COMPONENTS OF AN EFFECTIVE PUBLIC FINANCING LAW

Since the Supreme Court's 2010 decision in *Citizens United* unleashed unlimited political spending, there's been a tidal wave of money from a small number of large donors. In the 2016 election cycle, which cost just under $6.5 billion, just 0.01 percent of the U.S. adult population gave over $2.3 billion (35 percent of the total).[1] And the top 0.01 percent of *donors* — a group of fewer than 200 people — gave almost $1 billion (15 percent of the total).[2]

It's unsurprising, then, that that 96 percent of Americans blame money in politics for creating dysfunction in the political system, according to an October 2017 Washington Post-University of Maryland poll.[3] That same poll revealed that 94 percent of Americans blamed wealthy political donors for political dysfunction.[4] Public financing is a key reform for restoring balance in politics and making it possible for everyone to have a voice.

Public financing is good for candidates and voters alike. The expense of running for office can discourage talented and promising candidates from entering public life if they lack personal resources or the support of large donors. By reducing financial barriers, public financing helps to encourage all qualified candidates to compete. It also helps to ensure that citizens receive the best possible representation. By lessening the need to court special interests, public financing programs can promote interaction between candidates and the diverse constituents they seek to represent — which makes politics work better for everyone. And once elected, publicly financed candidates are accountable to the many individual donors who have supported them, rather than a wealthy few. As Richmond, California councilmember and public financing recipient Jovanka Beckles observed in a 2016 interview with the Brennan Center, "When you take money from the public, you are beholden to the public only, and not any other corporate interest."[5]

Public financing increases the racial, economic, and gender diversity of those running for office *and* those contributing to the races.[6] By focusing on grassroots support from ordinary constituents, public financing encourages more citizens, particularly those from historically

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[1] Niv M. Sultan, *Election 2016: Trump's free media helped keep cost down, but fewer donors provided more of the cash*, CTR. FOR RESPONSIVE POLITICS, https://www.opensecrets.org/news/2017/04/election-2016-trump-fewer-donors-provided-more-of-the-cash/ (last accessed Apr. 3, 2018).
[2] *See id.*
[3] John Wagner & Scott Clement, *'It's just messed up': Most think political divisions as bad as Vietnam era, new poll shows*, WASH. POST (Oct. 28, 2017), https://www.washingtonpost.com/graphics/2017/national/democracy-poll/?utm_term=.e25faf2ddce0.
[4] *See id.*
[5] DENORA GETACHEW & AVA MEHTA, BREAKING DOWN BARRIERS: THE FACES OF SMALL DONOR PUBLIC FINANCING 17 (2016), https://www.brennancenter.org/sites/default/files/publications/Faces_of_Public_Financing.pdf.
[6] ELIZABETH GENN ET AL., DONOR DIVERSITY THROUGH PUBLIC MATCHING FUNDS 4-5 (2012), https://www.brennancenter.org/sites/default/files/legacy/publications/DonorDiversityReport_WEB.PDF.

disenfranchised communities, to participate in politics.[7] Studies of existing public financing systems show increased in participation among low-income and racial minority communities.[8]

The Brennan Center has long advocated for programs that provide a multiplied match for small donations, which have an extensive and successful history of increasing participation of small donors and the diversity of candidates in jurisdictions like New York City. A good public financing system can take a number of other forms, including vouchers, tax credits and rebates, and block grants, or some combination of all three.

Small Donor Matching

Small donor matching systems empower average citizens by elevating the importance of small donations.[9] These systems have been implemented with success in several major U.S. cities, including New York City, Los Angeles, and San Francisco[10] and have allowed small donors—of both major parties and all ideologies—to play a significant role in politics.[11]

The concept behind small donor matching systems is simple: small donations from individuals, usually under about $200, are matched by public money.[12] Funding may come from a variety of sources, including appropriations from state or local budgets. An analysis of a proposed statewide public financing system in New York State estimated it would cost approximately two dollars per New Yorker to implement.[13] The most successful systems also employ a multiple match ratio, thereby amplifying the impact of a single small donation.[14] For example, under a 5:1 ratio, a $10 contribution from a constituent would be matched with $50 in public funds for the candidate. The systems are voluntary for candidates, who typically agree to certain conditions, such as lower contribution limits.[15]

Small donor systems offer concrete benefits for both candidates and voters. When public funds are made available, candidates rely far more heavily on small donations than candidates who rely on traditional fundraising and big donors.[16] With an alternative source of funds, candidates who don't necessarily have connections to big donors are more likely to enter electoral contests,

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[7] *Id.* at 16-22; *see* BRENT FERGUSON, STATE OPTIONS FOR REFORM 1 (2015), https://www.brennancenter.org/sites/default/files/publications/State_Options_for_Reform_FINAL.pdf.
[8] *See* GENN ET AL., *supra* note 6, at 16-22; FERGUSON, *supra* note 7, at 1; MICHAEL J. MALBIN ET AL., SMALL DONORS, BIG DEMOCRACY: NEW YORK CITY'S MATCHING FUNDS AS A MODEL FOR THE NATION AND STATES, 11 Elec. L.J. 3, 13 (2012).
[9] ADAM SKAGGS & FRED WERTHEIMER, EMPOWERING SMALL DONORS IN FEDERAL ELECTIONS 1 (2012), http://www.brennancenter.org/sites/default/files/legacy/publications/Small_donor_report_FINAL.pdf.
[10] FERGUSON, *supra* note 7, at 1; Testimony of Ian Vandewalker, Senior Counsel, Brennan Ctr. for Justice, to the Council of the District of Columbia (June 29, 2017), *available at* https://www.brennancenter.org/sites/default/files/analysis/BC%20testimony_DC%20B22-0192%20Fair%20Elections%20Act.pdf.
[11] SKAGGS & WERTHEIMER, *supra* note 9, at 1.
[12] FERGUSON, *supra* note 7, at 1.
[13] *See* Ian Vandewalker, *The Truth About the Cost of Public Campaign Funding*, Brennan Center for Justice (May 7, 2013), http://www.brennancenter.org/analysis/truth-about-cost-public-campaign-funding.
[14] Ferguson, *supra* note 7, at 1.
[15] *Id.*
[16] SKAGGS & WERTHEIMER, *supra* note 9, at 14.

increasing the overall competitiveness of elections and diversifying the candidate pool.[17] From the voter perspective, the match encourages more small donors to give, knowing their contribution is more valuable to a candidate.[18] And even such small-scale financial involvement in elections serves as a gateway to other ways of engaging in the political process.[19] Studies have shown that small donors are more likely to volunteer for campaigns, canvass voters, and pass out campaign literature.[20]

The success of New York City's small donor matching system illustrates the benefits that these systems offer. During the 2017 election cycle, 82 percent of New York City candidates participated in the matching funds program.[21] The program has helped candidates rely on small contributions and public money: In 2013, the median contribution size for participating city council incumbents was $100, while the median for participating challengers was $50.[22]

New Yorkers who contribute to city candidates are much more racially and economically diverse than donors to candidates for non-publicly-financed candidates for state legislature.[23] In fact, the neighborhoods where small donors in New York City elections reside are more representative of the city as a whole than the neighborhoods where donors to state candidates live.[24] Elections are transformed when small donors' voices are amplified.

Vouchers

Another option for reform is a voucher system, in which citizens receive vouchers they can use to direct public funds to the candidates they favor.[25] Rather than seek big-money donations from a select few donors, politicians instead have the incentive to focus on encouraging many potential small donors to use their vouchers.[26] The City of Seattle pioneered this kind of system. Under its "Democracy Voucher" program, each voter receives four $25 vouchers.[27] The program has diversified the campaign donor pool to better reflect the demographics of Seattle residents, and lower-income residents are making first-time donations according to public voter participation statistics.[28]

[17] GETACHEW & MEHTA, *supra* note 5, at 2.
[18] SKAGGS & WERTHEIMER, *supra* note 9, at 1.
[19] *Id.*
[20] *Id.*
[21] N.Y.C. CAMPAIGN FIN. BD., *82 Percent of City Candidates Join Public Matching Funds Program* (June 20, 2017), https://www.nyccfb.info/media/press-releases/82-percent-of-city-candidates-join-public-matching-funds-program/.
[22] N.Y.C. CAMPAIGN FIN. BD, 2013 Post-Election Report 49 (2014), http://www.nyccfb.info/PDF/per/2013_PER/2013_PER.pdf.
[23] FERGUSON, *supra* note 7, at 1; SKAGGS & WERTHEIMER, *supra* note 9, at 15.
[24] FERGUSON, *supra* note 7, at 1; SKAGGS & WERTHEIMER, *supra* note 9, at 15.
[25] FERGUSON, *supra* note 7, at 2.
[26] *Id.*
[27] SEATTLE MUN. CODE § 2.04.620(b) (2015).
[28] Gene Falk, *Do Seattle's democracy vouchers work? New analysis says yes*, THE SEATTLE TIMES (Oct. 15, 2017), https://www.seattletimes.com/seattle-news/data/do-seattles-democracy-vouchers-work-new-analysis-says-yes/.

Rebates and Tax Credits

Rebates and tax credits also make donations more attractive for small donors, if only indirectly.[29] States such as Minnesota, Virginia, and Oregon have offered small contributors a rebate or tax credit, usually with a $50 cap.[30] Tallahassee has implemented a similar reform.[31] Although participation in these programs has not been high enough to fundamentally change privately funded elections, they've increased political participation and lowered barriers to running for office. They also enjoy broad bipartisan support, with groups from both major parties backing tax credits.[32]

Block Grants

Some states, including Maine, Connecticut, and Arizona, have taken a different approach by providing block grants of public money to qualifying candidates through "clean elections" laws.[33] Under these programs, a candidate must collect small contributions (generally around five dollars) from a sufficiently large number of individuals to demonstrate that he or she has enough public support to get a public grant.[34] It is worth noting that, in 2011, the Supreme Court invalidated certain aspects of Arizona's law, which provided extra public money when a candidate faced a particularly high-spending opponent.[35] In the wake of that decision, states have made an effort to strengthen their clean elections laws, including a 2015 citizen initiative in Maine to improve its existing law.

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As noted above, different types of public financing can be combined to provide for a comprehensive system of financing elections. Below, we detail the most critical components of one type of reform, a small donor matching bill. The specifics will vary by jurisdiction. Contact the Brennan Center to discuss the best way to implement these suggestions in your jurisdiction.

- **Provide for an adequate and reliable funding stream.** A strong public financing program should identify its funding source. New York City's law, for example, has established a special fund — the New York City Campaign Finance Fund — to pay for

[29] FERGUSON, *supra* note 7, at 2.
[30] FERGUSON, *supra* note 7, at 2; M.S.A. § 290.06(23) (2018); VA CODE ANN. § 58.1-339.6 (2016) (providing 50% tax credit for first $50); OR. REV. STAT. § 316.102 (2015); *see also* MINN. DEP'T OF REVENUE, *Political Contribution Refund*, http://www.revenue.state.mn.us/individuals/individ_income/Pages/wn-PoliticalContributionRefund2017.aspx (last accessed Apr. 3, 2018).
[31] LAWRENCE NORDEN & DOUGLAS KEITH, SMALL DONOR TAX CREDITS: A NEW MODEL 2 (2017), https://www.brennancenter.org/publication/small-donor-tax-credits-new-model.
[32] *Id.* at 1.
[33] FERGUSON, *supra* note 7, at 2; A.R.S. §§ 16-946, 16-951 (establishing Arizona block grant system); CONN. GEN. STAT. ANN. § 9-702 (2011) (establishing Connecticut's Citizens' Election Program); 21-A M.R.S.A. §§ 1121- 1128 (establishing Maine Clean Election Fund and outlining terms of participation).
[34] *See, e.g.*, A.R.S. §§ 16-946; 16-951 (outlining qualifying contribution requirement and funding amounts).
[35] Arizona Free Enter. Club's Freedom Club PAC v. Bennett, 564 U.S. 721, 753 (2011) (finding that block grant system's matching funds provision did not survive First Amendment scrutiny).

its system.[36] The Fund is financed through general appropriations from the City Council budget.[37]

- **Have a qualifying threshold.** Candidates participating in a small donor matching program should demonstrate they have a minimum threshold level of support. This prevents frivolous or uncompetitive candidates from draining public resources unnecessarily. Legislation should include both a qualifying threshold *amount* of funds and a threshold *number of donors* in the jurisdiction or district to ensure that the candidate is supported by a sufficiently large number of contributors providing reasonably small sums.[38] Contact the Brennan Center to discuss strategies for assessing an appropriate threshold.

- **Make small contributions up to a certain amount matchable.** Under New York City's campaign finance law, contributions of up to $175 are eligible for matching.[39] Other jurisdictions can adjust as appropriate.

- **Implement a multiple match ratio.** A sufficiently large ratio amplifies the effect of small donations. Strong legislation would propose a match ratio of at least 4:1. New York City's 6:1 ratio allows candidates to receive up to $1,050 from the City per contribution.[40]

- **Limit matchable contributions to "natural persons" living within the jurisdiction.** The geographic limitation helps to curb out-of-jurisdiction contributions. The "natural persons" requirement prevents the system from subsidizing special interest group money. Both requirements reinforce the focus on the interests of local constituents.

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[36] N.Y.C. ADMIN. CODE § 3-709.

[37] *Id.*; *see also* N.Y.C., N.Y. Local Law No. 8 (1988). Other jurisdictions have used different strategies to fund their public financing programs. Some states, as well as the federal government, have used tax check-off s to allow taxpayers to direct a portion of their taxes to candidates or political parties. *See, e.g.*, M.S.A. § 10A.31 (allowing Minnesota residents to designate on tax return that $5 be paid from general fund to state elections campaign account); NORDEN & KEITH, *supra* note 31, at 7 (describing tax form check-off for funding presidential public financing program). We note, however, that participation in check-off programs alone does not always provide sufficient funding. *See Public financing of elections a state budget casualty*, WISCONSIN STATE JOURNAL (July 4, 2011), http://host.madison.com/wsj/news/local/govt-and-politics/elections/public-financing-of-elections-a-state-budget-casualty/article_3dfcc38a-a63f-11e0-ad5d-001cc4c03286.html (observing decline in participation in voluntary check-off to fund elections). North Carolina used surcharges on attorney dues to the state bar, in combination with a tax check-off, to fund its now-defunct public financing program for statewide judicial candidates. Alicia Bannon, *Public Financing Helps Keep Special Interests Out of N.C. Courts*, Brennan Center for Justice (Apr. 2, 2013), https://www.brennancenter.org/analysis/public-financing-helps-keep-special-interests-out-nc-courts. Seattle's Democracy Voucher program is funded through a property tax on business, commercial, and residential properties, and costs the average homeowner approximately $11.50 per year. *Democracy Voucher Program: About the Program*, http://www.seattle.gov/democracyvoucher/about-the-program (last accessed Apr. 23, 2018).

[38] SKAGGS & WERTHEIMER, *supra* note 9, at 2; *see also* N.Y.C. ADMIN. CODE § 3-703(2) (setting eligibility thresholds for public financing).

[39] *See* N.Y.C. ADMIN. CODE § 3-705(2)(a) (providing six dollars in public funds for each dollar contributed, up to $1,050).

[40] *See id.*

- **Reduce contribution limits for participating candidates.** In return for receiving public matching funds, participating candidates should have stricter contribution limits than traditionally funded candidates. This restriction would encourage publicly funded candidates to focus their fundraising efforts on a large number of voters, including those of modest means.

- **Only give public funds to candidates with an actual opponent.** This protects the system from a drain on resources where a candidate is likely to prevail anyway.

- **Cap the amount of public funding that a candidate can receive at a reasonable amount, but impose no limits on how much they can raise or spend.** Even after receiving the maximum public funds, candidates should be able to raise and spend additional funds privately, subject to the contribution limits that apply to participating candidates. The absence of an overall spending limit will prevent serious candidates from declining to enter the public financing system out of fear that they would be unable to run a competitive campaign.

- **Require participating candidates to take part in a public debate hosted by a neutral entity.** Cities including New York City and San Francisco, and states including New Jersey, impose such a requirement on candidates who participate in their small donor matching programs.[41] Nonparticipating candidates should be invited, but not compelled, to join the debates.

- **Provide for effective disclosure and enforcement.** Mechanisms for transparency and accountability will ensure that the program is efficiently administered and will guard against fraud. A sound system would require regular reports of small donations to ensure compliance with the prerequisites to receive matching funds. A governmental board or commission should oversee and administer the program. The board or commission should have audit authority and be tasked with detecting violations of the campaign finance law.

FOR MORE INFORMATION ON PUBLIC FINANCING

BRENNAN CTR. FOR JUSTICE & DEMOS, A CIVIL RIGHTS PERSPECTIVE ON MONEY IN POLITICS (2016), https://www.brennancenter.org/analysis/civil-rights-perspective-money-politics

BRENT FERGUSON, STATE OPTIONS FOR REFORM (2015), https://www.brennancenter.org/publication/state-options-reform

ELISABETH GENN, MICHAEL J. MALBIN, SUNDEEP IYER, & BRENDAN GLAVIN, BRENNAN CTR. FOR JUSTICE & CAMPAIGN FIN. INST., DONOR DIVERSITY THROUGH PUBLIC MATCHING FUNDS (2012),

[41] N.J. ADMIN. CODE § 19:25-15.17(a)(1) (candidates for Governor or Lieutenant Governor seeking to qualify for receipt of public matching funds must file a statement of agreement to participate in two interactive debates (in the case of a candidate for Governor) or one debate (in the case of a candidate for Lieutenant Governor)); N.Y.C. ADMIN. CODE § 3-709.5(1)(a) (requiring participating public financing candidates to take part in either of the two pre-election debates, or both); S.F. CAMPAIGN & GOV'TAL CONDUCT CODE § 1.140(a)(2)(F) ("To be eligible to receive public financing of campaign expenses under this Chapter, a candidate must . . . agree to participate in at least three debates with the candidate's opponents.").

http://www.brennancenter.org/sites/default/files/legacy/publications/DonorDiversityReport_WEB.PDF

DENORA GETACHEW & AVA MEHTA, BREAKING DOWN BARRIERS: THE FACES OF SMALL DONOR PUBLIC FINANCING (2016), https://www.brennancenter.org/sites/default/files/publications/Faces_of_Public_Financing.pdf

ANGELA MIGALLY & SUSAN LISS, SMALL DONOR MATCHING FUNDS: THE NYC ELECTION EXPERIENCE (2010), https://www.brennancenter.org/sites/default/files/legacy/Small%20Donor%20Matching%20Funds-The%20NYC%20Election%20Experience.pdf

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ADAM SKAGGS & FRED WERTHEIMER, EMPOWERING SMALL DONORS IN FEDERAL ELECTIONS (2012), http://www.brennancenter.org/sites/default/files/legacy/publications/Small_donor_report_FINAL.pdf

Ian Vandewalker & Brent Ferguson, *Small Donors can Outweigh Wealthy Few* (Dec. 13, 2013) https://www.brennancenter.org/analysis/small-donors-can-outweigh-wealthy-few

COMPONENTS OF AN EFFECTIVE DISCLOSURE LAW

In recent years, there has been a steep increase in election spending by outside actors. Much of this spending has come from entities that do not publicly disclose their donors — often referred to as "dark money."[1] There has also been a rise in "gray money"— election spending by entities that disclose their donors in a manner that makes the original sources of money difficult or impossible to trace.[2]

Dark money groups spent almost $181 million in federal contests during the 2016 election cycle.[3] This spending took place on both sides of the aisle, with outside groups providing substantial financial support to candidates of both major political parties without disclosing the source of their funds.[4] The overall rise in dark money partly reflects a sharp uptick in donations to super PAC spenders.[5] Although super PACs must legally disclose their donors, nonprofit groups that donate to super PACs, such as 501(c)(4) social welfare groups and 501(c)(6) trade associations, do not.[6] Together, super PACs and dark money groups spent over $1.4 billion in the 2016 federal election cycle.[7] With such large sums of money at play, the public needs to have the information necessary to make informed decisions at the polls.

Transparency is especially crucial at the state and local level, where dark money poses a unique threat.[8] State and local elections are relatively low-cost compared to federal contests, so it is easy for dark money to dominate with unaccountable messages that voters cannot assess meaningfully.[9] In many contests that the Brennan Center has studied, in fact, dark money groups outspend candidates with amounts in the low $100,000s, or even in the $10,000s.[10] Such sums could be prohibitively expensive for candidates and community groups to overcome, but are pocket change for special interests.[11] Sources of dark money often harbor a direct economic interest in a state or local election's outcome.[12] Attempts to influence election outcomes have proliferated, from charter school interests donating in local school board elections, to power suppliers targeting an Arizona public utilities commission race with $3.2 million in dark money ads.[13] Dark money spending also impacts ballot measure initiatives, which take place in all 50

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[1] CHISUN LEE ET AL., SECRET SPENDING IN THE STATES 5 (2016) https://www.brennancenter.org/sites/default/files/analysis/Secret_Spending_in_the_States.pdf.
[2] *Id.* at 5.
[3] Robert Maguire, *$1.4 billion and counting in spending by super PACs, dark money groups*, CTR. FOR RESPONSIVE POLITICS (Nov. 9, 2016), *available at* https://www.opensecrets.org/news/2016/11/1-4-billion-and-counting-in-spending-by-super-pacs-dark-money-groups/ (last accessed Apr. 3, 2018).
[4] *Id.*
[5] LEE ET AL., *supra* note 1, at 8.
[6] *Id.*
[7] Maguire, *supra* note 3.
[8] LEE ET AL., *supra* note 1, at 10.
[9] *Id.*
[10] *Id.* at 17.
[11] *See id.*
[12] *Id.* at 1, 17.
[13] *Id.* at 13-14.

states.[14] Because ballot measures are often high-stakes but low-cost for business interests, secret outside spenders have poured money into these contests.[15]

Strengthening disclosure laws is a key way to increase transparency. Despite significant changes in campaign finance law in recent years, disclosure is among the few campaign finance rules that the Supreme Court still embraces. The Court has noted that disclosure requirements "provid[e] the electorate with information, deterring actual corruption and avoiding any appearance thereof[.]"[16]

Disclosure also has broad popular support. In a November 2015 Associated Press poll, for example, 76 percent of respondents agreed that "all groups that raise and spend unlimited money to support candidates should be required to publicly disclose their contributors."[17] Eighty-seven percent of respondents in that same poll reported that they believed that disclosure would be at least somewhat effective at reducing the influence of money in politics.[18] And a 2015 New York Times/CBS News poll underscored that disclosure has broad bipartisan support, with Democrats and Republicans equally supporting a requirement that groups spending money in political campaigns publicly disclose their contributors.[19]

States and local governments have been working to strengthen transparency in their elections. For example, Montana's disclosure law requires *all* groups engaged in election spending to disclose the source of their funds.[20] Strong disclosure provisions have also been enacted in California, Delaware, and New York City.[21] Most recently, Washington State enacted the Washington DISCLOSE Act of 2018, which will strengthen existing transparency measures by requiring disclosure by nonprofits spending significant sums in politics.[22]

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[14] *Id.* at 14-15.
[15] *Id.* at 15.
[16] McConnell v. Fed. Election Comm'n, 540 U.S. 93, 196 (2003).
[17] LEE ET AL., *supra* note 1, at 23; *see also* AMERICANS' VIEWS ON MONEY IN POLITICS, THE ASSOCIATED PRESS-NORC & CTR. FOR PUB. AFFAIRS RESEARCH 7 (2015), *available at* http://www.apnorc.org/PDFs/PoliticsMoney/November_Omnibus_Topline_FINAL.pdf.
[18] LEE ET AL., *supra* note 1, at 23; AMERICANS' VIEWS ON MONEY IN POLITICS, THE ASSOCIATED PRESS-NORC & CTR. FOR PUB. AFFAIRS RESEARCH 11 (2015), *available at* http://www.apnorc.org/PDFs/PoliticsMoney/November_Omnibus_Toplin e_FINAL.pdf.
[19] AMERICANS' VIEWS ON MONEY IN POLITICS, N.Y. TIMES/CBS (June 2, 2015), *available at* https://www.nytimes.com/interactive/2015/06/02/us/politics/money-in-politics-poll.html (76% of Republicans polled, and 76% of Democrats polled, reported that such groups "should publicly disclose") (under tab labeled "Show responses from," select "Republicans" and "Democrats," respectively).
[20] MONT. CODE ANN. § 13-37-232 (2015) (outlining disclosure requirements for "incidental committees"); *id.*§ 13-1-101(23)(a) (defining "incidental committee" as "a political committee that is not specifically organized or operating for the primary purpose of supporting or opposing candidates or ballot issues but that may incidentally become a political committee by receiving a contribution or making an expenditure").
[21] *See* LEE ET AL., *supra* note 1, at 23-24, 26.
[22] Political Campaign Financing—Disclosures, S.B. 5991, 65th Leg. Reg. Sess. (Wash. 2018).

Disclosure, on its own, does not replace other necessary campaign finance reforms, but it is a crucial tool to unearth special interest spending that can distort policy. A model disclosure law would:

- **Ensure that voters and regulators know who is really behind the spending:**
  - ***Extend disclosure to organizations that donate to spender organizations.*** In California, even a nonprofit must disclose donors for contributions made to organizations that engage in outside spending, and outside spenders must list the top two donors who gave them at least $50,000.[23] Subject to certain exceptions, Connecticut requires spenders to list the names of their own contributors, as well as the five biggest aggregate donors to those contributors if their funds are used for independent expenditures.[24]
  - ***Require disclosure of the people in charge of opaque spending entities.*** The individuals contributing to a dark money group are generally not the same individuals running the group. Information about the identities of both makes meaningful accountability more possible. Delaware, for example, requires entity contributors to provide "one responsible party" for the entity.[25] In New York City, entities contributing to organizations engaging in outside spending are required to disclose "at least one individual who exercises control over the activities of such contributing entity."[26]
  - ***Require disclaimers on political advertising.*** Public information about funders is most helpful to voters if that information appears on the advertising itself in the form of a "paid for by" disclaimer.[27] Disclaimer requirements should require that advertisements state whether they are paid for and/or authorized by a candidate or another group. Lawmakers may consider additional requirements, such as requiring advertisements from outside groups to list the group's top few contributors on each ad. Such a requirement helps bolster the efficacy of disclosure when ads are run by groups with anodyne names or that are unfamiliar to voters.[28]

[23] LEE ET AL., *supra* note 1, at 25; CAL. GOV'T CODE § 84222(e)(5) (2014); CAL. CODE REGS. tit. 2 § 18422.5 (2015).
[24] LEE ET AL., *supra* note 1, at 25; CONN. GEN. STAT. § 9-621(j)(1) (2013); *see also* CONN. GEN. STAT. ANN. § 9-601(29)(A) (2017) (defining a "covered transfer" as "any donation, transfer, or payment of funds by a person to another person if the person receiving the donation, transfer or payment makes independent expenditures or transfers funds to another person who makes independent expenditures").
[25] LEE ET AL., *supra* note 1, at 26; 15 Del. C. § 8031(a)(4)(b) (2013) (requiring non-individual contributors to provide name and mailing address of "one responsible party" if the aggregate amount of contributions made by such entity during the election period exceeds $1,200).
[26] LEE ET AL., *supra* note 1, at 26; N.Y.C., N.Y. Local Law No. 41 Int. No. 148-A (2014).
[27] BRENT FERGUSON, STATE OPTIONS FOR REFORM 4 (2015), https://www.brennancenter.org/sites/default/files/publications/State_Options_for_Reform_FINAL.pdf
[28] *See id.*

- **Close loopholes that allow nonprofits to keep donors secret when they spend money in politics:**
  - ***Require disclosure by all groups that spend a substantial amount of money in politics.*** California, Washington, and Montana's disclosure laws apply to groups even if their "primary purpose" is not deemed political.[29] The specific dollar amounts that would make spending by such groups "substantial" will vary by jurisdiction. Contact the Brennan Center to discuss the best way to determine the appropriate amount in your jurisdiction.
  - ***Require disclosure on both express advocacy ads and issue ads that mention candidates.*** Laws that only require disclosure of spending on "express advocacy" communications — that is, ads that specifically urge voters to vote for or against a candidate — only address a fraction of independent spending. Advertisers in states with such laws can easily dodge disclosure by avoiding using certain words. In reality, so-called "issue ads" provide an easy vehicle for hidden spending. State and local laws should require disclosure of issue ads within a reasonable window of time before an election.[30]
  - ***Require disclosure of donors to political spending even if they don't earmark their contributions for that purpose.*** For example, Delaware requires disclosure of all donors to groups that buy electioneering communications.[31] Lawmakers might also consider permitting donors to establish separate accounts specific to spending and receiving for election purposes if they do more than political spending. Connecticut and New York have taken this approach.[32]
- **Require disclosure before Election Day.** Some states' disclosure schedules result in significant gaps between campaign spending and reporting. This can leave sources of major election spending undisclosed until just before, or even well after, Election Day.[33]
- **Include reasonable accommodations to ensure disclosure rules are not overly burdensome:**
  - ***Set reasonable monetary thresholds.*** Not every penny needs to be disclosed for a transparency bill to be effective. Small contributions and expenditures do not raise

[29] LEE ET AL., *supra* note 1, at 24; CAL. GOV'T CODE § 84222 (defining "multipurpose organization"); MONT. CODE ANN. § 13-1-101(23)(a) (defining "incidental committee" to include groups that may be treated like political committees on account of their political activity); Political Campaign Financing—Disclosures, S.B. 5991, 65th Leg. Reg. Sess. (Wash. 2018) (requiring disclosure by "incidental committees," defined as "nonprofit organization[s] not otherwise defined as a political committee but that may incidentally make a contribution or an expenditure in excess of . . . reporting thresholds . . . directly or through a political committee").
[30] LEE ET AL., *supra* note 1, at 24.
[31] *Id.*; 15 Del. C. §§ 8002(27), 8031 (making third-party advertising expenditures, which include electioneering communications, subject to disclosure).
[32] CONN. GEN. STAT. ANN. § 9-601d(g)(1) (2013) (allowing persons to establish a dedicated independent expenditure account and limit relevant disclosures to the funds in that dedicated account); N.Y. EXEC. LAW § 172-f(2)(c) (2016) (allowing social welfare nonprofits to establish a segregated account subject to donor disclosures for communications related to public officials or public policy).
[33] LEE ET AL., *supra* note 1, at 26.

the risks of corruption or distorting influence that disclosure laws are meant to address. Implementing reasonable thresholds is a smart way to ensure that disclosure measures are tailored to target big spending.

- ***Permit reasonable exemptions.*** In some instances, the publicity associated with donor disclosure can risk harming certain individuals, such as survivors of domestic violence. Disclosure is also inappropriate when there is evidence that past disclosure exposed a group's members to severe retaliation. Carefully crafted exemptions can protect these individuals' demonstrated need for privacy without meaningfully reducing the anticorruption or informational value of disclosure.[34]

- ***Make other reasonable accommodations.*** States should avoid capturing non-political spending in their campaign finance disclosure laws. Under California law, for example, individual donors may expressly prohibit a recipient organization from using their money for political purposes and thus avoid having to be disclosed.[35]

❖ **Ensure adequate enforcement, but make penalties proportional.** Small or technical lapses should not be subject to adjudication procedures or large fines, and penalties should be predictable.[36]

FOR MORE INFORMATION ON DISCLOSURE

BRENT FERGUSON, STATE OPTIONS FOR REFORM (2015), https://www.brennancenter.org/publication/state-options-reform

CHISUN LEE, KATHERINE VALDE, BENJAMIN T. BRICKNER, & DOUGLAS KEITH, SECRET SPENDING IN THE STATES (2016), https://www.brennancenter.org/sites/default/files/analysis/Secret_Spending_in_the_States.pdf

MONEY IN POLITICS: EMPIRICAL EVIDENCE DATABASE, BRENNAN CTR. FOR JUSTICE *available at* http://www.brennancenter.org/analysis/money-politics-database

[34] *Id.* at 27.
[35] *Id.* at 28; CAL. GOV'T CODE § 84222(e)(2).
[36] LEE ET AL., *supra* note 1, at 28.

COMPONENTS OF AN EFFECTIVE COORDINATION LAW

Given the vast sums of money that have flooded into politics since the *Citizens United* decision, one might not realize that there are still some financial limits. Contribution limits to candidates are alive and well, and have been uniformly upheld by the courts.

This is not the case, however, when it comes to contributions to "independent" groups. When the Supreme Court gave the green light for unlimited expenditures, it assumed that such spending would not be coordinated with candidates and would not undermine the anti-corruption purpose of contribution limits to candidates.[1] A great deal of real-world evidence shows that the Court's assumption was flawed.[2] In fact, the laws of many states, as well as the federal government, do not go far enough to address the realities of coordinated spending. Independent groups are often little more than unregulated arms of candidate campaigns. The notion that there is no "coordination" is a polite fiction.

Coordinated spending between candidates and outside groups moves power away from ordinary citizens in favor of deep-pocketed donors. This is especially true in state and local elections, where campaigns are less costly.[3] In these races, a fairly modest sum can buy significant influence: as one Montana regulator told the Brennan Center, a mere "$20,000 would be a lot of money for a legislative seat."[4] It is no wonder, then, that outside groups have funneled money into every level of state and local government, from gubernatorial and legislative elections, to attorney general and secretary of state races, to mayoral, city council, and district attorney contests.[5]

Certain types of conduct can be evidence of coordination. One indicator is when candidates fundraise for the "independent" groups that support them.[6] Other coordination activities could include the sharing between a candidate's campaign and the outside group of information material to electioneering staff or vendors, such as political consultants, and public communications or materials.[7]

Notably, although candidate-specific groups have often come in the guise of super PACs, issue advocacy nonprofits have increasingly become a vehicle for candidate coordination.[8] Whereas super PACs must publicly report donor information under federal law and the law of many

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[1] *See* Citizens United v. Fed. Election Comm'n, 558 U.S. 310, 360 (2010) ("By definition, an independent expenditure is political speech presented to the electorate that is not coordinated with a candidate.").
[2] *See* MONEY IN POLITICS: EMPIRICAL EVIDENCE DATABASE, BRENNAN CTR. FOR JUSTICE, https://www.brennancenter.org/analysis/money-politics-database (last visited Apr. 3, 2018).
[3] CHISUN LEE ET AL., SECRET SPENDING IN THE STATES 3-4, 10 (2016), https://www.brennancenter.org/sites/default/files/analysis/Secret_Spending_in_the_States.pdf .
[4] CHISUN LEE ET AL., AFTER *CITIZENS UNITED*: THE STORY IN THE STATES 6 (2014), https://www.brennancenter.org/sites/default/files/publications/After%20Citizens%20United_Web_Final.pdf (hereinafter "AFTER *CITIZENS UNITED*").
[5] *See id.*
[6] *See id.* at 10-12.
[7] Testimony of Daniel I. Weiner, Counsel, Brennan Center for Justice at NYU School of Law, Submitted to the Philadelphia Bd. of Ethics (Sept. 17, 2014), *available at* http://www.brennancenter.org/analysis/brennan-center-urges-adoption-enhanced-coordination-rules-philadelphia#7.
[8] LEE ET AL., AFTER *CITIZENS UNITED*, *supra* note 4, at 8.

states, issue advocacy nonprofits are typically exempt from disclosure requirements.[9] The secrecy that these groups enjoy raises special concerns about corruption.[10]

Many jurisdictions' laws have not caught up with these realities. Often, these laws provide only a basic, statutory definition of coordination, enabling candidates and spenders to plead ignorance when certain cooperative actions are not clearly covered.[11] State and local laws need to provide clearer guideposts and capture a realistic range of coordinated activity.

States and cities that have strengthened and enforced their coordination laws have helped to ensure that unlimited spending is independent. For example, in California, regulations presume that spending is coordinated if it involves anyone who has provided campaign or fundraising strategy services to the candidate within the same election.[12] The law also prevents groups from making independent expenditures to support a candidate who has helped the group to raise money.[13] And in Vermont, in response to a flood of candidate-specific outside money, the legislature enacted an unusually strong requirement for outside groups to conduct their activities "entirely independent of candidates" if they wish to raise unlimited funds.[14]

Meaningfully curbing potentially corruptive coordination requires a comprehensive approach. We recommend using all of the following ideas together as a package of reforms, rather than picking and choosing among them.[15]

- **Make sure the law applies to a realistic range of spending**. The weakest laws exclude large amounts of outside spending from coordination regulation by covering only express advocacy (that is, advocacy that directly solicits a vote for or against a candidate), rather than including election-season advertisements that promote or attack candidates' stances on issues.[16] The latter type of ad is far more common.[17] Maine, Ohio, and the federal government have laws that consider a reasonably broad range of activity in regulating coordination.[18]

- **If a candidate raised money for a group, treat all spending by that group on behalf of the candidate as coordinated**.[19] When candidates raise money for a group that then spends on communications to promote their election, they are cooperating to make those expenditures. [20] A candidate's ability to solicit funds for a supportive and unlimited

[9] *Id.*
[10] *Id.*
[11] *Id.* at 4, 28.
[12] *Id.* at 18; *see also* 2 CAL. CODE REGS. § 18225.7(d)(3).
[13] BRENT FERGUSON, STATE OPTIONS FOR REFORM 3 (2015), https://www.brennancenter.org/sites/default/files/publications/State_Options_for_Reform_FINAL.pdf; 2 CAL. CODE REGS. § 18225.7(d)(5).
[14] LEE ET AL., AFTER *CITIZENS UNITED*, *supra* note 4, at 20; *see also* 17 V.S.A. § 2901(10) (2014) (defining "independent expenditure-only political committee" as a political committee that conducts its activities "entirely independent of candidates"); *id.* § 2944 (2014) (outlining "accountability for related expenditures").
[15] LEE ET AL., AFTER *CITIZENS UNITED*, *supra* note 4, at 29.
[16] *Id.* at 27.
[17] *See id.*
[18] *Id.*
[19] *Id.*
[20] *Id.*

spender raises concerns about corruption analogous to those that justify limits on direct campaign contributions.[21] Minnesota's law provides a strong example of how to address this problem: any expenditure to promote the election of a candidate who has raised money for the spender is viewed as coordinated.[22] Weaker laws, such as Connecticut's, allow a candidate's fundraising role for an outside group to be viewed merely as *evidence* of coordination, but does not go so far as to automatically view it as coordination per se.[23]

- **Provide sensible "cooling off" periods before a candidate's former staff can work for a group making unlimited expenditures for the candidate's election.[24]** Without such safeguards, there is a substantial risk that outside spending will be de facto coordinated with the candidate, increasing the risk of corruption.[25] The federal rules currently contemplate a too-short cooling-off period of a mere 120 days. Such a window is too brief, especially given that super PACs work year-round to advance candidates' interests.[26] More reasonable examples could include a full calendar year, as Maine law provides,[27] or 18 months, as in Connecticut.[28]

- **Treat as coordinated any spending that reproduces material produced by the candidate's campaign.[29]** For example, in 2014, the Philadelphia Board of Ethics approved changes to the city's coordination law, providing, among other things, that if an outside group reproduced a candidate's campaign material, the expenditures for the reproduction would be counted as a contribution.[30] A similar proposal passed in San Diego in 2014.[31]

- **Publish scenario-based examples of what constitutes prohibited coordination and what does not.** Strong laws publish examples of prohibited activity in realistic contexts. For example, Connecticut provides a detailed list of scenarios that create a rebuttable

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[21] *Id.*
[22] *Id.* at 28; MINN. CAMPAIGN FIN. & PUB. DISCLOSURE BD., Advisory Opinion 437, at 1 (Feb. 11, 2014), *available at* http://www.cfboard.state.mn.us/ao/AO437.pdf.
[23] LEE ET AL., AFTER *CITIZENS UNITED*, *supra* note 4, at 28.
[24] *Id.*
[25] Testimony of Daniel I. Weiner and David Earley, Counsel, Brennan Center for Justice, to Federal Election Commission (Jan. 15, 2015), *available at* https://www.brennancenter.org/analysis/comment-fec-wake-supreme-court-decisions-fix-disclosure-and-coordination-rules-and-enforce.
[26] LEE ET AL., AFTER *CITIZENS UNITED*, *supra* note 4, at 28.
[27] 94-270 C.M.R. Ch. 1, § 6(9)(B)(1) (an expenditure is presumed to be coordinated when, among other things, the spender has "had a paid or unpaid position managing the candidate's campaign, or has received any campaign-related compensation or reimbursement from the candidate" in the last twelve months preceding the expenditure).
[28] CONN. GEN. STAT. § 9-601c(b)(5) (2013) (applying 18-month cooling off period to individuals who served as employee or consultant to candidate's candidate committee or opponent's candidate committee).
[29] LEE ET AL., AFTER *CITIZENS UNITED*, *supra* note 4, at 28.
[30] PHILADELPHIA, PA. BD. OF ETHICS REG. NO. 1.40 (2014); *see also* Leigh Hartman, *Philadelphia Regulation Attempts to Reign in Coordinated Spending*, BRENNAN CTR. FOR JUSTICE (Nov. 7, 2014), *available at* https://www.brennancenter.org/blog/philadelphia-regulation-attempts-reign-coordinated-spending.
[31] Joe Yerardi, *San Diego's Ethics Commission votes to reign in independent committees*, INEWSOURCE (July 11, 2014), *available at* https://inewsource.org/2014/07/11/san-diegos-ethics-commission-votes-to-reign-in-independent-committees/.

presumption of coordination.[32] Federal law is unnecessarily narrow, but still provides more detailed guidance than the laws of many states.[33]

- **Treat as coordinated any spending to promote the election of a candidate, when the spender uses a consultant or vendor who has also served the candidate in a position privy to related campaign information.**[34] Federal regulations address this issue by providing that an outside spender may not use a vendor that a candidate has used in the last 120 days.[35] As noted in the above discussion of "cooling off" periods, such a window is too short. California and Maine regulate the same conduct, but without such a brief window.[36]

- **Allow the use of firewalls under appropriate circumstances to demonstrate that an outside group's spending was truly independent.**[37] When a vendor provides services to both a candidate and an outside group, the vendor may use an adequate firewall to separate the two streams of work and mitigate the risk of coordination.[38] States should allow proof of a formal, written policy prohibiting the exchange of relevant information to serve as evidence that no coordination occurred.[39]

- **Ensure adequate enforcement and deterrence.** Tough rules have no meaning if they are not enforced. A single entity should be vested with clear, primary authority to enforce the law.[40] That entity should not only react to private complaints but should also conduct investigations on their own initiative into possible coordinated activity.[41] The law should also deter coordination by providing for graduated penalties.[42] The size of the penalty should correspond to the severity of the violation. There should be allowances for de minimis transgressions, but there should also be adequate consequences for significant and deliberate wrongdoing.[43]

FOR MORE INFORMATION ON COORDINATION

BRENT FERGUSON, STATE OPTIONS FOR REFORM (2015), https://www.brennancenter.org/publication/state-options-reform

[32] *See* CONN. GEN. STAT. § 9-601c(b) (2013) (listing expenditures that raise rebuttable presumption of coordination).
[33] LEE ET AL., AFTER *CITIZENS UNITED*, *supra* note 4, at 28.
[34] *Id.*
[35] *Id.*
[36] *Id.*
[37] *Id.* at 29.
[38] *Id.*
[39] *Id.*
[40] *Id.* at 28.
[41] *Id.*
[42] *See id.*
[43] *Id.*

CHISUN LEE, BRENT FERGUSON, & DAVID EARLEY, AFTER *CITIZENS UNITED*: THE STORY IN THE STATES, (2014), https://www.brennancenter.org/sites/default/files/publications/After%20Citizens%20United_Web_Final.pdf

COMPONENTS OF AN EFFECTIVE INTERNET ADVERTISING LAW

The internet has transformed every aspect of society, including politics. In 2016, campaigns spent a total of $1.4 billion online, eight times higher than the amount spent in 2012.[1] Federal and state rules have not kept pace with these game-changing shifts.

On the federal level, legislation is pending to extend rules that govern political advertising on television and radio to cover internet ads, too. However, there is much that states and cities can, and should, do to improve their laws. California has provided a strong start with its Disclose Act, which requires disclaimers for political ads on social media feeds.[2] And in 2018, New York State expanded its definition of "political communication" to include paid internet or digital advertisements.[3]

Seattle has also won attention for its enforcement of campaign finance laws against undisclosed spending on the internet. In February 2018, the Seattle Ethics and Elections Commission found Facebook in violation of a city law that requires disclosure by ad buyers.[4] Seattle's campaign disclosure law was drafted in 1977, before the advent of the internet.[5] The law requires companies that sell election advertising — regardless of the medium — to maintain public books showing the names and addresses of ad buyers, the corresponding payments, and the "exact nature and extent of the advertising services rendered."[6] The potential penalties could be up to $5,000 per advertising buy.[7] Previously, the law had not been enforced against tech companies.[8] After Seattle's action, Washington State updated its campaign finance laws to include online ads in its disclosure rules, including a requirement that ad sellers maintain a file of ads available for public inspection.[9]

Importantly, this episode underscores that older, broader laws may leave ad buyers and sellers confused about their obligations and can even result in inconsistent application of laws across jurisdictions. It is preferable to specifically tailor laws to encompass the internet by enacting the following:

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[1] IAN VANDEWALKER & LAWRENCE NORDEN, GETTING FOREIGN FUNDS OUT OF AMERICA'S ELECTIONS 2 (2018) https://www.brennancenter.org/sites/default/files/publications/Getting%20Foreign%20Funds%20Out%20of%20America%27s%20Elections.%20Final_April9.pdf.
[2] CAL. GOV'T CODE ANN. §§ 84504.3(a), 84504.3(f) (2018); *see also* Ian Vandewalker & Larry Norden, *California should require disclosure of political ad buys to fend off meddling*, S.F. CHRONICLE (Feb. 18, 2018), https://www.sfchronicle.com/opinion/openforum/article/California-should-require-disclosure-of-political-12623972.php.
[3] Budget Bill, S.7509-C, 2017-2018 Leg. Sess. (N.Y. 2018), https://www.nysenate.gov/legislation/bills/2017/s7509.
[4] David Ingram, *Seattle says Facebook is violating city campaign finance law*, REUTERS (Feb. 6, 2018), https://www.reuters.com/article/us-facebook-politics/seattle-says-facebook-is-violating-city-campaign-finance-law-idUSKBN1FP2MB.
[5] *Id.*; SEATTLE MUN. CODE § 2.04.280 (1977).
[6] *See* SEATTLE MUN. CODE § 2.04.280(A).
[7] *See id.* § 2.04.500(A)(1).
[8] Ingram, *supra* note 4.
[9] Washington included digital ads under existing rules around political advertising. An Act Concerning Campaign Finance Law Enforcement and Reporting, H.B. 2938, 65th Leg. Reg. Sess. (Wash. 2018), http://apps2.leg.wa.gov/billsummary?BillNumber=2938&Year=2017&BillNumber=2938&Year=2017.

- **Update laws to cover online spending.** Campaign finance laws should explicitly require disclosure of internet ad spending and their underlying funding. Definitions of "electioneering communications" should include online expenditures.

- **Require disclaimers for online ads.**[10] Disclaimer provisions — sometimes called "stand by your ad" rules — require payer information to be placed directly on an advertisement. Including a disclaimer will ensure that people viewing a political ad online will know whether it is a paid ad and, if so, who paid for it. Viewers will then be in a better position to meaningfully evaluate the online ad's content. Disclaimer rules should also cover social media "shares" of paid political ads by requiring that disclaimer language follows the ad when it is shared by users.[11]

- **Require digital platforms to maintain public files of all political advertisements purchased on the platform.** The public files should provide information including the content of the ad, the audience targeted, the timing, and payment information.[12] The definition of "political" ads should include any mention of a candidate or legislative issues of public importance.[13] This will ensure that the scope of the definition is sufficiently broad to deter end-runs around the requirement. Lawmakers should also consider including a safe harbor provision, such that platforms would be allowed to keep some identifying information out of the public file where the ad buyer provides credible evidence that disclosure will subject the buyer to "threats, harassment, or reprisals."[14]

- **Provide for adequate enforcement and civil penalties for violations.** New York State, for example, recently passed budget legislation imposing a civil monetary penalty for violations of internet ad regulations.[15]

FOR MORE INFORMATION ON INTERNET ADVERTISING

IAN VANDEWALKER & LAWRENCE NORDEN, GETTING FOREIGN FUNDS OUT OF AMERICA'S ELECTIONS (2018), https://www.brennancenter.org/publication/getting-foreign-funds-out-americas-elections

Ian Vandewalker & Larry Norden, *California should require disclosure of political ad buys to fend off meddling*, S.F. CHRONICLE (Feb. 18, 2018), https://www.sfchronicle.com/opinion/openforum/article/California-should-require-disclosure-of-political-12623972.php

[10] VANDEWALKER & NORDEN, *supra* note 1, at 10, 23.
[11] *Id.* at 11.
[12] *Id.* at 10, 23.
[13] *Id.* at 23.
[14] Buckley v. Valeo, 424 U.S. 1, 74 (1976).
[15] Budget Bill, S.7509-C, 2017-2018 Leg. Sess. (N.Y. 2018), https://www.nysenate.gov/legislation/bills/2017/s7509.

COMPONENTS OF AN EFFECTIVE LAW ON FOREIGN SPENDING

Americans have been wary of the influence of foreign powers on politics since the country's founding.[1] The 2016 elections provided a prominent example of this threat.[2]

In February 2018, Special Counsel Robert Mueller charged 13 Russian nationals with "information warfare" against the U.S., including charges of conspiracy to defraud the country, bank and wire fraud, and aggravated identity theft.[3] This group was associated with the Internet Research Agency, a notorious "troll farm" in St. Petersburg.[4] Posing as Americans, they created false social media personas and ran pages and groups designed to attract American audiences.[5] Tens of millions of Americans saw the ads but were left in the dark about their true source.[6]

What is pernicious about spending online, and on social media in particular, is the leveraging effect of platforms like Twitter and Facebook. Russian trolls often began with paid, promoted posts appearing in recipients' feeds. But once users "liked" or "shared" any of these posts, they were automatically (and possibly unknowingly) subscribed to follow the accounts' "organic" unpaid–posts.[7] It is estimated that over 126 million users were exposed to organic posts on Facebook alone.[8]

Legislators need to shore up campaign finance laws to address unaccountable dark money group spending that can disguise foreign funding sources. Dark money poses a unique danger at state and local levels, where races tend to be less costly and voters often have less information on which to base their decisions.[9]

Some already have shown leadership on this front. California has robust disclosure requirements that keep the levels of dark money in its elections low.[10] To address the fact that corporations and other business entities with foreign ownership are another potential avenue for foreign election spending, Colorado law restricts spending by corporations that are majority foreign-owned.[11]

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[1] THE FEDERALIST NO. 68 (Alexander Hamilton) (defending the Electoral College's role in electing the president in part as a defense against allowing "foreign powers to gain an improper ascendant in our councils").
[2] IAN VANDEWALKER & LAWRENCE NORDEN, GETTING FOREIGN FUNDS OUT OF AMERICA'S ELECTIONS 2 (2018), https://www.brennancenter.org/sites/default/files/publications/Getting%20Foreign%20Funds%20Out%20of%20America%27s%20Elections.%20Final_April9.pdf.
[3] Indictment, United States v. Internet Research Agency LLC, et al., No. 1:18-cr-00032-DLF, 2018 WL 914777 (D.D.C. Feb. 16, 2018), *available at* https://www.justice.gov/file/1035477/download (hereinafter "Internet Research Agency Indictment").
[4] *Id.* ¶ 2; Ian Vandewalker & Larry Norden, *California should require disclosure of political buys to fend off meddling*, S.F. CHRONICLE (Feb. 18, 2018) https://www.sfchronicle.com/opinion/openforum/article/California-should-require-disclosure-of-political-12623972.php.
[5] Internet Research Agency Indictment ¶ 4.
[6] VANDEWALKER & NORDEN, *supra* note 2, at 6-7.
[7] *Id.* at 7-8.
[8] *Id.* at 7.
[9] CHISUN LEE ET AL., SECRET SPENDING IN THE STATES 3, 17-18 (2016), https://www.brennancenter.org/sites/default/files/analysis/Secret_Spending_in_the_States.pdf; VANDEWALKER & NORDEN, *supra* note 2, at 15.
[10] LEE ET AL., *supra* note 9, at 3; VANDEWALKER & NORDEN, *supra* note 2, at 16.
[11] COLORADO REV. STAT. ANN. §§ 1-45-103(10.5)(b), 1-45-107.5(1) (2016); VANDEWALKER & NORDEN, *supra* note 2, at 19.

A strong foreign spending law would do the following:

- **Update laws to cover online spending**. Campaign finance laws should regulate internet spending like other mass media. Most importantly, laws should include online ads that mention candidates before an election, often called "electioneering communications," in rules that ban foreign spending and require disclosure of funding sources.[12]

- **Require disclaimers for online ads.** Voters are entitled to know who paid for an online ad, just as they do for radio and television ads. Disclaimer rules should cover social media "shares" of paid political advertisements by requiring disclaimer language to follow a political ad when the ad is shared.[13]

- **Require major platforms to maintain public databases of political ads.** The databases should make available the content of an ad, the audience targeted, the timing, and the source of payment.[14] For purposes of this requirement, the definition of "political" ads should be sufficiently broad and include any mention of a candidate or legislative issues of public importance.[15] Lawmakers should also consider adding a safe harbor provision to this proposed requirement by allowing platforms to keep some identifying information out of the public file in instances where the ad buyer presents credible evidence that disclosure will subject the buyer to "threats, harassment, or reprisals."[16]

- **Require ad sellers to make reasonable efforts to identify and block foreign purchases of political ads.[17]** Ad sellers should require address information for credit card transactions and check addresses against those on file with card issuers.[18] Sellers should make sure that the card holder has a U.S. address.[19] Sellers should also be clear about their procedures for identifying ineligible buyers and provide a robust and transparent appeals process for buyers who are blocked in error.[20]

- **Toughen disclosure laws.** To take away dark money as a potential hiding place for foreign spending, laws should require organizations that spend above a certain threshold on politics to disclose their donors. For example, California requires groups including nonprofits to report political expenditures above a certain amount, as well as the identities of recent donors.[21] When one group makes significant political expenditures, other groups that have donated to that group may also be required to disclose their donors.[22]

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[12] *Id.* at 8, 13, 23.
[13] *Id.* at 11.
[14] *Id.* at 10, 23.
[15] *Id.* at 23.
[16] *Id.* at 10; *see also* Buckley v. Valeo, 424 U.S. 1, 74 (1976).
[17] VANDEWALKER & NORDEN, *supra* note 2, at 11-12, 23.
[18] *Id.* at 12.
[19] *Id.*
[20] *Id.*
[21] CAL. GOV'T CODE § 84222; VANDEWALKER & NORDEN, *supra* note 2, at 16.
[22] VANDEWALKER & NORDEN, *supra* note 2, at 16.

- **Prohibit spending by foreign-controlled corporations.**[23] Corporations and other business entities with substantial foreign ownership should be included in bans on foreign election spending. For example, in Colorado, a firm is prohibited from spending on state elections when foreign nationals have a stake larger than 50 percent.[24]

- **Strengthen enforcement.** State and local governments should step up their efforts to enforce campaign finance disclosure laws to target foreign spending. Seattle provided a recent example of strong local enforcement when its Ethics and Elections Commission found Facebook in violation of a city campaign finance law requiring disclosure of ad purchasers' identities.

FOR MORE INFORMATION ON FOREIGN SPENDING

IAN VANDEWALKER & LAWRENCE NORDEN, GETTING FOREIGN FUNDS OUT OF AMERICA'S ELECTIONS (2018), https://www.brennancenter.org/publication/getting-foreign-funds-out-americas-elections

Ian Vandewalker & Larry Norden, *California should require disclosure of political ad buys to fend off meddling*, S.F. CHRONICLE (Feb. 18, 2018), https://www.sfchronicle.com/opinion/openforum/article/California-should-require-disclosure-of-political-12623972.php

Lawrence Norden & Ian Vandewalker, *This Bill Would Help Stop Russia From Buying Online Election Ads*, SLATE (Oct. 19, 2017), http://www.slate.com/articles/technology/future_tense/2017/10/the_honest_ads_act_would_help_stop_online_election_meddling_from_foreign.html

[23] *Id.* at 18-19.
[24] *Id.* at 19; COLORADO REV. STAT. ANN. §§ 1-45-103(10.5)(b), 1-45-107.5(1).

COMPONENTS OF EFFECTIVE OFFICEHOLDER-CONTROLLED NONPROFIT REGULATION

The recent explosion in election advertising by super PACs and other groups that raise and spend funds without limit is well known. But during this same period a less noticed yet potentially more pernicious trend has also emerged. Similar groups are also cropping up across the country to boost politicians *after* Election Day — once a candidate has attained government power. Yet these post-election vehicles operate with even less oversight than that required during elections.

Created by elected officials or their top aides to raise unlimited, undisclosed funds — including from donors with government business — these "officeholder-controlled nonprofits" are used to promote officeholders and their agendas, including through TV, radio, and digital ads. Much of their spending would qualify as campaign advertising if it happened during an election cycle, but because it occurs after an elected official takes office, it is subject to less regulation.[1] The result is a loophole that can create serious risks of conflicting loyalties and corruption.

The problem likely will spread. Just as buddy PACs supporting single candidates became a must-have accessory for politicians in recent years, officeholder-controlled nonprofits have proliferated at every level of government. President Trump's former White House and campaign advisors run America First Policies, a 501(c)(4) social welfare nonprofit that spent millions on ads featuring the president to promote passage of his tax plan.[2] Top aides to President Obama created Organizing for America, also as a 501(c)(4) nonprofit, to raise nearly $50 million to promote what the group embraced as "Obamacare," among other signature policies.[3]

This phenomenon does not occur at just the federal level. In Missouri, for example, Governor Eric Greitens's campaign treasurer founded a nonprofit called A New Missouri to promote the governor and his agenda through advertisements, events, and social media.[4] One senior advisor announced that he would work for the governor's office, his reelection campaign, and A New

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[1] The anti-coordination and transparency laws that apply to election spenders are mostly time-limited, kicking in for a relatively short stretch before Election Day. *See, e.g.*, 11 C.F.R. § 100.29 (2014). The short time periods apply to issue ads that mention a candidate but do not expressly call for the candidate's election or defeat. While the relevant provisions could be read more broadly, the Federal Election Commission has deadlocked on whether to do so. *See* Fed. Election Comm'n, Statement on Advisory Opinion Request 2011-23 (American Crossroads), Dec. 1, 2011, https://www.fec.gov/resources/about-fec/commissioners/weintraub/statements/AO_2011-23_American_Crossroads_CLB_ELW_Statement.pdf. For express advocacy, limitations may apply if there is a clearly identified candidate for office, which may be long before Election Day. *See* 11 C.F.R. §§ 100.3, 100.22 (2014).

[2] John McCormick, *Lewandowski Stars in Pro-Trump Ad Blitz for GOP Tax Plan*, BLOOMBERG (Nov. 3, 2017), https://www.bloomberg.com/news/articles/2017-11-03/lewandowski-stars-in-pro-trump-ad-blitz-backing-gop-tax-plan. Nothing in this toolkit implies that America First Policies or any other organization would not also be subject to existing campaign finance laws to the extent it is seeking to influence a federal election. Indeed, the good government group Common Cause recently filed a complaint against America First Policies with the Federal Election Commission alleging numerous violations of the Bipartisan Campaign Reform Act (BCRA) and other federal campaign finance laws. See Common Cause v. Donald Trump (before the Federal Election Commission), last accessed April 20, 2018, http:// www.commoncause.org/policy-and-litigation/litigation/cc-v-trump-fec-3-5-18.pdf.

[3] CHISUN LEE ET AL., ELECTED OFFICIALS, SECRET CASH 2 (2018), https://www.brennancenter.org/sites/default/files/publications/EO%20Secret%20Cash.%20Foreword.%20March%2023.pdf.

[4] *Id.* at 6.

Missouri simultaneously, noting that there would be "coordination" among the three operations.[5] A New Missouri has its headquarters in a building that a major campaign donor owns, and it hired Greitens's campaign finance director and Greitens's sister-in-law to join the team.[6] Other governors and mayors have also formed such promotional nonprofits.[7] Even the very limited records of these groups' activity show they have raised at least $150 million since 2010.[8]

One city is already working to combat the threats that officeholder-controlled nonprofits pose. New York City Mayor Bill de Blasio drew scrutiny for partnering with a nonprofit that his campaign manager launched after his election in 2013.[9] De Blasio appeared at the organization's fundraisers (the group raised at least $4 million), and key advisors to de Blasio went to work there.[10] The ensuing controversy led city lawmakers to recognize that existing rules were inadequate to deal with potential conflicts of interest posed by officeholder-controlled entities.[11] In December 2016, the New York City Council passed a law requiring these groups to disclose their donors and capped donations from any donor with business before the city at $400.[12]

Effective laws regulating officeholder-controlled nonprofits would do the following:

- **Establish a threshold test to identify entities subject to the law.** The law should identify a threshold for when an entity is so closely affiliated with an elected official that it poses a serious risk of corruption.[13] An entity should fall under the new rules for officeholder-controlled entities if it (1) is structurally so closely affiliated with an elected official as to be subject to direction by the official and (2) spends significant resources publicly promoting the official.[14]
    - ***Structural affiliation*:** Under any of the following circumstances, an entity is structurally affiliated with an official such that it is eligible for regulation:
        - **The elected official, or a current or recent employee or advisor of the official, or a family member of the official, established the organization.[15]**

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[5] *Id.*
[6] *Id.*
[7] Laura Nahmias, *Campaign for One New York, Disbanded and Under Investigation, Raised Money through February*, POLITICO (July 15, 2016), http://www.politico.com/states/new-york/city-hall/story/2016/07/campaign-for-one-new-york-raised-from-real-estate-through-february-this-year-103899; David Weigel & John Wagner, *Bernie Sanders Launches 'Our Revolution' with Electoral Targets – and a Few Critics Left Behind*, WASH. POST (Aug. 24, 2016), https://www.washingtonpost.com/news/post-politics/wp/2016/08/24/bernie-sanders-launches-our-revolution-with-electoral-targets-and-a-few-critics-left-behind/?utm_term=.a0c9e64bc81e; Jason Hancock, *Nonprofit linked to Missouri governor raises new questions about 'dark money,' ethics*, KANSAS CITY STAR (Mar. 8, 2017), http://www.kansascity.com/news/politics-government/article137209643.html.
[8] LEE ET AL., *supra* note 3, at 3.
[9] *Id.* at 8.
[10] *Id.*
[11] *Id.*
[12] *Id.*
[13] *See id.* at 13.
[14] *Id.*
[15] *Id.* at 12.

- **Any of the above individuals participates in directing the work of the organization.**[16]

- **Any of the above individuals solicits for the organization.**[17] In Minnesota, for example, a candidate's fundraising for, or even "promotion" of an outside group "destroys the independence of any subsequent expenditure" of that group.[18] In New York and California, a candidate's mere appearance at a fundraiser for an outside group that supports the candidate leads to a presumption that the group is not independent from the candidate.[19]

- **The organization shares resources, including non-public information or strategy, personnel, or a consultant, with the elected official.** For example, in New York, sharing office space can serve as proof that a group is not operating independently.[20] And in California, a group's spending is presumed not to be independent if a candidate uses the same political consultant as the group.[21]

- ***Activity of affiliation*:** If an entity that is structurally affiliated with an elected official also spends a significant portion of its resources on public communications containing the name or image of that elected official, then it should be subject to officeholder-controlled entity rules.[22] Jurisdictions should at least address the activity of explicitly promoting an elected official, applying new rules to any entity that spends above a certain monetary threshold.[23] The amount should be tailored to the particular market.[24]

    - **Take cues from other jurisdictions.** New York City's definition of "elected official communications" provides one sensible model. Such communications include radio, television, print, internet, or telephone advertisements that contain the "name, voice, or likeness" of the affiliated officeholder and imposes certain contribution caps on entities that spend 10 percent or more of their budgets on such communications.[25]

[16] *Id.*
[17] *Id.*
[18] MINN. CAMPAIGN FIN. & PUB. DISCLOSURE BD., Advisory Opinion 437, 5 (2014).
[19] N.Y. ELEC. LAW § 14-107(1)(d)(ii); CAL. CODE. REGS. tit. 2, § 18225.7(d)(5).
[20] See N.Y. ELEC. LAW § 14-107(1)(d)(vi) (coordination presumed when "[t]he candidate or the candidate's authorized committee, or an agent of the candidate or the candidate's authorized committee, shares or rents space for a campaign-related purpose with or from the independent expenditure committee, or its agent, making the payment or expenditure benefitting the candidate").
[21] CAL. CODE. REGS. tit. 2, § 18225.7(d)(3).
[22] LEE ET AL., *supra* note 3, at 14.
[23] *Id.*
[24] *Id.*
[25] N.Y.C. ADMIN. CODE §§ 3-901, 3-903; LEE ET AL., *supra* note 3, at 15.

- **Require entities meeting the threshold definition of an officeholder-controlled nonprofit to abide by key anti-corruption safeguards.**

    - ***Require transparency about finances.*** Mandatory public disclosure about the source and amount of donations to an officeholder-controlled entity will enable detection of improper official favors for donors, deter such improper behavior, and inform constituents about where their elected representatives' interests really lie.[26]

    - ***Cap contributions by donors with business before the elected official in question.*** Donors with specific business before government that could be affected by the officeholder should face donation limits.[27] Many jurisdictions outright ban these "doing-business" entities from contributing to political campaigns.[28]

    - ***Extend contribution limits to donors seeking business with the affiliated elected official.*** The capacity to grant government business is a powerful official function. It should be shielded from corruption. Other jurisdictions provide examples for how to do so: In New Jersey, for example, government agencies may not award large contracts to any business that contributed more than $300 to a campaign for governor or lieutenant governor, or to any state or county political party, in the last 18 months or at *any* point during the term of a gubernatorial contribution recipient.[29] In New York City, officeholder-controlled entities must return donations from anyone who is added to the city's database of doing-business entities within 180 days of making a donation.[30]

    - ***Require recusal under certain circumstances.*** For any doing-business donations that predate new anti-corruption restrictions on officeholder-controlled entities, jurisdictions should require the affiliated officials to recuse themselves from decisions affecting donors.[31]

- **Include reasonable accommodations and exceptions.**

    - ***Set an appropriate donation amount below which disclosure is not required.*** Disclosure rules could exempt small donations, which are less likely to pose a corruption risk.[32] Appropriate thresholds will vary by jurisdiction.[33] For example, in California, elected officials must report charitable contributions made at their "behest."[34] This requirement applies to any gift above $5,000 that a donor made "at the request, suggestion, or solicitation of, or made in cooperation,

[26] LEE ET AL., *supra* note 3, at 12.
[27] *Id.* at 12.
[28] *Id.* at 12, 16.
[29] N.J. STAT. ANN. § 19:44a-20.14 (2009); In re Earle Asphalt Co., 198 N.J. 143 (2009) (upholding the law); LEE ET AL., *supra* note 3, at 17.
[30] N.Y.C. ADMIN. CODE § 3-903(b); LEE ET AL., *supra* note 3, at 17.
[31] LEE ET AL., *supra* note 3, at 17.
[32] *Id.* at 12.
[33] *Id.*
[34] CAL. CODE REGS. tit. 2, § 18215.3; LEE ET AL., *supra* note 3, at 16.

consultation, coordination, or concert with, at the request or suggestion of, or with the express prior consent" of the public official.[35] And in New York City, any group affiliated with an elected official must disclose every donation from a person or entity doing business with the city and all other donations of $1,000 or more.[36]

- ***Allow segregated accounts.*** Jurisdictions should consider permitting entities to maintain a separate segregated fund from which they may exclusively fund communications promoting the affiliated elected official.[37] Only contributions to, and spending from, the segregated fund would be subject to new anti-corruption rules.[38]

- ***Other protections.*** An entity should be able to rebut a presumption that it is an officeholder-controlled entity for purposes of regulation by making an adequate showing that it is not sufficiently affiliated (for example, by demonstrating that the elected official and associates are not actually involved in directing the entity's work).[39]

FOR MORE INFORMATION ON OFFICEHOLDER-CONTROLLED NONPROFITS

CHISUN LEE, DOUGLAS KEITH, & AVA MEHTA, ELECTED OFFICIALS, SECRET CASH (2018) https://www.brennancenter.org/sites/default/files/publications/EO%20Secret%20Cash.%20Foreword.%20March%2023.pdf

[35] CAL. GOV'T CODE § 82015(b)(3)(B); CAL. CODE REGS. tit. 2 §18215.3(a); California Fair Political Practices Commission, *Behested Payments*, http://www.fppc.ca.gov/transparency/form-700-filed-by-public-officials/behested-payments.html; LEE ET AL., *supra* note 3, at 16.
[36] N.Y.C. ADMIN. CODE § 3-902(a)(7); LEE ET AL., *supra* note 3, at 16.
[37] LEE ET AL., *supra* note 3, at 15.
[38] *Id.*
[39] *Id.*