when prison time is available for officers who make mistakes.

This is not a hypothetical. In several states, committees wishing to form state-level Super PACs were forced to bring suit before undertaking activities that were clearly constitutional in the aftermath of *SpeechNow.org v. FEC*.⁷⁴ Similarly, text message contributions were not permitted at the federal level until an advisory opinion from the FEC permitted them,⁷⁵ with the result that in the 2012 election cycle, campaign ads for President Obama included an SMS code for contributions.⁷⁶ State legislators passing campaign finance laws in the 1990s or early 2000s could not have foreseen novelties like Super PACs or text message contributions, and would-be speakers with access to such innovations cannot safely use them absent litigation.

V. OTHER STATES TEND TO COMBINE ONE OR MORE OF THESE WEAKNESSES

The examples above illustrate the three main weaknesses experienced by the majority of states. Indeed, very few states have systems that combine the three elements of a successful advisory opinion regime: a single actor for rulemaking, who is also entrusted with enforcement, and whose advisory opinions immunize the recipient from legal consequences for following an opinion's advice.

Texas, for example, has a remarkably good system on its face. The Texas Ethics Commission is vested with the power to “administer and enforce” the state's campaign finance laws.⁷⁷ The Ethics Commission also offers advisory opinions at the request of any person “about the application of any of these laws to the person in regard to a specified existing or hypothetical factual situation” on campaign finance

other_pubs/CampaignFinanceRedTape.pdf. Dr. Milyo serves as an academic advisor to the Center for Competitive Politics.

74. *E.g.*, *Yamada v. Weaver*, 872 F. Supp. 2d 1023 (D. Haw. 2012); *Pers. PAC v. McGuffage*, 858 F. Supp. 2d 963 (N.D. Ill. 2012).

75. *See FEC Record: Compliance*, FED. ELECTION COMMISSION, <http://www.fec.gov/pages/fecrecord/2012/october/txtmessage.shtml> (last visited Mar. 7, 2013).

76. *See* Alina Selyukh, *Obama Campaign to Start Accepting Text Message Donations*, REUTERS (Aug. 23 2012, 5:07 PM), <http://www.reuters.com/article/2012/08/23/us-usa-campaign-money-idUSBRE87M08U20120823>.

77. TEX. GOV'T CODE ANN. § 571.061(a)(3) (West 2012).

questions.⁷⁸ Reliance on such opinions is “a defense to prosecution or to imposition of a civil penalty.”⁷⁹ But the entire system is undermined by a Colorado-like private right of action. As a result, all Texans are permitted to sue as functional agents of the state to enforce the campaign finance laws.⁸⁰

While Texas law holds that acting in accordance with an Ethics Commission advisory opinion is a “defense” in such a court case,⁸¹ it is not an absolute defense that would force courts to dismiss a suit. Consequently, Texas’s system offers incomplete protection against personal or political litigation by sophisticated actors operating against grassroots activists.⁸²

Meanwhile, Alabama has cobbled together a system from the weaknesses of “no guidance” states such as Vermont and North Dakota, and paired it with the division of authority problem present in Florida, while adding a new wrinkle of its own. In Alabama, disclosure and reporting is handled by the office of the Secretary of State *and* the county probate judges.⁸³ But enforcement is handled by the (elected) Attorney General and the (elected) district attorneys.⁸⁴ And none of these parties may offer an advisory opinion to grassroots organizers.⁸⁵

78. *Id.* § 571.091(a)(7).

79. *Id.* § 571.097.

80. TEX. ETHICS COMM’N, CAMPAIGN FINANCE GUIDE FOR CANDIDATES AND OFFICEHOLDERS WHO FILE WITH LOCAL FILING AUTHORITIES 19–20 (Sept. 28, 2011), *available at* http://www.ethics.state.tx.us/guides/coh_local_guide.pdf (“Any citizen may file a criminal complaint with the district attorney, a civil complaint with the Ethics Commission, or a civil action against a candidate or officeholder for violations of title 15.”).

81. TEX. GOV’T CODE § 571.07 (West 2012).

82. *See* Sampson v. Buescher, 625 F.3d 1247, 1251 (10th Cir. 2010).

83. ALA. CODE § 17-5-11 (2012).

84. Both of which are partisan races. *See* STATE OF ALABAMA, CANVASS OF RESULTS, GENERAL ELECTION NOVEMBER 2, 2010, at 1–20 (Nov. 22, 2010), *available at* <http://www.sos.alabama.gov/downloads/election/2010/general/2010GeneralResults-AllStateAndFederalOfficesAndAmendments-CompleteWithWrite-inAppendix.pdf>.

85. The Alabama Attorney General is only entitled to give advisory opinions to certain enumerated officials. ALA. CODE § 36-15-1 (2012). There is also an Alabama Ethics Commission, which is only permitted to offer advisory opinions on Title 36, Chapter 25 of the Code of Alabama, while the Fair Campaign Practices Act is encoded in Title 17 of the Code of Alabama. ALA. CODE § 36-25-4(a)(9) (2012).

VI. DELAWARE: A NEW HOPE⁸⁶

In Delaware, the State Elections Commissioner supervises the state's campaign finance operations.⁸⁷ The Commissioner is appointed by the Governor and confirmed by the state's Senate for a term of four years.⁸⁸ He or she has authority to "[m]ake and publish such rules and regulations not inconsistent with the provisions of" the state's law and "such rules and regulations shall have the force and effect of law."⁸⁹ In Delaware, the Commissioner is empowered to "make a ruling" applying the campaign finance laws of the state "to a set of facts specified" by the requestor.⁹⁰ "Any candidate or treasurer who reasonably and in good faith acts in reliance upon any [such] ruling . . . shall not be liable nor subject to any penalty with respect to conduct conforming to the ruling."⁹¹

This is an example of good government. Delaware citizens can rest assured that the Commissioner, who is the sole official responsible for the state's campaign finance system, can offer legally binding advice, and the interpretive certainty such advice provides. Thankfully, Delaware is not the only state that has built a system that mirrors that of the FEC. By our count, thirteen of the fifty states employ systems that correspond to the federal model.⁹² Most of these states are in the South and the Midwest, a fact that may surprise some observers of "good governance."

CONCLUSION

The First Amendment's political speech rights are indispensable to the functioning of our republican government. The federal

86. New law related to the state's enforcement regime went into effect on January 1, 2013, after the writing of this Article. This paragraph assumes the reform has taken place.

87. DEL. CODE ANN. tit. 15, § 301 (2012); *About the Agency*, ST. DEL., <http://www.elections.delaware.gov/aboutagency.shtml> (last visited Mar. 8, 2013).

88. DEL. CODE ANN. tit. 15, § 301. The Commissioner serves at the pleasure of the Governor—an element that ought to be reformed. While it is possible that an interpretation of DEL. CODE ANN. tit. 15, § 8042 could grant a private right of action, it has never been utilized for such a purpose. *Cf.* DEL. CODE ANN. tit. 15, § 8042 ("For purposes of any civil remedy on behalf of any injured person, the Court of Chancery shall have jurisdiction.").

89. *Id.* § 8041.

90. *Id.* § 8041(2).

91. *Id.*

92. Alaska, Delaware, Georgia, Hawaii, Kansas, Michigan, Minnesota, Missouri, North Carolina, Ohio, South Carolina, Tennessee, and Wisconsin. *See infra* Table 1.

government has created a system where speakers know where to come for advisory opinions and need only deal with one agency throughout the enforcement process. But the states have a variety of systems that suffer from a number of flaws.

As we have discussed, Colorado has enabled every citizen of the state to become a temporary prosecutor by creating a private right of action that renders advisory opinions—which are already informal and unsanctioned—functionally useless. Florida has unnecessarily complicated an otherwise functioning system by rendering committees vulnerable to multiple agencies’ interpretations and by decentralizing some enforcement authority. Vermont and North Dakota do not provide potential speakers with any administrative safe harbor. Many other states also suffer from these weaknesses, singly or in combination.

Other states employ systems that are very close to the federal model but fail to provide the necessary certainty. Rhode Island, for example, has a relatively flawless systems but for the states’ failure to codify a safe harbor for recipients of advisory opinions.⁹³ This is a minor flaw that can be easily addressed by legislation. Other states have divided their enforcement agencies for good reasons: in a state where the Secretary of State is elected, it makes little sense for the Secretary to be charged with enforcing the campaign finance laws as to candidates for Secretary of State. Such a workaround makes sense, but also highlights the importance of making a state’s election commission a fully independent agency, not attached to any other elected executive or legislative officer.

States should move toward binding advisory opinions and single campaign finance authorities. This will provide an avenue for certainty. But in some states, such as Alabama, Vermont, and North Dakota, such a system will also remove the ability for abuse of the law by elected district attorneys. While the district attorneys of these states are all doubtless upstanding citizens and ethically motivated, no possibility should exist for the aberrant unscrupulous person to manipulate a system and suppress political opposition.⁹⁴ And the

93. See IND. CODE § 3R.I. GEN. LAWS § 17-25-5(c)(1) (2012). While such safe harbors may, in some cases, be adopted through judicial rulemaking, in the authors’ opinion, one’s First Amendment rights would be better protected by a rigorous safe harbor provision embodied via statute.

94. Cf. THE FEDERALIST NO. 51 (James Madison) (“It may be a reflection on human nature, that such devices should be necessary to control the abuses of government . . . experience has taught mankind the necessity of auxiliary precautions.”).

reactions to such abuses, as the Federal Election Campaign Act following the scandals of the Nixon administration illustrates, are often overbroad and may unduly damage the freedom of speech.

As a result, it is no surprise that in the absence of clarity in the state campaign finance systems, many would-be players and activists will choose not to speak at all, rather than bring costly litigation to ensure their rights in advance. And this will continue to happen in spite of the Supreme Court's assurance that "[t]he First Amendment does not permit laws that force speakers to retain a campaign finance attorney . . . or seek declaratory rulings [in court] before discussing the most salient political issues of our day."⁹⁵

The debate over the proper scope of campaign finance regulation will continue, but all parties should agree that the rules—whatever they may be—should be clear. State-level campaign finance opinions given by a single entity, which enjoys a monopoly over state enforcement actions, and which immunize the requester, should be that rare thing in our modern political life: an uncontroversial policy choice.

95. *Citizens United v. Fed. Election Comm'n*, 130 S. Ct. 876, 889 (2010).

2012] *STATE LEVEL ADVISORY OPINIONS* 791**Table 1.**

State	Single Enforcement Agency	Authority to Issue Advisory Opinions	Advisory Opinion Provides Safe Harbor ⁹⁶
Alabama ⁹⁷	No. ⁹⁸	No.	No.
Alaska	Yes. ⁹⁹	Yes. ¹⁰⁰	Yes. ¹⁰¹
Arizona	No. ¹⁰²	No. ¹⁰³	No.
Arkansas	No. ¹⁰⁴	Yes. ¹⁰⁵	No. ¹⁰⁶

96. A note on methodology. State laws are in constant flux; this information was compiled in late 2012. Any changes should not undermine the necessity of this paper's policy proposal. Similarly, unless a statute specifically provided for a safe harbor, we viewed the state's advisory opinion process as not offering one. This view is consistent with the need for explicit, clear immunity from suit.

97. *See supra* note 83–85 and accompanying text.

98. Both the Secretary of State and the judges of the probate courts are given the authority to “accept and file all reports and statements” from the various committees and campaigns. ALA. CODE § 17-5-11 (2012). Yet, the law is largely enforced by the Attorney General's office. *See* Rogers, AO 99-39 (Ala. Ethics Comm'n Oct. 6, 1999) (advisory opinion).

99. Section 15.13 of the Alaska Statutes seems to envision the Commission as the sole enforcer of the law, although it may be possible for the Attorney General's office to act independently. ALASKA STAT. § 15.13 (2012).

100. Under section 15.13.374 of the Alaska Statutes, any person may petition the Alaska Public Offices Commission for an advisory opinion. *Id.* § 15.13.374.

101. Under section 15.13.374(e) of the Alaska Statutes, complaints may not be considered about persons who acted according to advisory opinions; even if they were not the requesters. *Id.* § 15.13.374 (e).

102. Under section 16-924 of the Arizona Revised Statutes, the Arizona Secretary of State's office notifies the attorney general regarding statewide election violations, the county elections officer notifies the county or city/town attorney “as appropriate.” ARIZ. REV. STAT. ANN. § 16-924 (2012). Appeals from fines levied by these officers for lack of compliance is appealable to the state superior courts. *Id.* However, under ARIZ. REV. STAT. ANN. § 16-905(L):

If the filing officer, attorney general or county attorney fails to institute an action within forty-five working days after receiving a complaint under subsection K of this section, the individual filing the complaint may bring a civil action in the individual's own name and at the individual's own expense, with the same effect as if brought by the filing officer, attorney general or county attorney. The individual shall execute a bond payable to the defendant if the individual fails to prosecute the action successfully. The court shall award to the prevailing party costs and reasonable attorney fees.

103. The Arizona Attorney General's office may issue advisory opinions to county attorneys, but “does not issue opinions for private citizens.” *See Attorney General Opinions*, ARIZ. ATT'Y GEN. TOM HORNE, <http://www.azag.gov/opinions/> (last visited Mar. 8, 2013).

104. Power is specifically divided between the State Board of Election Commissioners, the Arkansas Ethics Commission, and the law enforcement arm of the state. *See* ARK. CODE ANN. § 7-4-118 (2012).

California	No. ¹⁰⁷	Yes. ¹⁰⁸	Yes. ¹⁰⁹
Colorado ¹¹⁰	No.	No.	No.
Connecticut	No. ¹¹¹	Yes. ¹¹²	No. ¹¹³
Delaware ¹¹⁴	Yes.	Yes.	Yes.
Florida ¹¹⁵	No.	Yes.	No.
Georgia	Yes. ¹¹⁶	Yes. ¹¹⁷	Yes. ¹¹⁸
Hawaii	Yes. ¹¹⁹	Yes. ¹²⁰	Yes. ¹²¹
Idaho	No. ¹²²	No. ¹²³	No. ¹²⁴
Illinois	No. ¹²⁵	No. ¹²⁶	No. ¹²⁷

105. The Arkansas Ethics Commission is permitted to issue advisory opinions regarding the elements of the state's election laws that fall under its bailiwick. *Id.* § 7-6-217(g)(2).

106. The statutes are unclear as to whether or not an advisory opinion from the Ethics Commission constitutes a safe harbor.

107. Section 83114 of the California Government Code specifically notes that the Fair Political Practices Commission is not the sole enforcement authority for violations of campaign practices. CAL. GOV'T CODE § 83114 (West 2012).

108. Under section 83114, the Fair Political Practices Commission is permitted to issue advisory opinions and advice letters to requestors. *Id.*

109. Under the same section, such opinions or letters provide a safe harbor. Advice letters are not a complete defense regarding criminal or civil proceedings, but reliance on a letter is a safe harbor regarding commission proceedings. Advisory opinions do constitute a safe harbor regarding criminal or civil proceedings. *Id.*

110. *See supra* notes 29–48 and accompanying text.

111. Under section 9-7b of the General Statutes of Connecticut, the State Elections Enforcement Commission serves as the conduit for all campaign finance violations. CONN. GEN. STAT. § 9-7b (2012). But under section 9-625 of the General Statutes of Connecticut, state referees and judges of the Superior Court are given investigatory authority “upon the written request of any state’s attorney or any assistant state’s attorney.” *Id.* § 9-625.

112. Section 9-7b(14) of the General Statutes of Connecticut grants the Commission power to “issue upon request and publish advisory opinions in the Connecticut Law Journal.” *Id.* § 9-7b(14).

113. The statute is unclear as to the legal safe harbor afforded by the opinions.

114. *See supra* notes 86–92 and accompanying text.

115. *See supra* notes 49–61 and accompanying text.

116. Under section 21-5-6, the Government Transparency and Campaign Finance Commission is the campaign finance clearinghouse. GA. CODE ANN. § 21-5-6 (2012).

117. *Id.* § 21-5-6(a)(13).

118. *Id.*

119. HAW. REV. STAT. § 11-314 (2012).

120. *Id.* § 11-315.

121. *Id.*

122. *See* IDAHO CODE ANN. §§ 34-201, 34-202 (2012).

123. *Id.*

124. *Id.*

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Indiana	No. ¹²⁸	Yes. ¹²⁹	No. ¹³⁰
Iowa	No. ¹³¹	Yes. ¹³²	Yes. ¹³³
Kansas	Yes. ¹³⁴	Yes. ¹³⁵	Yes. ¹³⁶
Kentucky	No. ¹³⁷	Yes. ¹³⁸	Yes. ¹³⁹

125. Under chapter 10, act 5, section 1A-8 of the Illinois Compiled Statutes, Illinois centralized the enforcement of the campaign finance system in the State Board of Elections. 10 ILL. COMP. STAT. 5/1A-8 (2012). However, Illinois does maintain a limited private right of action for complainants in cases where the Board fails to act. 10 ILL. COMP. STAT. 5/922 (2012).

126. *Id.*

126. *Id.*

127. *Id.*

127. *Id.*

128. The Indiana Election Commission is authorized to “[c]arry out” the campaign finance provisions of the state code. IND. CODE § 3-6-4.1-14 (2012); but Indiana splits some enforcement with the Election Division of the Secretary of State’s office. *See* IND. CODE § 3-6-4.2-2 (2012); IND. ELECTION DIV., 2012 INDIANA CAMPAIGN FINANCE MANUAL 82 (2011), *available at* http://www.in.gov/sos/elections/files/2012_Campaign_Finance_Manual_11-1-11_version.pdf.

129. The commission is empowered to “[i]ssue advisory opinions.” *Id.* § 3-6-4.1-25.

130. The statute is unclear as to whether or not a safe harbor exists. *Id.* Furthermore, it appears that an advisory opinion has not been issued since 2001. *See* Ind. Election Comm’n, *Campaign Finance Advisory Opinions*, IND. SECRETARY ST., http://www.in.gov/sos/elections/files/IEC_Campaign_Finance_Advisory_Opinions.pdf (last visited Mar. 29, 2013).

131. It is a duty of the Independent Ethics and Campaign Disclosure Board to “[e]stablish and impose penalties, and recommendations for punishment of persons who are subject to penalties of or punishment by the board or by other bodies, for the failure to comply with the requirements of this chapter, chapter 68A, or section 8.7.” IOWA CODE § 68B.32A(9) (2013). This opening for “other bodies” seems to eliminate the certainty of a unitary enforcement agency.

132. The Board permits advisory opinions. *Id.* §68B.32A(12).

133. “Advice contained in board advisory opinions shall, if followed, constitute a defense to a complaint . . . that is based on the same facts and circumstances.” *Id.*

134. “The Kansas Governmental Ethics Commission (GEC) is charged with administering, interpreting and enforcing the Campaign Finance Act and laws relating to conflict of interests, financial disclosure and the regulation of lobbying.” *Kansas Governmental Ethics Commission Homepage*, GOVERNMENTAL ETHICS COMMISSION, <http://www.kansas.gov/ethics/> (last visited Mar. 8, 2013).

135. Advisory opinions are issued by the Governmental Ethics Commission. *Opinions*, GOVERNMENTAL ETHICS COMMISSION, <http://www.kansas.gov/ethics/Opinions/> (last visited Mar. 8, 2013).

136. *Id.* (“The Commission’s advisory opinions serve to interpret the laws under the Commission’s jurisdiction. Pursuant to KAN. STAT. ANN. § 46-254 and KAN. STAT. ANN. § 25-4159, any person who acts in accordance with the provisions of such an opinion shall be presumed to have complied with the provisions of the applicable conflict of interests, lobbying, or campaign finance laws.”).

137. While the State Board of Elections “shall administer the election laws of the state,” Kentucky treats the “regulation of elections” differently than the “regulation

Louisiana	Yes. ¹⁴⁰	Yes. ¹⁴¹	No. ¹⁴²
Maine	Yes. ¹⁴³	No.	No.
Maryland	Yes. ¹⁴⁴	No.	No.
Massachusetts	No. ¹⁴⁵	Yes. ¹⁴⁶	No.
Michigan	Yes. ¹⁴⁷	Yes. ¹⁴⁸	Yes. ¹⁴⁹

of campaign finance.” KY. REV. STAT. ANN. § 121.120 (West 2012). The state’s Registry of Election Finance is empowered with enforcing the campaign finance statutes in the state. *Id.* However, “[t]he Attorney General, Commonwealth’s attorney, the registry, or any qualified voter may sue for injunctive relief to compel compliance with the provisions of Ky. Rev. Stat. Ann. § 121.056 and Ky. Rev. Stat. Ann. §§ 121.120 to 121.230.” *Id.* § 121.990(5).

138. The Registry is required to “render a written advisory opinion . . . to the person making [a] request not later than thirty (30) days after the registry receives the request.” *Id.* § 121.135(1).

139. Under section 121.135(4)(b) of the Kentucky Revised Statutes Annotated, a safe harbor is granted to the requester regardless of who attempts to bring a charge. *Id.* § 121.135(4)(b). However, section 121.135(4)(c) pointedly notes that it is not a defense for others who relied on the opinion who were “not the person or committee involved in the specific transaction or activity with respect to which the advisory opinion was rendered.” *Id.* § 121.135(4)(c).

140. LA. REV. STAT. ANN. § 18:1511.1 (2012) (“The Board of Ethics is placed in charge of enforcing the campaign finance rules as a ‘supervisory committee.’”).

141. *Id.* § 18:1511.2B (“The supervisory committee may render an advisory opinion concerning the application of a general provision of this Chapter, or a general provision prescribed as a rule or regulation by the committee. The supervisory committee may render an opinion in response to a request by any public official, any candidate for public office, any political committee, or the committee may render an advisory opinion on its own initiative. Such an opinion shall not constitute a rule under the provisions of the Administrative Procedures Act and the supervisory committee shall not be subject to that Act in carrying out the provisions of this Subsection.”).

142. The state’s ethics rules do not clearly state that an advisory opinion serves as a legal safe harbor. *See* STATE OF LOUISIANA RULES FOR THE BOARD OF ETHICS ch. 6 (2012), *available at* <http://www.ethics.state.la.us/Pub/Other/rules.pdf>.

143. The Commission on Governmental Ethics and Election Practices is placed in charge of administering Maine’s campaign finance rules. ME. REV. STAT. tit. 21, § 1003 (2011).

144. MD. CODE ANN., ELEC. LAW § 2-102 (West 2012).

145. Chapter 55, section 33(a) of the General Laws of Massachusetts provides voters a private right of action for certain campaign finance violations. MASS. GEN. LAWS ch. 55, § 33(a) (2012).

146. *Id.* ch. 55, § 3 (“He shall, from time to time as he deems necessary or advisable, issue rules and regulations in conformity with the provisions of this chapter and chapter thirty A, and shall also issue interpretative bulletins and respond with reasonable promptness to requests for information, interpretations and advice presented by candidates, state committees, political committees and members of the public.”).

147. Section 169.215 of the Michigan Compiled Laws places the Michigan Secretary of State in charge of the campaign finance regime. MICH. COMP. LAWS § 169.215 (2012).

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Minnesota	Yes. ¹⁵⁰	Yes. ¹⁵¹	Yes. ¹⁵²
Mississippi	No. ¹⁵³	No.	No.
Missouri	Yes. ¹⁵⁴	Yes. ¹⁵⁵	Yes. ¹⁵⁶
Montana	No. ¹⁵⁷	Yes. ¹⁵⁸	No.
Nebraska	No. ¹⁵⁹	No. ¹⁶⁰	No.
Nevada	Yes. ¹⁶¹	No.	No.

148. Section 169.215 permits the Secretary to issue “declaratory rulings” which are analogous to advisory opinions. *Id.*

149. “A declaratory ruling is binding on the Department and the requestor.” *Elections in Michigan: Declaratory Rulings and Interpretative Statements*, MICHIGAN.GOV, http://www.michigan.gov/sos/0,4670,7-127-1633_23669---,00.html (last visited Mar. 8, 2013).

150. MINN. STAT. § 10A.02, subdiv. 11 (2012).

151. *Id.* § 10A.02, subdiv. 12.

152. *Id.* § 10A.02, subdiv. 12(b).

153. Section 23-15-903 of the Annotated Mississippi Code gives the county commissioners the power to enforce violations of the election laws. MISS. CODE ANN. § 23-15-903 (2012).

154. Missouri splits the election authority for certain offices between local authorities and the state ethics commission. MO. REV. STAT. § 130.026 (2012). But investigatory and enforcement powers seem lodged in the ethics commission. *Id.* § 130.054.

155. *See Advisory Opinions*, MO. ETHICS COMMISSION, <http://www.mec.mo.gov/EthicsWeb/Opinions/Opinions.aspx> (last visited Mar. 8, 2013).

156. *Id.* (“Any Advisory opinion issued by the Ethics Commission shall act as legal direction to any person requesting such opinion. However, anyone examining such advisory opinion should be careful to note that an opinion of the Missouri Ethics Commission deals only with the specific request to which the opinion responded and only as to the law as it existed at the date of the response.”).

157. Section 13-37-125 of the Montana Code Annotated, the county attorneys share investigatory power with the Commissioner of Political Practices, who is permitted to hire his own attorneys to “prosecute violations of” the election code. MONT. CODE ANN. § 13-37-113 (2012).

158. *See Campaign Finance and Practices Opinions*, MONT. COMMISSIONER POL. PRACS., <http://politicalpractices.mt.gov/5campaignfinance/opinions.mcp>x (last visited Mar. 8, 2013).

159. Under section 32-202 of the Revised Statutes of Nebraska, the Secretary of State is charged with enforcement of the campaign finance laws. NEB. REV. STAT. § 32-202 (2012). However, enforcement is housed with the Nebraska Accountability and Disclosure Commission. NEB. REV. STAT. § 32-1612 (2012).

160. Under section 32-201 of the Revised Statutes of Nebraska, “[t]he Secretary of State shall decide disputed points of election law. The decisions shall have the force of law until changed by the courts.” *Id.* § 32-201. However, the statute does not provide a vehicle for the Secretary to promulgate an advisory opinion. *Id.* The statutes give no such authority to the Commission either.

161. Under sections 294A.410 and 294A.420 of the Nevada Revised Statutes, the Secretary of State is placed in charge of enforcing the state’s campaign finance regime. NEV. REV. STAT. §§ 294A.410, 294A.420 (2011).

New Hampshire	Yes. ¹⁶²	No. ¹⁶³	No.
New Jersey	Yes. ¹⁶⁴	Yes. ¹⁶⁵	No. ¹⁶⁶
New Mexico	No. ¹⁶⁷	Yes. ¹⁶⁸	No. ¹⁶⁹
New York	No. ¹⁷⁰	No. ¹⁷¹	No.
North Carolina	Yes. ¹⁷²	Yes. ¹⁷³	Yes. ¹⁷⁴
North Dakota ¹⁷⁵	No.	No.	No.

162. Section 666:8 of the New Hampshire Revised Statutes Annotated provides that “[t]he attorney general shall be responsible for the enforcement of the election laws.” N.H. REV. STAT. ANN. § 666:8 (2013); *see also id.* § 7:6-c.

163. New Hampshire’s list of powers granted to the Attorney General does not include the power to promulgate advisory opinions. *Id.* §§ 7:7 to :8.

164. Under section 19:44A-6(b) of the New Jersey Statutes Annotated, the Election Law Enforcement Commission (ELEC) is empowered “to enforce the provisions” of the campaign finance law. N.J. STAT. ANN. § 19:44A-6(b) (West 2012).

165. Under section 19:44A-6(f) of the New Jersey Statutes Annotated, the Commission is empowered to issue advisory opinions upon request. *Id.* § 19:44A-6(f).

166. The statute does not specifically offer a safe harbor for a requester. *Id.*

167. N.M. STAT. ANN. § 8-4-5 (2012) (“The bureau of elections shall perform those duties pertaining to the state administration of elections as are assigned by the secretary of state and which are pursuant to the election laws of the state.”); *see also id.* § 1-19-36B (“The Campaign Reporting Act [N.M. Stat. Ann. §1-19-25 (1978)] may be enforced by the attorney general or the district attorney in the county where the candidate resides, where a political committee has its principal place of business or where the violation occurred.”).

168. *Id.* § 1-19-34.4.

169. The statute does not specifically provide a safe harbor. *Id.*

170. N.Y. ELEC. LAW § 3-104 (McKinney 2012) (“The state board of elections shall have jurisdiction of, and be responsible for, the execution and enforcement of the provisions of article fourteen of this chapter and other statutes governing campaigns, elections and related procedures.”); *see also id.* § 14-126(1) (“Any person who fails to file a statement required to be filed by this article shall be subject to a civil penalty, not in excess of . . . one thousand dollars, to be recoverable in a special proceeding or civil action to be brought by the state board of elections or other board of elections.”).

171. Although not spelled out in the statute, the Board does issue formal interpretative opinions. However, there is no statutory backing for doing so under the present code. *Id.*

172. Section 163-278.22 of the General Statutes of North Carolina gives control of the campaign finance system to the State Board of Elections. N.C. GEN. STAT. § 163-278.22 (2012).

173. Section 163-278.23 gives the Executive Director of the Board of Elections the power to issue advisory opinions upon request of interested parties. *Id.* § 163-278.23.

174. *Id.* (“If the candidate, communications media, political committees, referendum committees, or other entities rely on and comply with the opinion of the Executive Director of the Board of Elections, then prosecution or civil action on account of the procedure followed pursuant thereto and prosecution for failure to comply with the statute inconsistent with the written ruling of the Executive Director of the Board of Elections issued to the candidate or committee involved shall be barred.”).

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Ohio	Yes. ¹⁷⁶	Yes. ¹⁷⁷	Yes. ¹⁷⁸
Oklahoma	No. ¹⁷⁹	Yes. ¹⁸⁰	No. ¹⁸¹
Oregon	No. ¹⁸²	No.	No.
Pennsylvania	Yes. ¹⁸³	No. ¹⁸⁴	No.
Rhode Island	Yes. ¹⁸⁵	Yes. ¹⁸⁶	No. ¹⁸⁷

175. *See supra* Part IV.

176. Sections 3517.151–153 of Baldwin’s Ohio Revised Code Annotated place the enforcement of campaign finance in the hands of the Ohio Elections Commission. OHIO REV. CODE ANN. §§ 3517.151–153 (West 2012). A private right of action in mandamus was specifically denied in *State ex rel. Ohio Democratic Party v. Blackwell*, 855 N.E.2d 1188 (Ohio 2006).

177. OHIO REV. CODE ANN. § 3517.153(D).

178. *Id.* (“When the commission renders an advisory opinion relating to a specific set of circumstances involving any of those sections stating that there is no violation of a provision in those sections, the person to whom the opinion is directed or a person who is similarly situated may reasonably rely on the opinion and is immune from criminal prosecution and a civil action, including, without limitation, a civil action for removal from public office or employment, based on facts and circumstances covered by the opinion.”).

179. Although Title 26, Chapter A1 of the Oklahoma Statutes deals with elections, elements related to campaign finance were recodified and given to the authority of the Oklahoma Ethics Commission. However, the Commission specifically notes that “[a] decision by the Commission does not limit the power of . . . the Attorney General, district attorneys, or a multi-county grand jury to investigate and/or prosecute alleged crimes.” OKLA. STAT. tit. 74, § 257:30-1-4(e) (2012).

180. *Id.* § 257:1-1-6(h) (“The [Oklahoma Ethics] Commission may, in its discretion and where appropriate, issue ethics interpretations pertaining to the provisions of this title when requested by any person or committee who may be subject to the jurisdiction of the Commission.”).

181. *Id.* (“Provided further, such interpretation shall be binding on the Commission in any subsequent proceeding under this title.”). However, the statute does not suggest that it is binding upon other actors.

182. Generally, the Secretary of State handles enforcement, but “[a] complaint alleging a violation involving the Secretary of State, a candidate for the office of Secretary of State, or any political committee or person supporting the Secretary of State or a candidate for the office of Secretary of State may be filed with the Attorney General.” OR. REV. STAT. § 260.345 (2012).

183. Pennsylvania’s election laws are enforced by the Secretary of the Commonwealth. *See* 25 PA. STAT. ANN. § 2621 (West 2013).

184. *See id.*

185. *See About Us*, R.I. ST. BOARD ELECTIONS, <http://www.elections.state.ri.us/about/> (last visited Mar. 8, 2013) (“The mission of the Board of Elections is to protect the integrity of the electoral process and to effectively and efficiently administer the provisions of the election laws of the United States and the State of Rhode Island including, but not limited to, the governance and conduct of elections, voter registration, campaign finance, public funding of campaigns and any other duties prescribed by law.”).

186. R.I. GEN. LAWS § 17-25-5(c)(1) (2012).

187. *Id.* § 17-25-5. The statute does not explicitly offer a safe harbor.

South Carolina	Yes. ¹⁸⁸	Yes. ¹⁸⁹	Yes. ¹⁹⁰
South Dakota	No. ¹⁹¹	No. ¹⁹²	No.
Tennessee	Yes. ¹⁹³	Yes. ¹⁹⁴	Yes. ¹⁹⁵
Texas ¹⁹⁶	Yes.	Yes.	No. ¹⁹⁷
Utah	No. ¹⁹⁸	No. ¹⁹⁹	No.

188. South Carolina has a state Ethics Commission to enforce all of its campaign finance rules, although the South Carolina State Election Commission runs the state's elections. S.C. CODE ANN. §§ 7-3-10, 8-13-320 (2012).

189. The Ethics Commission is given the authority to issue advisory opinions. *Id.* § 8-13-320.

190. The Commission's power to issue advisory opinions is predicated on the fact "that an opinion rendered by the commission, until amended or revoked, is binding on the commission in any subsequent charges concerning the person who requested the opinion and who acted in reliance on it in good faith." *Id.*

191. While disclosure is handled by the Secretary of State, "[t]he attorney general is responsible for investigating any violations related to the campaign finance regulations in South Dakota." CHRIS NELSON, SEC'Y OF STATE, SOUTH DAKOTA CAMPAIGN FINANCE REPORTING GUIDELINES UPDATED AUGUST 2010, at 13 (2010), *available at* <http://sdsos.gov/content/html/elections/electvoterpdfs/2012/Guide%20to%20South%20Dakota%20Campaign%20Finance%20Regulations2010Update.pdf>. Yet certain administrative penalties may be assessed by the Secretary of State. S.D. CODIFIED LAWS § 12-27-29.2 (2012). Furthermore, state's attorneys are granted some investigatory and prosecutorial power for civil actions at the local level. *Id.* § 12-27-40.

192. The Attorney General may only give opinions "upon all questions of law submitted to him by the Legislature or either branch thereof, or by the Governor." S.D. CODIFIED LAWS § 1-7-90 (2012) (emphasis omitted). The Secretary of State has no power to grant advisory opinions. *Id.* § 1-8-1.

193. Tennessee's campaign finance laws are enforced by the state's Bureau of Ethics and Campaign Finance. TENN. CODE ANN. § 4-55-103 (2012). County election commissions do overview financial disclosure of candidates, but are not engaged in statewide campaign finance. *See* TENN. CODE ANN. § 2-10-105. The Tennessee State Election Commission does not handle campaign finance. *Cf. State Election Commission*, TENN. SECRETARY ST., <http://tn.gov/sos/election/statecom.htm> (follow "About the State Election Commission" tab) (last visited May 24, 2013). There is a Tennessee Ethics Commission, which focuses on lobbying laws, not campaign finance. *See* TENN. CODE ANN. § 3-6-102.

194. *Id.* § 2-10-207(3).

195. *Id.* (stating that the advisory opinions "may be relied upon without threat of sanction with respect to the issue addressed by the opinion, if the candidate or committee conforms the candidate's or committee's conduct to the requirements of the advisory opinion").

196. *See supra* notes 77-79 and accompanying text.

197. Texas has a private right of action. TEX. ETHICS COMM'N, *supra* note 80, at 18.

198. Campaign finance and elections are run through the office of the lieutenant governor. UTAH CODE ANN. §§ 20A-11-101, 20A-11-104 (West 2012); *see, e.g., Disclosure Requirements*, UTAH LIEUTENANT GOVERNOR ELECTIONS, <http://www.elections.utah.gov/campaign-finance/disclosure-requirements> (last visited

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Vermont ²⁰⁰	No.	No.	No.
Virginia	No. ²⁰¹	No. ²⁰²	No.
Washington	No. ²⁰³	No.	No.
West Virginia	No.	No.	No.
Wisconsin	No. ²⁰⁴	Yes.	Yes. ²⁰⁵
Wyoming	No. ²⁰⁶	No. ²⁰⁷	No.

Mar. 8, 2013). However, the state grants a private right of action to registered voters. UTAH CODE ANN. § 20A-1-703 (West 2012).

199. The lieutenant governor's office does not have statutory authority to issue advisory opinions.

200. *See supra* Part IV.

201. Under Title 24.2 of the Code of Virginia, the State Board of Elections serves as the campaign finance clearinghouse. Yet, complaints of election law offenses are run through the Commonwealth's Attorney's offices. VA. CODE ANN. § 24.2-1019 (2012).

202. *Id.*

203. The Public Disclosure Commission handles only campaign disclosure, not limits on giving or other rules. WASH. REV. CODE § 42.17A.105 (2012). Enforcement is also handled by the attorney general and prosecuting attorneys, as well as through a private right of action. *Id.* § 42.17A.765.

204. The Government Accountability Board is charged with enforcing and administering the election and campaign finance laws of Wisconsin. WIS. STAT. § 5.05(1) (2013). However, the statute specifically notes that the law may be enforced by the district attorneys, and electors may choose between the two "where their authority is concurrent" requesting civil action be brought. WIS. STAT. § 11.60(4)–(5) (2013). If the state fails to act, "[a]ny elector may sue for injunctive relief to compel compliance with this chapter." WIS. STAT. § 11.66 (2013).

205. *Id.* § 5.05(6a) ("No person acting in good faith upon an advisory opinion issued by the board is subject to criminal or civil prosecution for so acting, if the material facts are as stated in the opinion request.").

206. Wyoming maintains a private right of action for candidates and parties, the law is enforced by district attorneys and the attorney general, yet the Secretary of State is the chief election officer for the state. WYO. STAT. ANN. §§ 22-25-108, 22-2-103 (2012).

207. The Secretary "shall prepare . . . [a]dvice or request from the attorney general's office advisory opinions on the effect of elections laws and their application, operation and interpretation." WYO. STAT. ANN. § 22-2-121 (2012). The Attorney General may issue advisory opinions, but only to state officers and either branch of the legislature. *Id.*