

All Hope is Not Lost: Effectively Regulating Independent Expenditures in a Post-*Citizens* *United* World

“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)

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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.