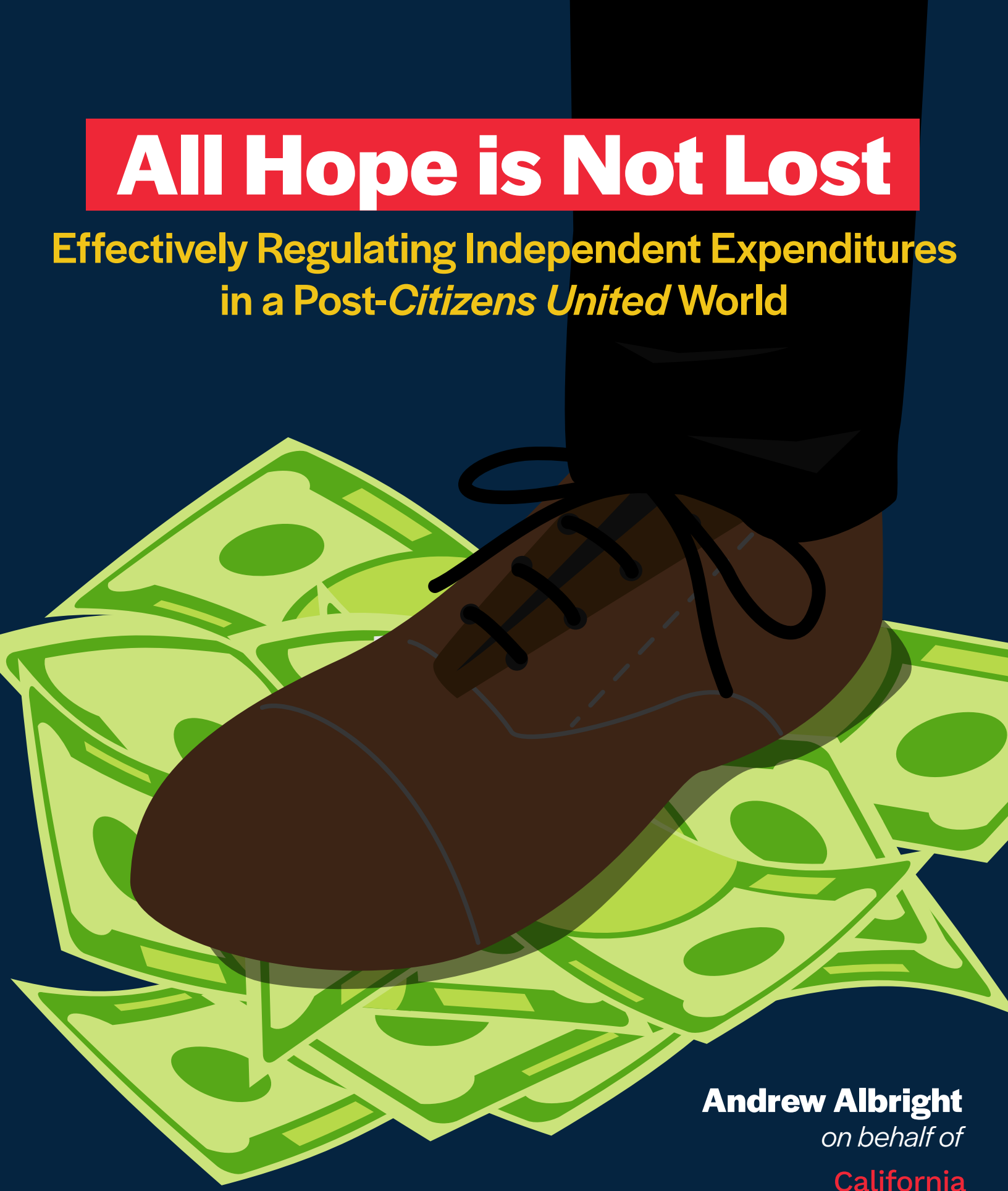
All Hope is Not Lost

Effectively Regulating Independent Expenditures in a Post-*Citizens United* World



Andrew Albright
on behalf of
California
Common Cause

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"There are two things that are important in politics. The first is money, and I can't remember what the second is."
– Senator Mark Hanna (AZ)

Andrew Albright
On behalf of California Common Cause

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After spending months absorbed in the topic of campaign finance law, I believe more firmly than ever that *Citizens United* is damaging to and continues to undermine the foundations of American democracy. Yet while it remains the law, reformers can take some comfort knowing there still exist pockets of campaign finance law ripe for reform.

EXECUTIVE SUMMARY

An independent expenditure is a sum of money spent by a third-party person, group of persons, or entity to support the election of a candidate with whom that third-party is technically unaffiliated. Unlike a campaign contribution, an independent expenditure cannot be capped by state or federal regulation, creating an avenue for unlimited spending in our politics. Just under one in every three dollars spent in California's 2022 state legislative races came in the form of an independent expenditure. Many scholars, politicians, and campaign officials have raised the alarm about independent expenditures due to their distorting effect on democracy. Wealthy individuals, corporate interests, and unions can use independent expenditures as a way to buy access to, and curry favor with, politicians to see their policy preferences enacted.

Despite the well-acknowledged distorting effects that independent expenditures can have in an election and on a democracy, the Supreme Court of the United States took all but the narrowest of policy solutions off the table in its landmark decision, *Citizens United v. FEC* (*Citizens United*). To withstand constitutional scrutiny, campaign finance regulations must protect against *quid pro quo* corruption, the trading of dollars for votes. *Citizens United* states that independent expenditures cannot be a source of *quid pro quo* corruption as long as the persons or entities spend their dollars independent of, or absent coordination with, the candidates those dollars support. Thus, the only form of regulation likely to withstand scrutiny under *Citizens United* are laws that ensure the independence of outside spenders. Reformers are therefore best positioned to turn their attention to strengthening coordination laws.

Coordination laws govern the relationships between candidates and third-party committees, or campaign spenders, that make independent expenditures in support of those candidates. This report examines the legal doctrine and public policy around coordination laws, in California, other states, and federally. It seeks to understand best-in-field practices, identify where California falls short, and propose how California can improve. It is based in part on fourteen interviews with academics, policymakers, and regulators in the campaign finance field, as well as a survey of relevant scholarship and research.

The most effective coordination laws adhere to the following four principles: (1) they cover all relevant spending, including both "express advocacy" and "issue advocacy," (2) they define coordination broadly, (3) they are free of loopholes, and (4) they are highly enforceable.

Although California's coordination laws are stronger than those in many other states, they suffer from four deficiencies. First, they fail to cover issue advocacy, meaning that California's coordination laws fail to regulate much of the most relevant campaign spending. Second, California employs a complex regulatory structure that distinguishes "general purpose" from "primarily formed" committees. This distinction creates loopholes that candidates can use to skirt California's coordination laws and other campaign finance limits. Third, California law is too flexible in allowing candidates to rebut presumptions of coordination in instances where coordination is altogether obvious. Finally, California allows political committees to make both direct contributions to candidates and independent expenditures on their behalf. This creates too much room for indirect coordination and sets California behind its peer states.

As the report documents in greater detail below, California can take three steps to tighten its laws. First, the state can extend its coordination laws to cover issue advocacy. Second, California can broaden its definition of "coordination" and afford those accused of coordination fewer opportunities to make bad-faith but ultimately successful rebuttals of clear evidence of coordination. Finally, California should consider barring "general purpose" and "primarily formed" committees from making independent expenditures. California can instead create an "independent expenditure only" committee that can make independent expenditures but cannot make direct contributions to candidates.

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I. INTRODUCTION

We began this project with an ambitious goal: to find an out-of-the-box idea to reign in independent expenditures. But we soon arrived at the same conclusion that many in the field reached long ago. Despite the clear distorting effects that independent expenditures have on American democracy, the legal framework set out by the Supreme Court of the United States (SCOTUS or "the Court") in *Citizens United v. FEC* (*Citizens United)* makes regulation virtually impossible. Indeed, the Court's formalistic approach to campaign finance has operated as a buzzsaw to some of the most innovative policy solutions.

Nevertheless, hope is not entirely lost. By working within the framework of *Citizens United*, reformers can instead focus their energy on regulating the relationships between outside spenders and the candidates on whose behalf they spend. Such regulations can help to guard against the trading of campaign dollars for votes.

This report follows in five parts. It begins with an overview of Independent Expenditures, their role in California elections, a discussion of their distorting effect on democracy, and how SCOTUS has complicated reform. Next, Part III summarizes the findings from legal and policy research as well as over a dozen conversations with campaign finance experts and practitioners. It summarizes the legal framework the Court set out in *Citizens United*, highlights the Court's impact on policy, and then identifies coordination laws as a viable path forward. Part IV then identifies four tenets of effective coordination laws and provides an overview of how California regulates coordination. In Part V, this report highlights three areas where California's laws fail those tenets and need strengthening.

This report then concludes by making three recommendations and suggesting how they might be implemented: (1) expand coordination laws to cover all relevant spending; (2) expand the definition of coordination to reach a greater array of relevant conduct; (3) bar general purpose and primarily formed committees from making IEs, and instead create a new "independent expenditure only" committee.

II. INDEPENDENT EXPENDITURES

An independent expenditure is an expenditure that a person or group, formally unaffiliated with a candidate, makes to support that candidate or oppose their opponent. These typically take the form of television, newspaper, or online ads, but outside groups may also use independent expenditures to pay for polling or get out the vote campaigns. In theory, these expenditures are made entirely independent of the candidate's campaign, meaning that the candidate had no say in any aspect of the expenditure. In reality, candidates and outside groups frequently find ways to indirectly coordinate with one another.

From a policy perspective, independent expenditures pose a vexing conundrum, as demonstrated in the following subsections. Independent, or outside spending,[1] accounts for as much as 30 percent of spending in California State Legislative races and rises as high as 60 percent in the most competitive races. Their use distorts the democratic process by creating an avenue for unlimited spending that, because the candidate is aware of who is paying for massive IEs on their behalf or against their opponent, regardless of whether there is coordination, can give wealthy interests a greater say in the election and policymaking process. Despite the opportunity for corruption IEs create, the Supreme Court prohibited some of the most effective policy options for regulating them in its 2010 case, *Citizens United*.

Independent Expenditures in California's 2022 Legislative Races

Every election cycle, campaign spending floods California, and 2022 was no exception. Across all State Assembly races, candidates raised over $139,000,000.[2] Across all State Senate races, candidates raised over $54,000,000.[3] Candidates raised these funds–approximately $193,000,000 in total–through direct contributions from voters in their district, donors outside of their district, political committees, corporations, and unions. In turn, these candidates spent this money at their own discretion to promote their candidacies.[4]

On top of funds raised by candidates, independent expenditures comprised $78,000,000 in spending across all of California's legislative 2022 races.[5] In other words, roughly one in every three dollars spent in California's legislative races came from independent, outside spending. And this spending is not evenly distributed. Across the ten most expensive legislative races in California's 2022 elections, candidates themselves fundraised approximately $20,000,000. But outside groups spent an additional $30,000,000.[6] About half of all independent expenditures were made within the 60 days leading up to election day[7].

1 This report uses the terms "independent expenditures," "independent spending," "third-party spending," and "outside spending" interchangeably to mean any money that is spent on behalf of a candidate yet formally independent from their campaign.

2 California Secretary of State, Cal-Access, https://cal-access.sos.ca.gov/.

3 *Id.*

4 These numbers represent contributions, not expenditures. Campaign contributions and campaign expenditures generally track one another fairly closely, but sometimes a candidate will not spend all of the funds in their campaign account. Sometimes, candidates spend beyond their bank account and go into debt.

5 Taryn Luna, *California Politics: Oil, housing and labor spent big on 2022 legislative races*, Los Angeles Times (Dec. 9, 2022, 9:00 AM), https://www.latimes.com/california/newsletter/2022-12-09/california-politics-oil-labor-realtors-ca-election-ca-politics.

6 Ben Christopher & Seema Kamal, *A gusher of campaign cash: Industry groups give big in California legislative races*, Cal Matters (Nov. 29, 2022), https://calmatters.org/politics/election-2022/2022/11/california-campaign-finance-industry-legislature./

7 *Id.*

The level of independent spending in 2022 legislative elections rose approximately 25 percent from 2020 and nearly doubled that spent in 2018. And this makes sense: In 2022, a combination of term limits and a wave of resignations led to nearly one third of the legislative races being "open" elections, meaning that the district did not have an incumbent standing for reelection.[8] To many outside groups, the Legislature appeared up for grabs for the first time in many years.

In 2022, independent spending came from all corners of the economy. From labor unions to health insurance companies, charter schools to tech companies, third-party spending took many forms. The single biggest source of outside spending came from the Oil, Gas, and Utilities industry.[9] This industry spent over $7,600,000 in state legislative races, over $5,800,000 of which came from a single organization called the "Coalition to Restore California's Middle Class, Including Energy Companies who Produce Oil, Gas, Jobs, And Pay Taxes" ("The Coalition"). This organization raised all of its money–$8,650,000 in total–from four companies: Chevron, Marathon Petroleum, Valero, and Phillips 66.[10]

The Coalition spent its money in a few ways. It gave $500,000 to the California Republican Party; it gave $249,000 to Jobs PAC, the Chamber of Commerce's political action committee; and it directly contributed a total of $417,000 to a committee primarily formed to support Kern County Supervisor Leticia Perez.11 Perez was an unsuccessful Democratic candidate for State Assembly; she lost her race to political-newcomer and Democrat, Jasmeet Bains.[12]

Despite Perez's loss, the Coalition had significant success elsewhere. The coalition made over $550,000 in independent expenditures towards digital advertising to support Democrat Angelique Ashby in her race against former Insurance Commissioner, Dave Jones.[13] Ashby won, narrowly. To her credit, Ashby denounced the support of the oil and gas industry.[14] Nevertheless, due at least in part to the industry's support, Ashby prevailed in the most expensive legislative race in 2022.[15] The Coalition was successful in its bid to defeat Jones, a bid perhaps related to Jones's support of Governor Newsom's plan to cap windfall profits within the oil and gas industry.

Countless groups like the Coalition spend money at all levels of elections in California, especially targeting their spending towards the most competitive races. Thanks to *Citizens United*, as long as these organizations remain independent from the candidate, they have the right to spend without limit. Scholars, politicians, and campaign officials alike have long sought to call attention to the distorting effect that this spending has on the democratic process.

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8 *Id.*; Ben Christopher, *What's behind the 'Great Resignation' of California lawmakers?*, Cal Matters (Mar. 12, 2022), https://calmatters.org/politics/2022/01/california-legislature-great-resignation/.

9 Christopher & Kamal, *supra* note 6.

10 California Secretary of State, *supra* note 2.

11 *Id.*

12 John Cox, *Bains declares victory over Perez in race for 35th District Assembly seat*, Bakersfield.com (Nov. 22, 2022), https://www.bakersfield.com/news/bains-declares-victory-over-perez-in-race-for-35th-district-assembly-seat/article_02e8a084-6a8c-11ed-bb36-539f1e38869d.html.

13 *Id.*

14 Angelique Ashby (@AshbyforSenate), Twitter (Oct. 12, 2022, 3:20 PM), https://twitter.com/AshbyForSenate/status/1580322643680452608?s=20&t=kLmnLjy6hJpiYxaZtaiD_g.

15 Christopher and Kamal, *supra* note 6.

How Campaign Finance Law Leads to Political Inequality

Money does not necessarily buy electoral outcomes. If it did, Jeb Bush would have become President in 2016[16] followed by Michael Bloomberg in 2020. Meg Whitman would have defeated Jerry Brown in 2010 to become California's 39th governor.[17] While true that money is necessary to a campaign's viability, money alone is not sufficient to secure an electoral outcome. Thus, the role of money in our political system is much more complex. Money affects legislative action, including not just outcomes but also what is on the agenda and what is not.[18] Money influences who elected officials and their staffers meet with.[19] It paves the way for special interests to have greater influence in policy matters. Money curries attention, action, inaction, and access.

Money's role in facilitating access creates political inequality, skewing democratic outcomes towards the preferences of wealthy special interests. In a well-known study of how election spending impacts policy change, Martin Gilens and Benjamin Page found that federal politicians are significantly more likely to change policy in line with the preferences of the economic elite. They found that the probability of policy change was static – about 30 percent – whether a tiny minority or large majority of average citizens preferred the policy change.[20] But that probability rose to 45 percent when 80 percent of the top decile of income earners favored the policy change.[21]

Often viewed as a tool of the wealthy, independent expenditures are also a tool of the white. For example, in 2014, 93 percent of all funds donated to federal PACs and Super PACs came from white donors.[22] This contribution gap in turn distorts the identities of our elected representatives as well as their policy positions. "For every additional million dollars donated in a primary election contest, the likelihood that candidate is a Black American is reduced by 5 percentage points."[23] The reverse is also true for white candidates; the more money spent in an election, the greater likelihood that a white candidate has to win their party primary.[24] And because policy opinion differs across racial groups, as independent spending increases in primary and general elections, white-voter policy preferences are enacted at a higher rate.[25]

Yet despite the clear distorting effects of unlimited spending in elections, reformers are largely pow-

16 Richard L. Hasen, Plutocrats United 1 (Yale Univ. Press 2016).

17 Seema Mehta & Maeve Reston, *Jerry Brown nearly matched Meg Whitman's campaign spending on TV in final weeks of race*, L.A. Times (Feb. 1, 2011), https://www.latimes.com/archives/la-xpm-2011-feb-01-la-me-governor-money-20110201-story.html

18 *Id.* at 46.

19 *Id.* at 50; Joshua L. Kalla & David E. Broockman, *Campaign Contributions Facilitate Access to Congressional officials: A Randomized Field Experiment*, 60 Am. J. Pol. Sci. 545 (2015).

20 Hasen, *supra* note 15 at 53 (quoting Martin Gilens & Benjamin I. Page, *Testing Theories of American Politics: Elites, Interest Groups, and Average Citizens*, 12 PERSPECTIVES ON POL. 564, 565 (2014), https://www.cambridge.org/core/services/aop-cambridge-core/content/view/62327F513959D0A304D4893B382B992B/S1537592714001595a.pdf/testing-theories-of-american-politics-elites-interest-groups-and-average-citizens.pdf).

21 Giles & Page, *supra* note 19.

22 Abhay Aneja, Jacob M. Grumbach & Abby K. Wood, *Financial Inclusion in Politics* 21 (February 6, 2021), USC Law Legal Studies Paper No. 21-3, *available at* https://ssrn.com/abstract=3767092. Researchers leveraged publicly available FEC data detailing funds donated to Super PACs; this data is incomplete, as it does not include donations to 501(c)(4)s, which are not required to disclose their donors. The authors of this study used statistical techniques to predict donor race from information about the donor's name and geographic location.

23 *Id.* at 24.

24 *Id.* at 25.

25 *Id.* at 26 - 29.

erless to reign in independent expenditures. The Supreme Court's *Citizens United* decision in 2010 has taken all but the narrowest of policy ideas off the table.

Citizens United: A Roadblock to Reform

For those concerned about the impact of independent expenditures on the ability of everyday Californians to have an equal say in political outcomes, reform and regulation might seem like an appropriate response. But over the past fifteen years, the Supreme Court has consistently narrowed the range of tools available for regulating IEs. In its most infamous and consequential campaign finance case, *Citizens United*, the Court effectively ruled that any form of direct regulation that hampers political speech rights, including the rights of entities that are non-natural persons, like corporations, is unconstitutional.[26] And the Court has long equated campaign cash with political speech: Absent the ability to spend money, the Court reasons, it would be impossible to pay for a political advertisement.

Citizens United is probably best known for its holding that corporations and unions have the same political speech rights as voters.[27] This holding paved the way for the current policy landscape: corporations, unions, political committees, and individuals can spend unlimited sums of money to influence elections. Governments are relatively powerless to limit that spending. But even more important, *Citizens United* constructed an impossibly high standard of constitutional review that any campaign finance regulation must pass. This standard has led to the fall of countless effective policies and has likely stopped many states from even attempting to regulate in the first place.

The section that follows traces *Citizens United*, its legal standard, its progeny, and its impact on policy. And while the Court has closed the door on a large swath of reform ideas, hope is not entirely lost. One area of policy – regulating the relationships between independent expenditure organizations and campaigns – remains a viable, albeit limited, area of reform.

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

27 *See id.*

III. LEGAL FRAMEWORK

Over the course of more than a dozen interviews and months of research and legal analysis, it became abundantly clear that direct regulation of independent expenditures is legally infeasible. Nevertheless, this work produced one clear path forward: tightened coordination laws.

This section begins by highlighting the relevant legal framework under which courts assess campaign finance regulations. Then, it proceeds with an assessment of policies and legal theories that this jurisprudence has taken off the table. This section concludes by identifying coordination laws as a limited yet viable area of reform still permissible under *Citizens United*.

The Legal Framework of *Citizens United*

Courts view campaign finance regulations as a burden on the First Amendment right to freedom of speech. Money facilitates a campaign's ability to communicate with voters, educate the public on pressing issues, and inform voters of their opponent's flaws. Thus, because money facilitates speech, the Supreme Court views restrictions, or regulations, upon an individual, union, corporation, or other entity's ability to spend in elections as an indirect burden on their ability to engage in political speech.[28] Courts therefore apply a high degree of legal scrutiny to campaign finance regulations.

Much of the relevant legal framework traces back to *Buckley v. Valeo,* a 1976 case considering the constitutionality of the Federal Election Campaign Act of 1971 and its 1974 amendments. The Court stated that any burden on political speech must be justified by a government's compelling interest in preventing "corruption" or "the appearance of corruption."[29] For example, a state can impose limits on how much money an individual can donate directly to a candidate because that limit guards against the possibility of an elected official trading their vote for high-dollar contributions. By contrast, the Court held that limits on how much money a campaign itself could spend did little to stem corruption; therefore, governmental limits on campaign spending (as opposed to donations to a campaign) could not withstand First Amendment scrutiny.[30]

Following *Buckley*, the touchstone of this analysis became a government's interest in preventing corruption. But this too set off a long-standing debate. Left-leaning justices tended to include "ingratiation and access" within a broad definition of corruption, while right-leaning justices tended to view corruption in its narrowest form: *quid pro quo* corruption.[31]

In 2010, the Court settled this debate in *Citizens United* with three legal maneuvers that largely freed independent expenditures from regulation. First, the Court unambiguously extended First Amendment rights to corporations and unions, two of the biggest sources of independent expenditures.[32] Second,

28 *Buckley v. Valeo*, 424 U.S. 1, 19 (1976).

29 *Id*. at 33.

30 *Id*. at 45.

31 Hasen, *supra* note 15.

32 *Citizens United*, 558 U.S. at 342-43.

the Court cabined the definition of "corruption" to *quid pro quo* corruption, meaning that campaign finance laws can only stand if they address corruption in its narrowest sense: the explicit trading of dollars for votes. Indeed, "[i]ngratiation and access . . . are not corruption," wrote Justice Kennedy.[33] Finally, the Court went one step further and held that *as a matter of law*, "independent expenditures . . . do not give rise to corruption or the appearance of corruption."[34] In other words, if campaign finance laws must prevent corruption in order to be constitutional, and if independent expenditures cannot corrupt, then in practice states cannot directly regulate IEs.

The Court underpinned its holding that independent expenditures cannot legally corrupt[35] with a rationale that such expenditures are made – in theory – entirely independent of a campaign. The Court stated that "[t]he absence of prearrangement and coordination with the candidate . . . alleviates the danger that [independent] expenditures will be given as a *quid pro quo* for improper commitments from the candidate."[36] As long as there is no coordination between the candidate and the entity spending on their behalf, the two parties could never come to a *quid pro quo* agreement. Despite the common understanding that the actions of a politician may change based on who is spending for or against them[37] – including when that spending is technically independent, but the candidate is well aware of who is responsible for the spending – the Court underpinned its entire opinion on a highly formalistic view of independence. In turn, the Court's laser focus on *quid pro quo* corruption has operated as a roadblock to meaningful reform of independent expenditures.

The Court's Impact on Campaign Finance Policy

A helpful dichotomy in thinking about campaign finance regulation emerged from much of the research and interviews that went into this report.[38] On the one hand, some laws seek to balance political inequality by "leveling down." That is, they directly regulate the use of independent expenditures. On the other hand, some laws seek to balance political inequality by "leveling up."[39] That is, they empower those with limited financial resources to nevertheless donate to campaigns.[40]

Although this report primarily focuses on "leveling down" regulation, many of those interviewed believe that carefully tailored "leveling up" policies can meaningfully counteract independent expenditures, generate greater participation, and bring new voters and donors into politics by giving them an incentive to donate to a campaign.[41] Predominantly, these reforms include democracy voucher systems that give voters money to contribute directly to candidates; public funding programs that match small

33 *Id.* at 360.

34 *Id.* at 357.

35 In subsequent cases, parties have provided direct evidence that independent expenditures can, in fact, be a source of corruption. Yet, despite this evidence, the Court has held firm that as a matter of law independent expenditures do not corrupt. *See American Tradition Partnership, Inc. v. Bullock* 567 U.S. 516, 517 (2012) (Breyer, J., dissenting).

36 *Citizens United*, 558 U.S. at 345 (quoting *Buckley*, 424 U.S. at 47).

37 Interview with Janet Napolitano (Goldman School of Public Policy).

38 For a list of all those interviewed for this report, see *Appendix: Methodology*.

39 Hasen, *supra* note 15 at 84-103; Interview with Richard Hasen (UCLA School of Law).

40 Interviews with Richard Hasen (UCLA School of Law), Michael Malbin (University of Albany, SUNY), Bertrall Ross (University of Virginia School of Law).

41 Interviews with Richard Hasen (UCLA School of Law), Michael Malbin (University of Albany, SUNY), Jonathan Mehta Stein (California Common Cause).

dollar campaign contributions at a high rate, such as eight to one;[42] and lump-sum public grants for candidates who meet qualification criteria. Other possible reforms include public mobilization funds, tax deductible private contributions earmarked for mobilization efforts,[43] and even direct incentives to vote.[44] Each of these policies merit further study, but they are largely outside the scope of this report.

By and large, leveling-down policies, like direct limits on independent expenditures, cannot withstand scrutiny in front of the current Supreme Court. Two different policy ideas demonstrate this conclusion. First, consider a policy that would impose a very permissible contribution limit on what individuals can give to organizations that make independent expenditures.[45] The policy would restrict contributions to $25,000 per group per election cycle, a sum that few could ever fathom donating to a political cause. Technically, *Citizens United* did not reach this question; rather *SpeechNow.org v. FEC*, a case out of the DC Circuit, found this policy unconstitutional.[46] But the DC Circuit's reach does not extend to state campaign finance laws, so the policy remains legally viable in many states.[47] But the problem with this policy is the legal risk it poses to what remains of campaign finance law.[48] Many fear that pushing this type of policy in states could land another campaign finance case in front of the Supreme Court. In turn, the Court could use such a case as a vehicle for a larger and more damaging finding, for example, doing away with limits on what individual donors can contribute directly to campaigns.[49]

Second, courts would be very likely to strike down innovative policies that seek to disincentivize, but not prohibit, the use of independent expenditures. For example, consider a policy that regulates independent expenditures through the tax code. Beyond a certain spending limit, the policy would impose an excise tax on independent expenditures made by 501(c)(4) organizations or individuals. Once an organization spends above $1,000,000 the government would impose a 25 percent tax on every dollar spent beyond that threshold. The threshold could even be set in proportion to the number of members that an organization has. Each of these mechanisms respond to various things the Supreme Court has said. For example, a tax is not "an outright ban, backed by criminal sanctions"; it is thus a substantially lesser burden than what the Court considered in *Citizens United*.[50] And the Court has spoken favorably about policy mechanisms that are crafted "in proportion to the interest served," or the problem the policy seeks to address.[51]

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42 Michael J. Malbin, *A Neo-Madisonian Perspective on Campaign Finance Reform, Institutions, Pluralism, and Small Donors*, 23 U. Pa. J. Const. L. 907 (2021), https://scholarship.law.upenn.edu/jcl/vol23/iss5/2.

43 Interview with Bertrall Ross (University of Virginia School of Law), Bertrall L. Ross, *Addressing Inequality in the Age of Citizens United*, 93 N.Y.U. L. REV. 1120, 1186-87 (2018).

44 Interview with Abdi Soltani (ACLU of Northern California).

45 *See* Hasen, *supra* note 15 at 99.

46 *SpeechNow.org v. Federal Election Com'n*, 599 F.3d 686 (D.C. Cir. 2010); Interview with Ron Fein (Free Speech For People).

47 This type of policy is not viable in any state within the Ninth Circuit, including California. *See Thalheimer v. City of San Diego*, 645 F.3d 1109 (9th Cir. 2011).

48 Free Speech for People has sued the state of Massachusetts to challenge the Attorney General's decision to reject a ballot initiative petition to limit super PAC contributions to $5,000 per year within Massachusetts. *Massachusetts Ballot Initiative to End Super PACS*, Free Speech For People, https://freespeechforpeople.org/massachusetts-ballot-initiative-to-end-super-pacs/ (last visited Mar. 29, 2023). Multiple individuals interviewed for this report expressed skepticism of this approach, noting that the Supreme Court could use such a case to do away with what remains of the campaign finance system. Interviews with Richard Hasen (UCLA School of Law), Ann Ravel (Former Chair, FEC), and Bertrall Ross (University of Virginia School of Law).

49 *Id.*

50 *Citizens United*, 558 U.S. at 337.

51 *McCutcheon v. Federal Election Com'n*, 572 U.S. 185, 218 (2014).

Nevertheless, experts think that the Supreme Court would remain highly skeptical of such a policy.[52] A tax necessarily makes every dollar spent above the limit more expensive. That in turn, as the policy intends, disincentivizes spending. Because money facilitates speech, the Court would likely see such a policy as one that "necessarily reduces the quantity of expression, . . . [reducing] the number of issues discussed, the depth of their exploration, and the size of the audience reached."[53] There is a prevailing sense that this Court is hostile to all restrictions on political speech and will find justifications to strike down any regulation on IEs, regardless of whether that regulation touches expenditures or contributions.[54]

Ultimately, the Court needs to recognize new legal justifications for campaign finance policy.[55] *Quid pro quo* is too narrow of a rationale to address the many democratic and political distortions that flow from the growing use of independent expenditures. In particular, the Court should recognize that campaign finance policies serve at least three highly important public interests. First, such policies promote procedural equality by ensuring that everybody has a chance to speak in our political system.[56] Second, campaign finance law can ensure that the positions of lawmakers broadly align with those of their constituents.[57] Finally, campaign finance regulations can further good governance, making policymakers more open to political compromise.[58] But absent a change in the composition of the Supreme Court, it is unlikely that the Court will recognize any of these theories, leaving us with *Citizens United*.

Focusing on the legal framework established in *Citizens United*, one theme stood out clearly across many of these interviews: Laws that regulate coordination between candidates and campaigns remain constitutional.[59] Further, though such laws may not fully alleviate political equality problems, they may go a long way to protect against corruption and to ensure that candidates cannot use independent expenditures to flout contribution limits.[60]

A Path Forward: Regulating Relationships, Not Speech

The logical underpinning of *Citizens United* is the idea that outside spenders are independent from the candidate on whose behalf they spend. "The absence of . . . coordination with the candidate . . . alleviates the danger that [independent] expenditures will be given as a *quid pro quo* for improper commitments from the candidate."[61] Because the Supreme Court has refused to accept evidence

52 Interviews with Richard Hasen (UCLA School of Law) and Ann Ravel (Former Chair, FEC).

53 *Citizens United*, 558 U.S. at 339 (quoting *Buckley*, 424 U.S. at 19).

54 Interviews with Richard Hasen (UCLA School of Law), Michael Malbin (University of Albany, SUNY), Ann Ravel (Former Chair, FEC), and Bertrall Ross (University of Virginia School of Law).

55 *Id*.

56 Interview with Richard Hasen (UCLA School of Law); Hasen, *supra* note 15 at 73.

57 *See, e.g.*, Nicholas Stephanopoulos, *Elections and Alignment*, 114 Colum. L. Rev. 283 (2014). During his interview for this report, Richard Hasen argued that alignment interests and procedural equality are conceptually the same thing. Each is interested in the idea of the political system better reflecting the attitudes of the median voter. Interview with Richard Hasen (UCLA School of Law).

58 Interview with Michael Malbin (University of Albany, SUNY); Malbin, *supra* note 39 at 910-22.

59 Interviews with Richard Hasen (UCLA School of Law), Nicolas Heidorn (campaign finance expert), Michael Malbin (University of Albany, SUNY), and Ann Ravel (Former Chair, FEC).

60 Interviews with Richard Hasen (UCLA School of Law) and Patrick Llewellyn (Campaign Legal Center).

61 *Citizens United*, 558 U.S. at 345 (quoting *Buckley*, 424 U.S. at 47).

showing the corrupting nature of independent expenditures,[62] this report concludes that it is likely not worth the time of advocates, reformers, or lawmakers to fight that premise. Instead, advocates should focus their attention working within the reasoning of *Citizens United*, namely by ensuring that campaigns and outside groups operate truly independently from one another.

When outside groups coordinate their expenditures with a campaign – by planning an ad-buy together, for example – those expenditures are no longer independent and thus pose the same risk of corruption as direct contributions that the Supreme Court recognized in *Citizens United*.[63] Thus, states can treat all coordinated expenditures, even done through implicit or indirect arrangements, as direct or in-kind contributions. Such contributions must adhere to the limits imposed upon direct contributions. Broadening what counts as coordination means that a wider set of expenditures will fall under the purview of laws that regulate direct contributions.

In line with this rationale, many states have turned their focus to more broadly regulating what constitutes coordination. *Citizens United* greenlit unlimited independent spending and "created new incentives to evade rules against coordination."[64] Campaigns can skirt coordination laws by either finding loopholes within state or federal laws or taking advantage of laws that are narrowly drawn to exclude significant swaths of relevant and valuable campaign advertising.[65] Moreover, many campaigns engage in "wink and nod" coordination: broader relationships between the two entities, facilitating coordinating behavior even in the absence of explicit information trading or direct strategy discussions.[66] All of these behaviors can and should be addressed.

62 *American Tradition Partnership, Inc. v. Bullock* 567 U.S. 516, 517 (2012) (Breyer, J., dissenting).

63 Letter from J. Adam Skaggs, Senior Counsel, Brennan Center, to Anthony Herman, General Counsel, Federal Election Commission, Advisory Opinion Request 2011-23 (Nov. 14, 2011), *available at* https://www.brennancenter.org/sites/default/files/legacy/Democracy/CFR/AO%202011-23%20Brennan%20Center%20Comments-Final.pdf.

64 Taylor Lincoln, *Super Connected*, Public Citizen 15 (Mar. 2013), https://www.citizen.org/wp-content/uploads/super-connected-march-2013-update-candidate-super-pacs-not-independent-report.pdf.

65 *Id.*

66 *Id.* at 37 ("If word got back to [Sheldon Adelson] that a group wasn't cooperating, he'd cut them off . . . . It's to maximize the dollars. You don't want repetition. You don't want people doubling up. He doesn't want to feel like his money is wasted.")

IV. COORDINATION LAWS

This section proceeds in two parts. It first sets out the tenets of an effective regulatory framework on the subject of IE-campaign coordination. It then summarizes coordination regulations within California. This discussion serves as the foundation for Part IV, which identifies specific gaps in California's regulatory framework as compared to an ideal system of regulation.

Tenets of Effective Coordination Regulation

A number of organizations have studied, documented, and identified best practices for effective coordination laws. No coordination system will truly guarantee the independence of outside spending; there will always be savvy campaign lawyers looking to exploit loopholes.[67] Nevertheless, strengthened coordination laws can still deter nefarious behavior and reduce incentives for campaigns to skirt the law.

The following section draws from the work of the Brennan Center, Public Citizen, and the Campaign Legal Center to identify overarching policy goals critical to effective enforcement of coordination laws. These themes are non-exhaustive, and indeed California's coordination laws are significantly stronger in some regards than those of other states.[68] Nevertheless, this report leverages the themes identified below to identify weaknesses in California's coordination system. Four tenets stand out:

Cover All Relevant Spending, Not Just "Express Advocacy" Advertising

The federal government and many states only extend coordination laws to cover "express advocacy," or ads that explicitly advocate the election or defeat of a specific candidate by using words like "vote for" or "vote against."[69] The problem with this approach is that it leaves the vast majority of independent spending unregulated. Indeed, at the federal level, of the $1.3B in independent spending during the 2022 federal midterms, only $4.6M or less than .4 percent qualified as "express advocacy" under the FEC's definition of the term.[70] Defining laws too narrowly leaves much of the independent expenditure landscape untouched by coordination laws.[71]

Many independent expenditure organizations spend their money on "issue advertising," or communications that support, oppose, or raise awareness about a policy issue rather than a specific candidate. An example might look like a glowing advertisement, featuring beaming photos and video of Candi-

67 *Id.* at 16, 50.

68 For example, the Brennan Center recommends that states publish "scenario-based of what constitutes prohibited coordination and what does not." David Early, Brent Ferguson & Chisun Lee, *After Citizens United: The Story in the States*, Brennan Center for Justice (2014), *available at* https://www.brennancenter.org/sites/default/files/publications/After%20Citizens%20United_Web_Final.pdf. California provides a series of manuals for campaign finance practitioners. These manuals are replete with scenario-based examples of what constitutes coordination. *See, e.g.*, Cal. Fair Pol. Pracs. Comm'n, Independent Expenditure Committees: Campaign Disclosure Manual 6 (2020) [hereinafter *FPPC Manual 6*].

69 Early, Ferguson & Lee, *supra* note 65 at 27.

70 *Total Outside Spending by Election Cycle, Excluding party Committees*, Open Secrets, https://www.opensecrets.orhttps://www.brennancenter.org/sites/default/files/publications/After%20Citizens%20United_Web_Final.pdfg/outside-spending/by_cycle (last visited Mar. 29, 2023).

71 Brennan Center For Justice, Components Of An Effective Coordination Law (2018), *available at* https://www.brennancenter.org/sites/default/files/stock/2018_10_MiPToolkit_CoordinationLaw.pdf; *Coordination Laws*, Campaign Legal Center, https://campaignlegal.org/democracyu/accountability/coordination-laws (last visited Mar. 29, 2023); Interview with Patrick Llewellyn (Campaign Legal Center).

date Smith, airing right in the middle of an election and saying things like "Thank Candidate Smith for supporting our farmers."[72] Despite clearly identifying a candidate in an impending election, this type of advertisement falls outside many state coordination regulations. An advertisement simply thanking a candidate for their work on an issue can be invaluable to a candidate though it may not explicitly encourage voters to go vote.[73]

Effective coordination laws should recognize that many forms of expenditures – not simply those made on express advocacy – can be helpful to a candidate. Coordination laws should therefore apply to such expenditures.

Define Coordination Broadly

Coordinating conduct can take many forms; laws should thus cover a broad range of conduct. The FEC assesses coordination in the context of a specific communication, asking whether a third-party and a candidate coordinated to disseminate a specific advertisement within a given market.[74] But coordination is much more subtle and may arise from relationships that give interested parties a special familiarity with a campaign's strategy.[75] Instead of looking at whether a campaign and an outside group coordinated to create a single communication, a better approach would assess relational factors between a campaign and an outside spender.[76] These relationships may facilitate broader coordination even in instances where the two parties did not discuss the specifics of a single advertisement.

Many states – including California – have adopted this approach. These states typically define a set of scenarios in which, if present, the regulator will presume that all expenditures made on behalf of a candidate are coordinated.[77] For example, if a candidate has raised money for an outside group, if a candidate's family member or former staffer works for the outside group, or if the candidate and the outside group share a common consultant, the regulator will presume that the third-party has coordinated its spending with the candidate.[78] This approach recognizes that coordination can happen without a specific meeting of the minds or discussion between the two parties. Rather, campaigns and outside groups can engage in "wink and nod" conduct that facilitates indirect yet effective coordination.[79]

Laws should be written broadly enough to cover any form of conduct that may realistically give rise to express coordination or indirect coordination. Such laws should look at context-specific conduct as well as relationships between campaigns and outside groups.

The Laws Should be Free of Loopholes

Effective coordination laws should be straightforward, simple, and free of carve outs or specialized exemptions. The inclusion of loopholes within otherwise comprehensive campaign finance regulations

72 *FPPC Manual 6.*

73 Interview with Patrick Llewellyn (Campaign Legal Center).

74 *Coordinated Communications*, Fed. Election Comm'n (last visited Mar. 29, 2023), https://www.fec.gov/help-candidates-and-committees/candidate-taking-receipts/coordinated-communications/.

75 Brennan Center For Justice, *supra* note 68.

76 *Coordination Laws*, *supra* note 68.

77 Early, Ferguson & Lee, *supra* note 65 at 18; Interview with Patrick Llewellyn (Campaign Legal Center).

78 *FPPC Manual 6.*

79 Emily Flitter, *With a nod and a wink, Republicans build 2016 campaign machine*, Reuters (Mar. 5, 2015, 10:15PM), https://www.reuters.com/article/us-usa-election-republicans/with-a-nod-and-a-wink-republicans-build-2016-campaign-machines-idUSKBN0M20EM20150306

can ultimately hobble those regulations and undermine their purpose.[80] Loopholes allow campaigns to maneuver around coordination laws and direct contribution limits. For example, "the 2012 election showed [federal] coordination rules to be far too porous."[81] The FEC decided to allow candidates for federal office to fundraise for the Super PACs supporting them, in unlimited amounts. In practice, this looks like Candidate Smith headlining a major event thrown by "Smith for President PAC," run by former Smith consultants and staff, while all parties claim that Smith and Smith for President PAC are independent of each other and Smith knows nothing of the PAC's donors or their interests.

Effectively, the FEC's permissive approach allowed campaigns to skirt federal contribution limits. For coordination laws to be truly comprehensive in scope, they must be air-tight and free of loopholes.

The Laws Should be Enforceable

As the Brennan Center argued in their 2014 report, *After Citizens United: The Story in the States*, "[e]ven the most comprehensive coordination law will not deter violations without adequate and sensible enforcement."[82] Agencies enforcing coordination laws receive thousands of complaints every election cycle, and they often do not have sufficient resources to fully investigate each complaint or investigate in a timely manner. For example, in the 2018 election, the FPPC had 1,243 cases with only nine investigators to handle the early investigatory work.[83] The FPPC's workload increased to 1,526 cases in the 2020 election.[84] The FPPC is regarded as one of the best funded elections regulators in the country, yet the FPPC can still find itself resource strapped.[85]

In a world of understaffed regulatory agencies,[86] lawmakers should write regulations such that the laws are easy and straightforward to enforce. This does not mean making laws overly burdensome upon candidates for office. But it does mean providing clear and straightforward definitions of what constitutes coordination and then allowing regulators to act swiftly when such scenarios arise. By streamlining coordination laws and reducing the steps a regulator must take in the investigation phase, the laws become more enforceable.

California's Approach to Coordination

At a high level, California's independent expenditure regulations operate on three levels. First, an entity seeking to make an independent expenditure must register as a specific type of "committee." Second, California then applies a three-step analysis to determine whether a given expenditure qualifies as "independent" or "coordinated." If the expenditure is "coordinated," the state treats it as a direct campaign contribution, subject to the state's contribution limits. Finally, if a committee has reported a coordinated expenditure as independent, the FPPC can institute enforcement proceedings, ultimately

80 Lincoln, *supra* note 61 at 36.

81 *Id.*

82 Early, Ferguson & Lee, *supra* note 65 at 4.

83 Cal. Fair Pol. Pracs. Comm'n, 2018 Annual Report 6 (2018); Cal. Fair Pol. Pracs. Comm'n, Enforcement Division Presentation For The February 2018 Commission Hearing (2018), *available at* https://www.fppc.ca.gov/content/dam/fppc/NS-Documents/EnforcementDiv/Information/Feburary%202018%20Commission%20Meeting%20Enforcement%20Presentation.pdf [hereinafter *FPPC Enforcement Presentation*].

84 Cal. Fair Pol. Pracs. Comm'n, 2020 Annual Report 7 (2020).

85 Interviews with Patrick Llewellyn (Campaign Legal Center) and Intake Unit Staff Member (FPPC).

86 Interview with Intake Unit Staff Member (FPPC).

seeking three times the amount of the expenditure in penalties. The subsections below detail how these three parts of the law work.

Committee Structure

California's Political Reform Act (PRA) defines a "committee" as a person, persons, or entities that does at least one of the following: (1) raise $2,000 or more for political spending, (2) spends $1,000 or more on independent expenditures, or (3) contributes $10,000 or more to or at the behest of candidates or committees.[87] Unlike federally regulated Super PACs, which can only make IEs, committees in California can both make independent expenditures and can contribute directly to campaigns, subject to contribution limits.[88]

The PRA defines four different types of committees: primarily formed, general purpose, controlled,[89] and sponsored.[90] For the purposes of this report, primarily formed and general purpose committees are the most important because "a committee that makes . . . independent expenditures in connection with candidates and ballot measures will qualify as either a general purpose or a primarily formed committee."[91] The coordination laws discussed in the following subsections apply in subtly different ways to primarily formed than they do to general purpose committees. This divergent treatment in turn leaves loopholes within California's laws, discussed in Part V.

Primarily formed committees exist to support or oppose a single candidate or ballot measure in a given election. They can also support or oppose a specific group of candidates in a single municipal or county election.[92] For example, in the 2022 election, the largest primarily formed committee was "Nurses and Educators Supporting Malia Cohen for Controller 2022 sponsored by labor unions - 1436014." As the name suggests, this committee supported Malia Cohen in her race for Controller. In total, the committee spent $1,820,000 on Cohen's behalf, 46% of which went to a political consulting firm called The Strategy Group.[93] A committee must file as primarily formed if it makes more than 70 percent of all of its contributions or expenditures in support or opposition of a single candidate.

By contrast, a general purpose committee exists to support or oppose a broader set of candidates. These committees can operate at the state, county, or municipal level[94] and often exist for multiple election cycles, supporting candidates based upon specific policy preferences. For example, "California Apartment Association Housing Solutions Committee" has been in operation since November 6, 2018, making about $287,742 in independent expenditures in the 2018 election. In the 2022 elections, this committee spent a little over $5,000,000 across dozens of races. Its largest supportive expenditures were on behalf of former State Senator Robert Hertzberg, while its largest opposition expenditures were

87 Cal. Gov't Code § 82013.

88 *Id.*

89 A controlled committee is a committee over which a candidate directly or indirectly exercises control and has "significant influence on the actions or decisions of the committee." Cal. Gov't Code § 82016.

90 A sponsored committee is a committee, typically established by a union or a corporation, that receives its contributions from its members, officers, employees, or shareholders. Cal. Gov't Code § 82048.7.

91 Cal. Fair Pol. Pracs. Comm'n, General Purpose Committees: Campaign Disclosure Manual 4 (2020) [hereinafter *FPPC Manual 4*].

92 Cal. Gov't Code § 82047.5.

93 California Secretary of State, *supra* note 2.

94 Cal. Gov't Code § 82027.5.

against Hugo Soto-Martinez and Katy Young Yaroslavski, candidates for the Los Angeles City Council. This committee also made expenditures across races in Alameda County, Santa Ana, and San Mateo.[95]

Disclosure and accounting requirements for these two types of committees vary. For example, a primarily formed committee must report all contributions it receives within 90 days of an election that are over $1,000 no more than 24 hours after receipt of the contribution by filing Form 497 with the FPPC.[96] By contrast, the FPPC does not require general purpose committees to file 24-hour reports upon receipt of a contribution.[97] A primarily formed committee can make independent expenditures and direct candidate contributions; it need not segregate those funds into separate bank accounts.[98] A general purpose committee can also make independent expenditures and direct contributions, but it typically must establish two separate bank accounts to do so.[99]

California requires general purpose committees to switch their registration to primarily formed in certain circumstances. If a committee treasurer has reason to know that the committee will spend or contribute 70 percent or more of its funds to support or oppose a single candidate, that committee must reregister as a primarily formed committee.[100] Reregistration occurs on a quarterly basis, in March, June, September, and December.[101] But even if a general purpose committee meets this threshold, it need not change its committee status unless it has made contributions and expenditures in excess of $100,000 or $10,000 towards a state or local candidate, respectively.[102]

Independent vs. Coordinated

Once a committee is formed and registered with the FPPC, it can begin to make independent expenditures. So long as the expenditure is independent, the committee may spend as much money as it wants to influence an election.[103] By contrast if the expenditure is not independent – for example if a campaign coordinated with a committee – the FPPC will treat the expenditure as a direct or in-kind contribution, subject to state limits.

To qualify as an independent expenditure in California, the FPPC imposes a three-step analysis. First, the communication[104] must be "express advocacy." This could take one of two forms. The advertisement could use words like "vote for," "elect," "cast your ballot," or "defeat" at any time during the election

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95 California Secretary of State, *supra* note 2.

96 Form 497 Contribution Report, Cal. Fair Pol. Pracs. Comm'n, *available at* https://www.fppc.ca.gov/content/dam/fppc/NS-Documents/TAD/Campaign%20Forms/497.pdf.

97 E-mail from Advice Unit, Cal. Fair Pol. Pracs. Comm'n (Mar. 23, 2023) (on file with author); *FPPC Manual 4*.

98 Cal. Fair Pol. Pracs. Comm'n, Information For State Candidates, Their Controlled Committees, And Primarily Formed Committees For State Candidates Manual 1 (2020) [hereinafter *FPPC Manual 1*].

99 A general purpose committee that "receives contributions for the purpose of making contributions to state candidates" must open an "all purpose" account. If that committee also takes contributions in excess of committee contribution limits for the purpose of making independent expenditures, that committee must also open a "restricted use account." But if the committee never receives contributions in excess of committee contribution limits, it need only open an "all purpose" account, from which it may make both direct contributions and independent expenditures. *FPPC Manual 4.*

100 Cal. Code Regs. tit. 2, § 18257.5(c)(3).

101 *FPPC Manual 4.*

102 *Id.*

103 *Citizens United*, 558 U.S. 310 (2010).

104 A communication can take many forms, including TV ads, online ads, newspaper ads, direct mail, and lawn signs.

cycle.[105] Alternatively, if made within 60 days prior to an election, an ad that, "when taken as a whole, unambiguously suggests only one meaning which is to urge a particular result in an election," the FPPC will consider it express advocacy.[106] This covers advertisements that say things like "only Candidate Smith can clean up City Hall," or "Candidate Smith is the One."[107] But ads that are susceptible to a different interpretation, such as one that simply thanks an elected official for their leadership on a policy matter, are not express advocacy.[108] In practical terms, this means that many types of ads that may influence an election are not subject to coordination laws.

Second, the communication must clearly identify a candidate in some manner, typically by including the candidate's name, their title, their candidacy status, or their picture.

Finally, for the FPPC to consider an expenditure independent, the organization making the expenditure must not have coordinated with the candidate in any way. In California, certain forms of conduct or interaction are dispositive indicators of coordination.[109] For example, if the candidate or their agent requests the committee to make an expenditure on its behalf, the communication is not independent. Further, if the person who created the communication has discussed its content, timing, location, or intended audience with the campaign, that communication is not independent and is thus a direct campaign contribution.[110]

But some scenarios are less clearcut. For example, a candidate may not have had any specific conversations with a primarily formed committee about strategy, but maybe the director of the committee is intimately familiar with a candidate's strategy because that person recently worked for the candidate. To respond to gray areas of coordination, the FPPC established a series of "rebuttable presumptions" in which it will presume coordination but allow the candidate to push back against that presumption.[111] This approach allows the FPPC to assess the relationship between a candidate and a committee from a holistic standpoint instead of analyzing facts specific to the expenditure itself.[112]

The FPPC has identified seven scenarios in which it will presume coordination:[113]

- The communication is based on information related directly to a **candidate's needs** – messaging information, polling data, planned expenditures – even if the candidate made this information publicly available on their website.[114]
- The expenditure is made through an **agent**[115] of the candidate during the 12 months prior to the election.

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105 *FPPC Manual 6.*

106 *Id.*

107 *Id.*

108 *Id.*

109 *Id.*

110 *Id.*

111 *FPPC Manual 6.*

112 Early, Ferguson & Lee, *supra* note 65.

113 *FPPC Manual 6.*

114 This provision, arguably, covers a practice common in federal elections known as "Redboxing." Saurav Ghosh, *Voters Need to Know What "Redboxing" Is and How It Undermines Democracy,* Campaign Legal Center (May 13, 2022), https://campaignlegal.org/update/voters-need-know-what-redboxing-and-how-it-undermines-democracy.

115 Neither the political reform act nor any FPPC regulation explicitly defines the term "agent." This term generally seems to mean some person acting on behalf of the candidate in some way.

- The campaign and the spending organization share **common consultants.**
- The communication simply **reproduces** a communication originally disseminated by the candidate.
- The candidate has engaged in **fundraising** activities on behalf of the committee that is "primarily formed" to support that candidate.[116]
- The candidate's **former staff** work at the organization making the expenditure.
- The **candidate's family** works at, principally funds, or established the organization making the expenditure.

If the FPPC has evidence of one of these scenarios and a candidate cannot rebut with contrary evidence, the FPPC will presume that all expenditures made by the committee are coordinated with the candidate. In turn, those expenditures fall under California's direct or in-kind contribution limits.

Enforcement

Where an expenditure reported as independent may be in reality the product of coordination, the FPPC can initiate an investigation. The FPPC receives information about falsely reported independent expenditures from a multitude of sources, including formal complaints, FPPC-initiated audits, news reports, and informal tips from campaigns or voters.[117] If the FPPC receives a coordination complaint, its Intake Unit may initiate an investigation.[118] The staff inform the candidate of the complaint and offer them the opportunity to rebut any of the presumptions listed above.

Ultimately, if the Intake Unit can compile sufficient evidence, the Enforcement Division can then seek penalties. The FPPC typically enforces violations of the Political Reform Act by stipulating a penalty with the opposing party of up to $5,000 per violation.[119] Additionally, the FPPC can initiate a civil action in state court in which it can seek up to three times the amount of the alleged campaign finance violation.[120] The FPPC most commonly issues an administrative penalty.[121] Finally, a local district attorney or the state attorney general can pursue a criminal prosecution for those who violate the Political Reform Act.[122]

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116 This presumption only applies to fundraising conducted on behalf of a Primarily Formed Committee. It does not apply where a candidate fundraises on behalf of a general purpose committee and that committee later spends on the candidate's behalf. This is discussed further in Part IV.

117 *FPPC Enforcement Presentation*, *supra* note 80.

118 Interview with Intake Unit Staff Member (FPPC).

119 E-mail from Advice Unit, Cal. Fair Pol. Pracs. Comm'n (Mar. 29, 2023) (on file with author); In the Matter of Barbara Messina, Friends of Barbara Messina, and Michael Messina, FPPC No. 06-1110 (2010).

120 Cal. Gov't Code § 91000 *et seq.*

121 *FPPC Enforcement Presentation*, *supra* note 80.

122 E-mail from Advice Unit, Cal. Fair Pol. Pracs. Comm'n (Mar. 29, 2023) (on file with author).

V. POLICY SOLUTIONS

In the course of regulatory and statutory research, supplemented by conversations with California campaign finance experts and FPPC staff, a number of areas for reform emerged. This section documents the potential gaps within California's coordination laws and makes the case for why lawmakers should address them.

Covering Issue Advocacy That Mentions Candidates

Many interpreted *Buckley v. Valeo* to require different treatment of issue spending and express advocacy. Indeed, the lower Federal courts read *Buckley* to establish a bright-line rule allowing regulation only of advertisements that use express words of advocacy, "such as 'vote for,' 'elect,' 'support,' cast your ballot for,'" etc.[123] In 2003 the Ninth Circuit reasoned that "[f]ollowing the *Buckley* rule, . . . [it] must strike down any language in the Political Reform Act purporting to regulate the discussion of issues ("issue advocacy")."[124] But in *McConnell v. FEC*, the Supreme Court stated that the *"Buckley* Rule" only clarified a line within a federal statute.[125] It "in no way drew a constitutional boundary that forever fixed the permissible scope of provisions regulating campaign-related speech."[126] And the Court rejected the notion "that the First Amendment erects a rigid barrier between express advocacy and so-called issue advocacy."[127] As long as the statute is clearly written, states are welcome to regulate issue ads in a similar manner to express advocacy.[128]

As identified above in Part IV, issue advocacy can be just as helpful to a candidate as express advocacy, particularly if it helps to position a candidate on a salient issue in the mind of voters. Thus, if those expenditures are coordinated, they should be treated as direct contributions. California performs much better on this metric than many states. The state's coordination laws extend to all advertisements that, "when taken as a whole, unambiguously suggests only one meaning."[129] But this approach still leaves a large swath of advertising unaddressed. The FPPC notes that an advertisement stating, "Thank you Supervisor Smith for continuing to support our farmers" does not meet the standard for express advocacy.[130] But if Supervisor Smith represents a district where support for farmers is the defining issue in her election, the incentives for coordination run high.

Were California to extend its regulations to cover all issue advocacy that mentions a candidate, it would by no means be a first mover. For example, in Maine, coordination laws apply to any independent expenditure that "names or depicts a clearly identified candidate" and is made within 28 or 35 days of a primary or general election, respectively.[131] New York State applies a similar approach. Its

123 *California Pro-Life Council, Inc. v. Getman* 328 F.3d 1088, 1097 (9th Cir 2003) (quoting *Buckley*, at 44 n.52).
124 *Id.*
125 540 U.S. 93, 191-92 (2003).
126 *Id.* at 192-93.
127 *Id.* at 193.
128 *Id.* at 192.
129 *Id.*
130 *FPPC Manual 6.*
131 ME. STAT. tit. 21-A, § 1019-B(1)(B).

coordination laws cover any independent expenditure that "includes or references a clearly identified candidate" made within 60 or 30 days of a general or primary election, respectively.[132] Similarly, in 2021, a group of U.S. Senators introduced the Freedom to Vote Act. While the act never passed, it too would have applied coordination law to any independent expenditure that "refers to the candidate or opponent . . . during the applicable election period," which it defines as 120 or 60 days before a general or primary election, respectively.[133]

Together, these three examples reveal an approach that California should embrace. California should consider expanding its coordination laws to cover any independent expenditure that makes any reference to any identified candidate within 60 days of an election. This would remove the incentive for political committees and candidates to coordinate around advertisements that, by eschewing the use of specific words of advocacy, skirt coordination laws.[134]

Arguably, this recommendation comes closer to burdening political speech than only applying coordination laws to express advocacy. Organizations run advertisements to express their stance on an issue with no intent of influencing an election; an overly restrictive regulation might dissuade an interested party from communicating their views on an issue. So, to protect the legitimate speech interests of issue advertising, California should only apply its coordination laws to issue advocacy during the period right before an election.

California already regulates advertisements 60-days before an election that "unambiguously suggest[] only one meaning which is to urge a particular result in an election." California could continue to use this same time-boxing mechanism and extend its coordination laws to all advertisements that make any reference to an identified candidate for office within this period. Time-boxing the application of coordination laws to the period before an election preserves the First Amendment rights of issue advocacy groups engaging in political speech outside of an electoral context. And in the event of a First Amendment challenge, a time-boxing mechanism serves as a strong basis to argue that the regulation is narrowly tailored, sufficient to survive strict scrutiny review.

General Purpose and Primarily Formed Committees

California should consider regulating all committees that make independent expenditures in the same way. The distinction between general purpose and primarily formed committees arguably serves an important purpose. Many general purpose committees are not focused on specific elections, and instead focus on issues. Thus, applying the more onerous filing and naming requirements of primarily formed committees to general purpose committees could deter some non-election speech.[135] At the same time, the distinction between general purpose and primarily formed committees creates loopholes that may undermine the State's campaign finance regulations. Two examples illustrate the problems that arise from treating these committees differently from one another.

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132 N.Y. State Bd. Of Elections, Campaign Finance Handbook 50 (2022), *available at* https://www.elections.ny.gov/NYSBOE/download/finance/hndbk2022.pdf.

133 Freedom to Vote Act, S. 2747, 117th Cong. § 7002 (2021).

134 In *McConnell*, the Supreme Court recognized that even ads that "do not urge the voter to vote for or against a candidate in so many words, they are no less clearly intended to influence the election." 540 U.S. at 193.

135 Interview with Dave Bainbridge (FPPC).

First, the FPPC presumes coordination when a candidate fundraises for a committee that later makes independent expenditures on that candidate's behalf. But this presumption only applies to primarily formed committees, not general purpose committees.[136] Consider two scenarios. In scenario number one, Candidate Smith – a pro-housing candidate – hosts a fundraiser for a primarily formed committee called "Residents for Candidate Smith." The FPPC will presume coordination for all of Residents for Candidate Smith's future spending and subject such spending to California's direct contribution limits. By contrast, in scenario number two, Candidate Smith hosts a fundraiser for a general purpose committee called "Residents for Housing Development." That committee can then spend an unlimited amount of money advocating for Candidate Smith's election,[137] but the FPPC will not treat it as coordinated spending. From the standpoint of possible coordination, the two scenarios are identical, yet the FPPC presumes coordination only in the first.

Second, the rules for reclassifying a general purpose committee to a primarily formed committee contain sizable loopholes. As one example, recall that general purpose committees must refile as a primarily formed committee if they spend in excess of 70 percent of their funds to support one single candidate. But general purpose committees need only assess whether they have passed this threshold once per quarter. It is possible for someone to found a general purpose committee, ask a candidate to fundraise for that committee, and spend all funds raised supporting that candidate.[138] As long as the committee concludes its spending and shuts its doors before the next reporting deadline – within a three month period – it will not have to reclassify as a primarily formed committee, and the FPPC will not apply the fundraising presumption discussed above.[139]

Additionally, the way that the FPPC calculates this 70 percent reclassification threshold contains a fairly substantial carve out. Contributions made from a general purpose committee to a primarily formed committee do not factor into the 70 percent threshold *if the sponsor of the two committees is the same person*.[140] As long as the same person controls a given primarily formed and general purpose committee, the general purpose committee can transfer all of its funds to the primarily formed committee without triggering this reclassification threshold.[141]

Consider the following scenario. Candidate Smith attends a fundraiser for "Residents for Housing Development," a general purpose committee founded by John Doe. Candidate Smith talks at length about his campaign strategy. Then, Residents for Housing Development, instead of making an independent expenditure on Candidate Smith's behalf, opts to send all of the money it raised at this fundraising event (which, assume accounts for 80 percent of its spending) to "Residents for Candidate Smith,"

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136 Cal. Code Regs. tit. 2, § 18225.7(d)(5).

137 As a general purpose committee, Residents for Housing Development must spend at least 30 percent of its funds on behalf of other candidates.

138 The committee must be founded at least 6 months before the election otherwise the FPPC presumes that it is a "primarily formed committee." Cal. Code Regs. tit. 2, § 18247.5(d)(2)(A).

139 E-mail from Advice Unit, Cal. Fair Pol. Pracs. Comm'n (Mar. 23, 2023) (on file with author); Interview with Intake Unit Staff Member (FPPC); *see* Cal. Code Regs. tit. 2, § 18247.5(d)(1),(f).

140 Cal. Code Regs. tit. 2, § 18247.5(f)(3).

141 The FPPC explained the existence of this provision as follows: "When the regulation was amended in 2011, it was determined that an existing general purpose committee that creates a separate primarily formed committee to run a measure or support a candidate, should not itself become primarily formed because it is contributing to that measure or candidate committee." E-mail from Advice Unit, Cal. Fair Pol. Pracs. Comm'n (Mar. 23, 2023) (on file with author).

a primarily formed committee also founded by John Doe, which under law would not be allowed to discuss campaign strategy with Candidate Smith. John Doe is a real estate developer who stands to benefit from Candidate Smith's election, but he has no familial or professional tie to Smith sufficient to trigger a coordination presumption. Arguably, Doe acted in his capacity as executive director of the general purpose committee rather than the primarily formed committee when he heard Candidate Smith discuss his campaign strategy.[142] It is not abundantly clear that the FPPC would thus treat spending by Residents for Candidate Smith as coordinated, despite the fact that Candidate Smith is directly responsible for all of their fundraising and has effectively given them insight into his campaign strategy.

Take a real-life example of the legal ambiguity created by the committee distinction.[143] On January 15, 2020, the FPPC received a complaint that alleged a Committee founded by Molly Flater, daughter of real estate developer Bill Galaher, had failed to file proper forms and to properly disclose its funders.[144] The complaint focused on a general purpose committee called "NotSoSmart.Org." After receiving a $559,183 contribution from Molly Flater, the committee funded radio and cable television advertising against Measure I, a ballot initiative in the 2020 Santa Rosa municipal election.[145]

The subtext of the complaint is that "NotSoSmart.Org" was a primarily formed committee, masquerading as a general purpose committee in order to avoid filing proper forms and identifying its funders. The FPPC contacted "NotSoSmart.Org" January 15 to inform its officers of the complaint. On January 22, the committee's lawyers responded to the FPPC. The committee told the FPPC that as of January 15 – the same day the FPPC notified the committee of the complaint – the committee had updated its status to primarily formed, changed its name to "NotSoSmart.Org, No on Measure I," and begun filing the proper forms.[146]

On February 20, 2020, the FPPC closed the complaint, formally declining to pursue an enforcement action in the matter. The FPPC did not specify its rationale.[147] It is certainly possible that "NotSoSmart.Org," a committee that had been in operation since 2016, changed its spending patterns in 2020 and simply made a filing error. And it is also possible that had somebody not come forward, "NotSoSmart.Org" would have retained its filing status as a general purpose committee and continued to take advantage of the more lenient general purpose filing requirements. Either way, the distinction between general purpose and primarily formed committees leaves numerous opportunities for political committees to exist in gray areas of the law, knowing that they can rectify improper filings *ex-post*.

These examples illustrate how campaigns might use different committee types as a means to skirt

142 In this scenario, the FPPC might presume coordination based on "candidate needs," discussed in Part IV, but Doe would have the opportunity to rebut this presumption.

143 The author received this information via a public records request filed with the FPPC. All materials are on file with the author.

144 Complaint No. COM-01152020-00071, NotSoSmart.Org. No on Measure I. Committee Major Funding From Molly Flater (filed Jan. 15, 2020) (on file with author).

145 Letter from Brian T. Hildreth, Attorney, Bell, McAndrews & Hiltachk, LLP, to Molly Flater, Re: Major Donor Notification (Jan. 8, 2020) (on file with author).

146 Letter from Brian T. Hildreth, Attorney, Bell, McAndrews & Hiltachk, LLP, to Ginny Lambing, Enforcement Division, FPPC, Re: FPPC Matter Number COM-01152020-00071 (Jan. 22, 2020) (on file with author); Form 410 Statement of Organization Recipient Committee, NotSoSmart.Org, No on Measure I, Cal. Fair Pol. Pracs. Comm'n (filed Jan. 15, 2020) (on file with author).

147 Letter from Galena West, Chief, Enforcement Division, FPPC, to Dani Sheehan-Meyer, Re: Complaint No. COM-01152020-00071 (Feb. 20, 2020) (on file with author).

campaign finance laws. Committees arguably prefer to operate as general purpose because general purpose committees have less onerous reporting requirements.[148] In turn, this can create incentives for committees to play games with the regulations, run right up to reporting thresholds, and switch registration in ways most convenient to their interests. California should consider following the lead of states like New York and treat all independent expenditures the same by allowing only one type of committee to make independent expenditures.

"Irrebuttable" Presumptions

California established itself as a leader in coordination law when it developed a series of situations in which the FPPC would presume coordinated spending. The "rebuttable presumption" redefined how many regulators investigated coordination. Instead of analyzing coordination as communication-specific, California takes a more-holistic, context- and relationship-conscious approach.[149] But lawmakers can further strengthen laws by absorbing some of these presumptions into the definition of coordination itself. In other words, certain rebuttable presumptions should become irrebuttable.

New York State has embraced this in 2016. In New York State, if any of the following scenarios occur, the Board of Elections considers it to be coordination and thus treats all expenditures made by an Independent Expenditure Committee as a direct contribution:[150]

- The candidate or their agent appears at a fundraiser of an Independent Expenditure Committee.
- The Independent Expenditure Committee employed a former employee of the candidate within two years of the election.
- The Independent Expenditure Committee is directed by a candidate's family member.
- The Independent Expenditure Committee uses or reproduces campaign material from the candidate.
- The Independent Expenditure Committee shares office space with the candidate.
- The Independent Expenditure Committee and the candidate share a common consultant and no firewall or confidentiality agreement is in place.

The Freedom To Vote Act, which failed in Congress, proposed a very similar approach to that adopted in New York State.

While California's coordination law covers all of these scenarios, the FPPC merely presumes coordination and allows the candidate to rebut that presumption. But it is not abundantly clear why a scenario in which, for example, a candidate fundraises for an independent expenditure committee and then directly benefits from that committee's spending should *not* be treated as coordination. It is, in effect, a way for the candidate to skirt direct contribution limits.

Rebuttable presumptions were an important evolution of coordination law, and they have likely had an important deterrent effect. Most committees treat the rebuttable presumptions as categories of

148 Dave Bainbridge (FPPC).

149 Early, Ferguson & Lee, *supra* note 65 at 18; Cal. Code Regs. tit. 2, § 18225.7(d).

150 N.Y. State Bd. Of Elections, *supra* note 129 at 52.

conduct that are legally prohibited.[151] And some presumptions, like the family member or common consultant presumption, are very difficult to rebut. That said, the presumptions can also make the law more difficult for the FPPC to administer. When the FPPC receives a viable accusation that a candidate engaged in coordinated behavior, it gives the candidate the opportunity to rebut the presumption. That can create a complicated and resource-intensive investigatory process in which FPPC staff do not always have the resources to investigate the issue to its end.[152] Sometimes, the candidate rebuts by merely denying the allegation; the FPPC then moves on to other charges or declines to pursue the case further.[153]

By expanding the definition of coordination to affirmatively include scenarios more likely to give rise to coordination – fundraising for the committee by the candidate, former staff connections, family member connections, material reproduction, among others – California lawmakers can make FPPC regulations more administrable and thus deter a greater amount of nefarious coordination.

Direct Contributions from Committees

California has a fairly glaring weakness in its independent expenditure laws.

General purpose and primarily formed committees can make both independent expenditures on behalf of and direct contributions to a candidate for office.[154] Any individual may form a committee, use that committee to collect donations, make a direct contribution to a candidate for office, and then make unlimited, supposedly independent, expenditures on behalf of that candidate. But recall that a contribution can take many forms, including an advertising expenditure expressly coordinated between a committee and a campaign. Thus, a committee employee could engage a candidate in conversations regarding content and strategy around a specific communication, as long as the cost of that communication is below the limit for direct contributions. Then, a different staffer of that committee could go on to make unlimited independent expenditures on that candidate's behalf. As long as she does not trigger any of California's coordination presumptions; the FPPC will deem these expenditures independent. Indeed, FPPC regulations specifically provide that prior contributions cannot be the sole basis for an allegation of coordination.[155]

Additionally, the FPPC requires no firewall between the contributing and the expending side of a committee: the same employee that engaged in a coordinated contribution can go on to make an "independent" expenditure or discuss the independent expenditure with her colleagues. This creates ample incentives for "wink and nod" coordination with plenty of room for plausible deniability. Of course, evidence that a committee both coordinated a direct ad-buy and then made separate independent expenditures would provide the FPPC with strong evidence of coordination,[156] but this evidence alone is not dispositive proof of coordination.

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151 Interview with Dave Bainbridge (FPPC).

152 Interview with Intake Unit Staff Member (FPPC).

153 *Id.*; *see e.g.*, Natalie Clark for Fresno Unified, FPPC Staff Advisory Letter, Case No. 090767 (Dec. 9, 2009) ("In his letter to us, Mr. Fortune acknowledges the presumption, but states that there was no coordination between the committees.").

154 Cal. Gov't Code § 82013; E-mail from Advice Unit, Cal. Fair Pol. Pracs. Comm'n (Feb. 3, 2023) (on file with author); *FPPC Manual 4.*

155 Cal. Code Regs. tit. 2, § 18225.7(e)(3).

156 Interview with Dave Bainbridge (FPPC).

This puts California out of step with a number of jurisdictions. New York State and Connecticut both prohibit committees established to make independent expenditures from directly contributing to candidates.[157] Even the Federal Elections Commission, not traditionally known for its robust regulation of independent expenditures, prohibits Super PACs from donating to candidates.[158]

California's requirement that general purpose committees keep two bank accounts – one for expenditures and one for contributions – helps from an accounting and disclosure standpoint but does not go far enough to prevent coordination if the same individuals exercise control over those bank accounts.[159]

California should consider prohibiting committees that make independent expenditures from also making direct contributions to a candidate. At the very least, California should establish a robust requirement that committees engaging in both direct contributions and independent expenditures must erect a firewall between the two sides of its committee. The firewall should reach all the way to committee leadership.

157 Conn. Off. Of Legis. Rsch., State Law On Independent Expenditures, 2020-R-0075 (Aug. 31, 2020), *available at* https://www.cga.ct.gov/2020/rpt/pdf/2020-R-0075.pdf; N.Y. State Bd. Of Elections, *supra* note 129 at 49.

158 *Political Action Committees (PACs)*, Fed. Election Comm'n (last visited Apr. 2, 2023), https://www.fec.gov/press/resources-journalists/political-action-committees-pacs/.

159 This requirement does not even apply in all circumstances. General purpose committees need only establish a "restricted fund" if its donors give above the committee contribution limits. For a general purpose who accepts donations under the limit it can commingle its independent expenditure funds with its direct contribution funds. *FPPC Manual* 4.

VI. RECOMMENDATIONS & IMPLEMENTATION

The three following recommendations flow directly from the gaps in California law, identified in Part V, and seek to demonstrate how the State might consider improving its coordination laws. This section is meant solely to provide high level guidance. Many of the provisions identified below exist within the Political Reform Act, amendments to which often travel a long and difficult road politically, sometimes even needing approval of voters at the ballot. Moreover, while this report suggests textual amendments, legislative counsel should ultimately craft appropriate language to achieve the three following recommendations:

Define Communication Broadly - To broaden coordination laws to "issue advocacy," California will need to amend the Political Reform Act, specifically CAL. GOV'T CODE § 82025(c)(2) as follows:

> A communication "expressly advocates" the nomination, election, or defeat of a candidate or the qualification, passage, or defeat of a measure if it contains express words of advocacy such as "vote for," "elect," "support," "cast your ballot," "vote against," "defeat," "reject," "sign petitions for," or, taken a as whole, unambiguously urges a particular result in an election, or, within 60 days before an election in which the candidate or measure appears on the ballot, the communication otherwise refers to a clearly identified candidate or measure. ~~so that the communication, taken as a whole, unambiguously urges a particular result in an election.~~

California may need to amend definitions of other terms throughout the Political Reform Act that interact with the definition of "communication" to ensure consistency with the purpose of this suggested reform. Some of this may need legislative reform, while the FPPC may be able to take care of some amendments through rulemaking.

These amendments will extend California's coordination laws to cover any and all advertisements that mention or picture a candidate whose name will appear on the ballot within sixty days of an election. The purpose of this change is to ensure that committees and candidates cannot skirt coordination laws simply by crafting an advertisement that, while advocating for a candidate, does not expressly call for that candidate's election or defeat.

Presumptions - California's rebuttable presumptions are a creature of FPPC rulemaking, not statute. It may be possible for the FPPC to rewrite its coordination rules and regulations to incorporate some of its rebuttable presumptions into its definition of "coordinated expenditures." To do this, the FPPC would need to move the presumptions listed in subsection (d) of Regulation 18225.7 into subsection (c).[160]

That said, the FPPC might not have the authority to do this absent new legislation. Such a move would drastically expand the definition of "coordination" under the Political Reform Act. Moreover, making such a change through rulemaking rather than a Political Reform Act amendment could result in lawsuits. If such a change requires an amendment to the Political Reform Act, amendments could focus

160 CAL. CODE REGS. tit. 2, § 18225.7.

on the statutory definition of "Made at the behest of."[161] An amendment could expand this provision to codify how the term is applied to independent expenditures by including the presumptions in Regulation § 18225.7(d).[162]

As discussed further below, whether done through rulemaking or legislation, either the FPPC or the Legislature should amend the Fundraising presumption as follows:

> Fundraising. ~~The committee making the expenditure is primarily formed to support the candidate or oppose their opponent and i~~**I**n the course of the current campaign, the candidate who benefits from the expenditure solicits funds for or appears as a speaker at a fundraiser for the committee making the expenditure, thereby participating in the committee's fundraising strategy.

This change will ensure where a candidate fundraises on behalf of an independent expenditure committee – regardless of the type of the committee – the FPPC will define such activity as coordination if that committee later makes an independent expenditure on behalf of that candidate.

Committees - California should create a new type of committee that can only make independent expenditures and bar all other forms of committees from making independent expenditures. The following language could fulfill this goal if added to Title 9, Chapter 2 of the California Government Code:

> "Independent Expenditure Committee" means any person or combination of persons who directly or indirectly:
>
> a. Receives contributions totaling two thousand dollars ($2,000) or more in a calendar year, and
> b. Makes independent expenditures totaling one thousand dollars ($1,000) or more in a calendar year.
>
> Any committee that makes contributions to or at the behest of candidates or committees shall be ineligible to make independent expenditures or to file as an Independent Expenditure Committee.

Then, legislators should amend CAL. GOV'T CODE § 82013 as follows:

> "Committee" means any person or combination of persons who directly or indirectly does any of the following:
>
> a. Receives contributions totaling two thousand dollars ($2,000) or more in a calendar year, **or**
> b. ~~Makes independent expenditures totaling one thousand dollars ($1,000) or more in a calendar year; or~~
> c. Makes contributions totaling ten thousand dollars ($10,000) or more in a calendar year to or at the behest of candidates or committees.

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161 CAL. GOV'T CODE § 82041.3.
162 CAL. CODE REGS. tit. 2, § 18225.7(d).

> A person or combination of persons that becomes a committee shall retain its status as a committee until such time as that status is terminated pursuant to Section 84214.

Creating a single "Independent Expenditure Committee" will suffice to solve the loopholes identified above because all presumptions and filing requirements will no longer depend on whether a committee is primarily formed or general purpose. The committee structure extends throughout the Political Reform Act; thus, this recommendation may require further study as to the impact it will have on other areas of the Political Reform Act, including the operation of "Sponsored" and "Controlled" committees.

Finally, reformers should seriously consider whether it is worth leaving the distinction between primarily formed and general purpose committees intact. In the course of writing this report, the author uncovered two clear, coordination-specific loopholes involving the fundraising presumption and the 70 percent committee reclassification threshold, as identified in Part IV. These loopholes derive from the different treatment of primarily formed and general purpose committees. But this is not an exhaustive list. There are likely similar loopholes throughout the Political Reform Act that allow general purpose committees to skirt otherwise-comprehensive areas of the law."

VII. CONCLUSION

Independent expenditures are a vexing problem for many political reformers. *Citizens United* took many policy innovations off the table. But hope is not lost. States can tighten laws that govern the relationships between campaigns and committees to ensure that independent expenditures truly are independent. Indeed, there exist numerous opportunities for reform in California. This work can start by expanding coordination laws to cover more forms of advertising, crafting a broader definition of "coordination," and closing loopholes within existing coordination laws by creating a single category of "Independent Expenditure Only" committee that regulators treat the same, regardless of whether it spends on behalf of a single or multiple candidates.

APPENDIX: METHODOLOGY

This report followed a three-staged analytical approach. First, the author engaged in substantial legal and policy research. This included a review of relevant books, reports, studies, law review articles, many of which are cited in this report and many of which are not. This also included legal research into relevant Supreme Court and Federal Appellate Court caselaw.

Second, the author conducted ten on-the-record interviews, one on-the-record interview with a confidential source, and two off-the-record interviews. On-the-record interviews included discussions with the following individuals: David Bainbridge (General Counsel, FPPC), Ronald Fein (Legal Director, Free Speech For People), Richard Hasen (Professor, UCLA School of Law), Nicolas Heidorn (Campaign Finance Expert), Patrick Llewellyn (Director, Campaign Legal Center), Michael Malbin (Professor, University of Albany, SUNY), Janet Napolitano (Professor, Goldman School of Public Policy, former Secretary of Homeland Security, and former Governor of Arizona), Ann Ravel (former Chair, Federal Elections Commission and former Chair, California Fair Political Practices Commission), Bertrall Ross (Professor, University of Virginia School of Law), and Abdi Soltani (Executive Director, ACLU of Northern California), and a staff member of the FPPC's Intake Unit.

Stages one and two helped the author understand the campaign finance landscape, what is possible and what is not. This approach ultimately led to the identification of coordination law as an appropriate area of focus.

In the third stage of this analysis, the author engaged in research into coordination laws. This involved independent research into academic writings on coordination laws to discern a set of principles necessary to effective coordination laws. This work flowed into research of California's coordination laws. This research included: analysis of the California Political Reform Act, FPPC regulations, FPPC guidance documents, and FPPC adjudications. The author spoke with individuals at the FPPC and the Campaign Legal Center about his findings and to help hone the recommendations and conclusions of this report.

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