



# **The Illusion of Independence**

*How Unregulated Coordination  
is Undermining Our Democracy,  
and What Can Be Done to Stop It*



## EXECUTIVE SUMMARY

This report explores the problem of coordination between candidates' campaigns and outside spending groups like super PACs. Since the U.S. Supreme Court's 2010 decision in *Citizens United v. FEC* unleashed an unprecedented wave of "independent" outside spending on elections, outside spending groups have routinely coordinated their activity with candidates' campaigns and party committees, flouting federal campaign finance laws that prohibit such coordination. Over that same 13-year span, the Federal Election Commission ("FEC"), which is responsible for enforcing federal campaign finance laws, has virtually never enforced its coordination rules and has failed to update those rules to close obvious gaps and confront emerging coordination tactics. Congress, likewise, has done nothing to curb coordination. As a result, the special interests that have funded the vast bulk of this "independent" spending have dramatically grown in power and influence, elbowing out average Americans—particularly women and people of color—from meaningful individual participation in the political process.

Coordination doesn't always happen through direct, surreptitious messages, nor does it always conform to the Hollywood stereotype of backroom deals or clandestine meetings late at night. Instead, as this report explains, candidates, political parties, and super PACs often use "redboxing" to coordinate in broad daylight, conveying their plans and goals through websites and social media platforms; they use intermediaries like common vendors to pass information from campaign to PAC; they enlist relatives and close allies to set up and run super PACs in accordance with their wishes; or they gather together at super PAC fundraising events where the candidate is a "featured guest speaker" invited to mingle with the heads of corporations and billionaire benefactors. All of this creates an unacceptably dangerous risk of corruption, influence, and preferential access for special interests willing to write big checks.

This report explains how these tactics work and discusses why they have grown more common—both because the rules meant to regulate coordination have not kept pace with legal developments and election practices, and because the laws that prohibit coordination routinely go unenforced. Solutions to the coordination problem accordingly require both reforms aimed at making the laws stronger, and a serious effort to investigate alleged violations and enforce the law. The report concludes by discussing the prospects for such reform at the federal level and surveying several useful models for coordination reform presented by state and local regulators across the country.

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## Introduction

Every election cycle, the cost of running for public office gets higher and higher, with candidates, political parties, political action committees (PACs), and other organizations spending astronomical amounts of money trying to garner voters' support. The 2020 election featured an overall price tag of over \$14.4 billion, an unprecedented sum for a presidential election cycle, and the 2022 election cost \$8.9 billion in total, likewise breaking the previous record for spending on a midterm election.<sup>1</sup> For candidates, this spending bonanza has generally meant that trying to run a viable campaign requires near-constant fundraising: relentless phone banking, traveling to and hosting events, glad-handing donors, and otherwise pursuing all available means to increase their campaign coffers.

Yet the money that candidates raise directly, through contributions to their campaign committees, represents only part of the overall amount spent to influence our elections. Indeed, with each election, more and more money flows through “independent” outside spending groups<sup>2</sup>—including “super PACs” and nonprofits<sup>3</sup>—that can raise and spend an unlimited amount on elections but are, by law, formally unaffiliated with any candidate or political party.

Consistent with overall trends, spending by these outside groups shows no signs of abating. According to public disclosure reports, the 2012 election cost about \$7 billion, and outside spending made up roughly \$2.1 billion of that total.<sup>4</sup> By 2020,

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<sup>1</sup> Karl Evers-Hillstrom, *Most Expensive Ever: 2020 Election Cost \$14.4 Billion*, OpenSecrets (Feb. 11, 2021), <https://www.opensecrets.org/news/2021/02/2020-cycle-cost-14p4-billion-doubling-16/>; Taylor Giorno, “Midterm Spending Spree”: Cost of 2022 Federal Elections Tops \$8.9 Billion, a New Midterm Record, OpenSecrets (Feb. 7, 2023), <https://www.opensecrets.org/news/2023/02/midterms-spending-sprees-cost-of-2022-federal-elections-tops-8-9-billion-a-new-midterm-record/>.

<sup>2</sup> Throughout this report, we use the phrases “outside spending group” or “outside group” to include any entity or organization that spends money on elections but is not subject to the contribution limits and prohibitions in the Federal Election Campaign Act (“FECA”), and thus generally operates “outside” of the federal regulatory regime. These groups are not permitted to coordinate their activity with any entity that *is* subject to those limits and prohibitions, including candidate-authorized campaign committees, traditional PACs—e.g., leadership PACs and corporate-sponsored separate segregated funds (“SSFs”)—and national, state, or local party committees.

<sup>3</sup> Throughout this report, we use the term “nonprofit” to refer to any organization that spends money on elections but is not required to publicly disclose its donors because it claims exemption from federal taxes under section 501(c) of the federal tax laws, including, e.g., organizations “operated exclusively to promote social welfare” under section 501(c)(4). *Social Welfare Organizations*, Internal Revenue Service (“IRS”), <https://www.irs.gov/charities-non-profits/other-non-profits/social-welfare-organizations>.

<sup>4</sup> Tarini Parti, *FEC: \$7B Spent on 2012 Campaign*, Politico (Jan. 31, 2013), <https://www.politico.com/story/2013/01/7-billion-spent-on-2012-campaign-fec-says-087051>.

not even a decade later, outside spending had grown substantially, with groups spending more than \$3.3 billion on an election that itself was more than doubly as expensive as the 2012 election.<sup>5</sup> While there is no telling how much will be spent on the 2024 election, all signs point toward another wave of outside money that threatens to drown out the electoral voice of the average American voter.

Federal laws make clear that this wave of outside election spending cannot be *coordinated* with any candidate or their campaign, or with any committee of a political party; outside election spending must remain “independent.” But as this report explains in detail, that has not happened. Instead, through regulatory neglect and increasingly audacious campaign practices that flout and undermine the laws, the required “independence” has grown more and more illusory.

**After *Citizens United v. FEC* (2010), the top 100 donors have provided between 66% and 77% of super PACs’ money each election cycle.**

**During the 2020 presidential election, the top 1% of donors provided 93% of super PACs’ money.**

When the U.S. Supreme Court struck down century-old campaign finance laws in its 2010 decision in *Citizens United v. FEC*, it opened the door to a flood of outside spending on elections and gave rise to the super PAC, an election spending vehicle that—unbound by the individual contribution limits that apply to candidates and traditional PACs—can raise massive amounts of money from a relatively small group of donors.<sup>6</sup> Indeed, a 2020 report marking *Citizens United*’s 10-year anniversary found that just *ten* donors and their spouses “injected \$1.2 billion into federal elections over the last decade.”<sup>7</sup> In every election cycle since 2010, the top 100 individual donors supplied the clear majority (between 66% and 77%) of super PAC money, and in the

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<sup>5</sup> Evers-Hillstrom, *supra* note 1.

<sup>6</sup> *Citizens United v. FEC*, 558 U.S. 310 (2010); see Tim Lau, *Citizens United Explained*, Brennan Ctr. for Just. (Dec. 12, 2019), <https://www.brennancenter.org/our-work/research-reports/citizens-united-explained>. For the purposes of this report, the non-contribution accounts of hybrid PACs are included in the term “super PAC.” Hybrid PACs have a “non-contribution account” that functions like a super PAC—in that it can accept unlimited contributions, cannot make contributions to candidates or party committees, and may only engage in independent expenditure activity—and a contribution account that, much like a traditional PAC, abides by the federal contribution limits and prohibitions and can make contributions to candidates. Thus, they are a “hybrid” between a traditional PAC and a super PAC. *Registering as a Hybrid PAC*, FEC, <https://www.fec.gov/help-candidates-and-committees/filing-pac-reports/registering-hybrid-pac/>.

<sup>7</sup> Karl Evers-Hillstrom, *et al.*, *More Money, Less Transparency: A Decade Under Citizens United*, OpenSecrets (Jan. 14, 2020), <https://www.opensecrets.org/news/reports/a-decade-under-citizens-united>.

last two presidential elections, in 2016 and 2020, the top 1% of donors provided over 88% and 93% of super PAC money, respectively.<sup>8</sup>

This small group of donors that supply the vast majority of outside groups' money—whether that money is routed through super PACs, nonprofits, or in many cases both—can wield tremendous power and influence over our elected officials and the policymaking process.<sup>9</sup> Put simply, most politicians today cannot afford to ignore the gravitational pull of outside spending, which impacts both how they run for office and what they do once there. Candidates who win elections with generous outside support—*i.e.*, multimillion-dollar super PAC ad campaigns that extol them or attack their opponents—know who they owe their success to, and thus who must be kept happy to keep the money flowing in their direction. The threat of seeing special interests' and wealthy donors' money flow toward a political rival in a future election also looms over lawmakers. These donors thus have a political voice amplified by the volume of money they give, which is unconstrained by contribution limits, creating a real danger that these donors' private interests will carry more weight in the policymaking process than the interests of the general public. The rise of this elite donor class has particularly severe consequences for the interests of people of color and women. Studies show that “[s]uper PAC giving is dominated by men” and “large donors are overwhelmingly white,” leaving these historically marginalized groups with less influence in our political system than their white, male counterparts.<sup>10</sup>

This growth of outside groups' mega-spending, which is often paid for by mega-donors, has not gone unnoticed by the general public. On the contrary, polls show overwhelming support for campaign finance reforms aimed at curtailing the power of special interests to spend vast sums on elections, which allows them to wield

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<sup>8</sup> *Super PACs: How Many Donors Give*, OpenSecrets (last visited Nov. 3, 2023), <https://www.opensecrets.org/outside-spending/donor-stats/2020?type=l>.

<sup>9</sup> While nonprofits and other types of outside spending groups are also able to raise and spend unlimited amounts of money on elections and have done so over the decade-plus since *Citizens United*, this report is primarily focused on super PACs both because of the vast sums that super PACs spend, and because in recent election cycles, nonprofits—which do not disclose their donors—often contribute to super PACs instead of spending directly on electoral communications. See Sophia Gonsalves-Brown, *Super PACs Are Continuing to Hide Secret Money from Wealthy Special Interests. Here's How*, Campaign Legal Ctr. (Jul. 30, 2020), <https://campaignlegal.org/update/super-pacs-are-continuing-hide-secret-money-wealthy-special-interests-heres-how>. In either case, the result is the same: wealthy special interests, whose spending is often concealed from the public, provide huge sums of money that are ultimately used to pay for electoral communications that are, all too often, coordinated with candidates.

<sup>10</sup> Evers-Hillstrom, *supra* note 7; Adam Lioz, *Stacked Deck: How the Racial Bias in Our Big Money Political System Undermines Our Democracy and Our Economy* at 20, 24, Demos (Dec. 2014), [https://www.demos.org/sites/default/files/publications/StackedDeck2\\_1.pdf](https://www.demos.org/sites/default/files/publications/StackedDeck2_1.pdf) (capitalization altered).

disproportionate power and control over the policymaking agenda. For instance, a recent Pew Research poll found that “[e]ight-in-ten U.S. adults say the people who donate money to political campaigns have too much influence on the decisions members of Congress make. And 73% say lobbyists and special interest groups have too much influence.”<sup>11</sup> These results dovetail with other research that shows overwhelming public concern about special interests corrupting policymakers: a 2014 study showed that “an elected official that promotes the interests of campaign donors at the expense of the public” was rated “very corrupt” or worse “by 74% of respondents.”<sup>12</sup>

**“Eight-in-ten U.S. adults say the people who donate money to political campaigns have too much influence on the decisions members of Congress make. And 73% say lobbyists and special interest groups have too much influence.”**

**-Pew Research Center, October 2023**

But according to the five Supreme Court justices who formed the majority in *Citizens United*, the risk of corruption attending this outside election spending is supposedly alleviated by its independence,<sup>13</sup> which is legally mandated by the federal laws that prohibit “coordination” between candidates and outside spending groups. Under *Citizens United*, groups like super PACs can raise limitless amounts from their donors, including corporations, but they must be “independent” and thus cannot coordinate their activity with the candidates they seek to elect.

The practical reality has been wildly different, however, from the picture the Supreme Court painted in 2010, and the guardrails on super PACs are functioning poorly, if at all. The federal laws forbidding coordination are virtually never enforced by the Federal Election Commission (“FEC”), the agency charged with enforcing them. Indeed, in a 2019 letter, the FEC informed Congress that in the nine years since *Citizens United* was decided—a span in which overall election spending and super PAC activity exploded—the agency had *never* found probable cause to believe

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<sup>11</sup> Andy Cerda and Andrew Daniller, *7 Facts About Americans' Views of Money in Politics*, Pew Rsch. Ctr. (Oct. 23, 2023), <https://www.pewresearch.org/short-reads/2023/10/23/7-facts-about-americans-views-of-money-in-politics/>.

<sup>12</sup> Douglas M. Spencer and Alexander G. Theodoridis, “*Appearance of Corruption*”: *Linking Public Opinion and Campaign Finance Reform*, 19 *Election L.J.* 510 (2020).

<sup>13</sup> See *Citizens United*, 558 U.S. at 357.

anyone had violated the coordination regulations or assessed a civil penalty for such a violation; that does not appear to have meaningfully changed since 2019.<sup>14</sup> A federal district court recently chastised the FEC for its “arbitrary and capricious” refusal even to find “reason to believe” unlawful coordination may have occurred where the record indisputably showed that a supposedly outside group had performed various services at the request of, and in self-described “partnership” with, a state political party.<sup>15</sup> The FEC’s explanation was “factually and legally unreasonable,” the agency applied a standard that “is not the test,” and even under a deferential standard of review, the court found that the FEC’s refusal to recognize the apparent, unlawful coordination ultimately “fell outside” the “zone of reasonableness.”<sup>16</sup>

- ▶ *Years since Citizens United (2010):* **13**
- ▶ *Estimated outside spending since 2010:* **\$9.33 billion**
- ▶ *Times the FEC has penalized an outside spending group or campaign for an illegal coordinated communication:* **0**

The FEC’s abject failure to enforce the regulations prohibiting coordination has undoubtedly created a culture of impunity with respect to maintaining super PACs’ “independence” from candidates’ campaigns.

Because coordination is now commonplace and super PACs’ “independence” is often a legal fiction, many super PACs act as a campaign’s shadow that augments—and in some cases even supplants—spending by the campaign. Similarly, certain super PACs act as extensions of the two major political parties, raising and spending hundreds of millions of dollars in direct cooperation and consultation with

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<sup>14</sup> See *FEC Responses to Questions from the Comm. on House Admin.* 24 (May 1, 2019), [https://www.fec.gov/resources/cms-content/documents/FEC\\_Response\\_to\\_House\\_Admin.pdf](https://www.fec.gov/resources/cms-content/documents/FEC_Response_to_House_Admin.pdf) (“Since the Supreme Court’s decision in *Citizens United*, the Commission has not entered into pre-probable cause conciliation or found probable cause to believe that a respondent violated the coordination regulations. The Commission found reason to believe that respondents violated the coordination regulations in one case, but ultimately determined that the violation was not worth pursuing.”). In 2021, the FEC entered into an agreement with a corporation that agreed to pay a \$187,500 civil penalty for making a prohibited, coordinated expenditure, based on facts uncovered through a Department of Justice (“DOJ”) investigation and publicly released in a non-prosecution agreement between the DOJ and the corporation. See *infra* note 46 and accompanying text (discussing MUR 7324, *et al.*).

<sup>15</sup> *Common Cause Ga. v. FEC*, No. 22-cv-3067, slip op. at 11–16 (D.D.C. Sep. 29, 2023), [https://campaignlegal.org/sites/default/files/2023-10/24%20Mem.%20opinion\\_9.29.23.pdf](https://campaignlegal.org/sites/default/files/2023-10/24%20Mem.%20opinion_9.29.23.pdf).

<sup>16</sup> *Id.*



Democratic and Republican congressional leaders. Coordination blurs the line between candidates and parties, on one hand, and super PACs, nonprofits, and other outside spending groups, on the other; indeed, coordination can render that line all but invisible. Super PACs that are coordinating with a candidate's campaign occupy an even more powerful place not only in elections but in the halls of government, which fundamentally threatens the assumptions on which our democracy rests: that government officials will act in the public's interest, that elected officials represent their constituents, and that voters have a clear electoral voice on the election of their representatives and the policies those representatives enact.

### *Scope and Overview of this Report*

This report documents and examines the ways in which campaign finance laws have failed to prevent coordination between candidates and the purportedly "independent" spending groups—particularly super PACs and nonprofits—that now occupy such a dominant place in the electoral milieu, as well as exploring how those laws can be reformed, strengthened, and enforced to better protect the rights of voters. The report explores how coordination works and why it's a problem, explains why it has not been sufficiently addressed by regulators and policymakers, and discusses solutions, including some that have already been implemented at the state and local levels.

First, this report describes the legal background underpinning the coordination problem, including by examining the flawed rationale of the U.S. Supreme Court's decision in *Citizens United v. FEC*. This section explains how *Citizens United* has influenced the implementation and enforcement—or lack thereof—of existing coordination laws.

Second, the report outlines the current federal legal framework for determining whether a particular activity constitutes coordination and describes how existing standards have been applied by the FEC. A survey of relevant FEC enforcement matters reveals that in the post-*Citizens United* era, this framework of laws has apparently never been enforced against an outside spending group and no one has been sanctioned for engaging in illegal coordination, despite ample instances where candidates and super PACs appear to have worked together toward the common goal of winning elected office.

Third, the report catalogues various types of coordination that political candidates and their supporters employ, including sharing common vendors to conduct their

supposedly independent activities, posting specific requests for super PACs to use in developing and distributing electoral messages, candidates raising money on behalf of super PACs devoted to supporting them at super PAC-sponsored events, and candidates relying on family members and close allies to run super PACs in accordance with their overall plans and preferences. This section also describes some of the factual and legal arguments offered in support of these tactics, and discusses how campaign finance laws have been abused or misinterpreted to justify what is, from a commonsense view, coordination.

Fourth, this report describes potential solutions and reform efforts, including legislative reforms at the federal, state, and local levels. It also discusses obstacles that have impeded enforcement and regulatory reform at the FEC. Finally, this section identifies some important legal considerations for policymakers and advocates to keep in mind when developing and implementing reforms to prevent coordination.

## Legal Background: Citizens United and “Independent” Spending

Campaign finance laws protect democratic values in our political system in several ways, including by limiting who can make political contributions to candidates and political parties, and how much they can contribute. These restrictions are designed to prevent wealthy special interests from using political contributions—especially a large volume of money coming from a small number of donors—to gain preferential treatment from elected officials. They correspondingly protect the rights of all citizens to have a voice in the political process by preventing those who are able to make outsized political contributions from drowning out the voices of everyday Americans. For instance, federal campaign finance laws limit individual campaign contributions to a specific amount per election—e.g., the limit for the 2024 elections is \$3,300 per election—while prohibiting all campaign contributions from corporations, labor unions, and federal government contractors.<sup>17</sup> These restrictions reduce the likelihood of candidates becoming captured by or beholden to the donors who write the largest checks and their policy preferences, which often do not reflect the interests and policy preferences of the candidates’ broader constituency.<sup>18</sup>

Without these contribution limits and prohibitions, candidates could effectively fund their campaigns by soliciting money from a small number of deep-pocketed contributors or tap into the large treasuries of corporations—which would almost certainly require keeping those contributors and corporations happy once in office—to raise the necessary funds to win elections. Such a plutocratic political system would essentially eliminate everyday voters’ ability to be heard by their elected officials, and would be vulnerable to corruption; candidates would become indebted to their “sponsors” once in office, and that would foster a lack of public trust in the political process. Campaign finance laws serve a crucial role by preventing this type of election capture and undue influence.<sup>19</sup> Or at least that’s how they are supposed to work.

Unfortunately, the decade-long boom in supposedly “independent” spending on federal elections presents a direct assault on these protections. Unlike candidates’

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<sup>17</sup> See 52 U.S.C. § 30116 (contribution limits); *id.* § 30118 (prohibiting corporate and union contributions); *id.* § 30119 (prohibiting federal contractor contributions); *Contribution Limits for 2023–2024*, [https://www.fec.gov/resources/cms-content/documents/contribution\\_limits\\_chart\\_2023-2024.pdf](https://www.fec.gov/resources/cms-content/documents/contribution_limits_chart_2023-2024.pdf).

<sup>18</sup> See Lioz, *supra* note 10, at 42–70 (describing how special interest giving has resulted in policies that harm, or are unpopular with, the general public and communities of color in particular).

<sup>19</sup> See *Citizens United*, 558 U.S. at 447–53 (Stevens, J., dissenting).

campaigns, which are subject to specific limits on how much they can raise from any individual contributor and cannot accept money from corporations or unions, “independent” groups like super PACs and politically active nonprofits are not subject to individual contribution limits, and can accept contributions from corporations and unions.<sup>20</sup> These exceptions are the product of a 2010 Supreme Court decision, *Citizens United v. FEC*, which effectively opened the floodgates to a massive and sustained increase of spending in our election system that is supposedly disclosed to the public and independent of candidates and parties, but has too often been neither disclosed nor independent.

In *Citizens United*, a nonprofit corporation (that was funded partly by donations from for-profit corporations) challenged federal campaign finance laws that barred it from using its general treasury funds to produce, promote, and distribute a feature-length film criticizing Sen. Hillary Clinton, who was then a presidential candidate in the Democratic Party primaries, during the run-up to the 2008 election. A narrow (5-4) majority of the U.S. Supreme Court held that this century-old legal prohibition against corporate election spending conducted without candidate involvement was unconstitutional.

“The **absence of prearrangement and coordination** of an expenditure with the candidate or his agent not only undermines the value of the expenditure to the candidate, but also **alleviates the danger** that expenditures will be given as a *quid pro quo* for improper commitments from the candidate.”

-*Citizens United v. FEC* (2010)

Crucially, the Supreme Court’s majority effectively disregarded the longstanding rationales for prohibiting corporate election spending, concluding that the “anticorruption interest is not sufficient to displace the speech here in question. . . . [I]ndependent expenditures, including those made by corporations, do not give rise to corruption or the appearance of corruption.”<sup>21</sup> The *Citizens United* decision makes clear, at various points, that the Court’s conclusions regarding the

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<sup>20</sup> Super PACs are still prohibited from taking money from federal contractors and foreign nationals. *Contributions to Super PACs and Hybrid PACs*, <https://www.fec.gov/help-candidates-and-committees/taking-receipts-pac/contributions-to-super-pacs-and-hybrid-pacs/>.

<sup>21</sup> *Citizens United*, 558 U.S. at 357.

potential risk of corruption and the appearance of corruption are predicated on the *independence* of the election spending in question, reiterating that “[b]y definition, an independent expenditure is political speech presented to the electorate that is not coordinated with a candidate[,]”<sup>22</sup> and—quoting the U.S. Supreme Court’s landmark *Buckley v. Valeo* decision from 1976—that “[t]he absence of prearrangement and coordination of an expenditure with the candidate or his agent not only undermines the value of the expenditure to the candidate, but also alleviates the danger that expenditures will be given as a *quid pro quo* for improper commitments from the candidate.”<sup>23</sup>

The *Citizens United* opinion adopted a cramped view of the interests at stake in the prohibition of corporate “independent” election spending, which extend well beyond the prevention of *quid pro quo* corruption (e.g., trading campaign money for votes). The Court rejected the interest in preventing corporations from using their disproportionately large financial power to gain preferential access and influence over the political process through unlimited election spending.<sup>24</sup> And even with respect to the interest the Court accepted as legitimate, the decision imprudently dismissed the risk of *quid pro quo* corruption presented by unlimited independent campaign spending. The notion that super PACs’ independence precludes corruption and special interest control of the political process is facile; candidates can easily track when political donors give generously to support them via super PACs, and thus can reasonably deduce who they have to keep happy to maintain super PAC support in a future election, or (viewed another way) to avoid seeing super PAC support favor an electoral opponent in a future election. The seeds of real or apparent corruption, or at least the appearance that our political system works for some and not others, have been planted—and as explained in this report, those seeds are apt to grow more rapidly when the “independent” election spending is, in actuality, coordinated with the candidates it is trying to help.

The majority in *Citizens United* also misjudged how secret spending or “dark money” would compound and exacerbate the corruptive effect of unlimited “independent” election spending.<sup>25</sup> Eight of the nine justices agreed on the importance of transparency and disclosure requirements, acknowledging that “disclosure permits

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<sup>22</sup> *Id.* at 360.

<sup>23</sup> *Id.* at 357 (internal quotations omitted).

<sup>24</sup> *See id.* at 359–361.

<sup>25</sup> *See* Campaign Legal Ctr., *5 Ways Secret Money Makes Its Way Into Our Elections* (Oct. 11, 2022), <https://campaignlegal.org/update/5-ways-secret-money-makes-its-way-our-elections>.

citizens and shareholders to react to the speech of corporate entities in a proper way [ , and] transparency enables the electorate to make informed decisions and give proper weight to different speakers and messages.”<sup>26</sup> Yet that lofty vision doesn’t come close to describing the level of transparency seen in our elections since *Citizens United* was decided in 2010. Indeed, in every election since then, voters have been deprived of crucial information regarding who is actually spending money to influence their vote, as corporations and wealthy special interests have sought to avoid public disclosure of their election spending by routing it through smokescreen nonprofits that often have no clear provenance and a meaningless name that has no connection to the group’s donor base—e.g., “Social Justice for All,” which might be funded completely by billionaire hedge fund executives. These groups, which are supposedly formed to advocate on social welfare issues, are not required to disclose their funding sources but because of *Citizens United* can spend millions of dollars on elections, including explicitly supporting or opposing candidates for public office. They typically either spend directly on political ads or give money to super PACs that do so; in either case, the special interests ultimately paying for this activity are concealed from public view, exacerbating the corruption potential of their “independent” election spending.

When special interests spend large amounts of money on elections, it creates a risk that they will get preferential access to and influence over elected officials, thus drowning out the political voice of everyday Americans. Secret spending and coordination further raise the stakes: When special interests’ spending is actually coordinated with candidates, and voters aren’t even *aware* that the candidates vying for their support are backed by special interests, elected officials can reward their biggest backers with special treatment—without fear of backlash or reprisal from their constituents.

And even under the *Citizens United* majority’s view of the world—*i.e.*, that the “absence of prearrangement and coordination of an expenditure with the candidate or his agent” obviates the risk of corruption—in the 13 years since *Citizens United* was decided, we have seen ample evidence that super PACs and other outside spending groups, which can receive and spend unlimited amounts of special interest money, are often anything but independent from the candidates they support. As explained throughout this report, the money spent through super PACs and other outside groups is often *not* free from “prearrangement and coordination” with candidates,

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<sup>26</sup> *Citizens United*, 558 U.S. at 371.

who have used a variety of mechanisms, both covert and overt, to coordinate with outside spending groups.

The result is that candidates risk becoming beholden to the wealthy donors and special interests whose money—which candidates still cannot directly accept—constitutes the lifeblood of super PACs, dark money nonprofits, and other outside spending groups. In the most extreme cases, coordination results in donors using these groups to effectively underwrite candidates' campaigns, and it leaves the political system vulnerable to special interest control. At least one study has shown that evidence of coordinated expenditures supporting incumbent officeholders—*i.e.*, those already in a position to influence policy outcomes—undermines public faith in the democratic process.<sup>27</sup>

The upshot of coordinated outside election spending is that ordinary Americans—including, disproportionately, women and voters of color—who do not have the resources to finance multimillion-dollar contributions to super PACs and dark money groups are increasingly becoming locked out of the political process, with their interests and policy preferences taking a backseat to those of the special interests who are funding an ever-increasing share of electoral campaigns.

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<sup>27</sup> Rebecca L. Brown and Andrew D. Martin, *Rhetoric and Reality: Testing the Harm of Campaign Spending*, 90 N.Y.U. L. Rev. 1066, 1089 (2015) (“Citizens experience a greater decrease in their faith in democracy based on evidence of reelection campaign expenditures on behalf of a candidate, when those expenditures are coordinated with the candidate’s campaign, as compared with when the expenditures are truly independent.”).

## The Current Legal Framework: How Do We Know if a Particular Electoral Expenditure is “Coordinated”?

Following *Citizens United*, a key question about any spending in support of a candidate is whether money is contributed to the candidate, either as a monetary donation or an in-kind donation of goods or services, versus being used for independent expenditures. This distinction turns on the important question of whether the electoral activity in question is “coordinated” with the candidate, because coordinated spending is legally equivalent to a direct contribution to the candidate.

An expenditure crosses the line from “independent” to “coordinated” if it is made “in cooperation, consultation, or concert, with, or at the request or suggestion of,” the candidate or their campaign.<sup>28</sup>

To take one straightforward illustration, if a candidate is planning a campaign event, asks a third party to pay for it, and the third party does so, the event expenses are coordinated expenditures and must be treated as contributions to the campaign. This classification makes logical sense because the third party’s spending on the campaign event provided a benefit to the campaign while offsetting expenses that the campaign would have otherwise had to pay itself. By helping the campaign in this way, the third party provided something of value to the campaign, which the campaign itself requested or suggested.

But this kind of direct contact between a third party and candidate is just one way—the most obvious way—that coordination can take place. Congress tasked the FEC, the agency responsible for interpreting and implementing federal campaign finance laws, with promulgating regulations to address the various ways an outside group might work “in cooperation, consultation, or concert with or at the request or suggestion of” a campaign for the benefit of that campaign. In response, the FEC promulgated two regulations—one outlining the test for coordinated communications and the other generally defining coordinated expenditures. Both regulations have serious flaws and are under-enforced.

### *Problems with the “Coordinated Communications” Test*

Under the FEC’s test, determining whether communications paid for by a third party are “coordinated” depends on the type of communication at issue and the

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<sup>28</sup> 52 U.S.C. § 30116(a)(7)(B)(i).



candidate's interaction with the third party.<sup>29</sup> But as this report explains, the requirements to show coordination are not only rife with built-in caveats—they have also been interpreted and implemented to effectively ensure that virtually no communication is ever deemed coordinated, leading to the indefensible situation where the FEC never enforces the laws barring coordination between a candidate and an outside spending group.

For starters, only certain kinds of communicative content are covered by the coordination rules, leaving glaring gaps that all but invite attempts to game those rules.<sup>30</sup>

Because the FEC has excluded unpaid internet communications<sup>31</sup>—including, e.g., blogs and social media posts—from its coordination test, outside spending groups and candidates have tried to openly coordinate in creating high-quality, expensive ads (paid for by the outside spending group) that are published at no charge on the outside group's websites and social media platforms. Similarly, ads that explicitly mention a candidate or their opponents, but don't "expressly advocate" for or against any candidate would also fall outside of the FEC's coordinated communications test in many circumstances.

These distinct scenarios present the same problem: manipulating the test so that special interests are effectively underwriting campaign ads. For instance, when a super PAC coordinates with a candidate to run a high-quality ad on the super PAC's websites and social media channels, the coordination of the ad with a candidate means that the super PAC's special interest donors underwrote the campaign, which undermines federal contribution laws and presents a clear corruption concern. Likewise, when a nonprofit works closely with a candidate's campaign to produce an ad that sharply criticizes that candidate's opponent (without expressly advocating for or against any candidate), and airs that ad every day for months, the nonprofit's special interest donors have essentially paid for a tremendous portion of the

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<sup>29</sup> See 11 C.F.R. § 109.21(a).

<sup>30</sup> The coordinated communication test covers "electioneering communications," public communications that "republish" campaign materials, public communications containing "express advocacy," *id.* § 100.22 (defining "expressly advocating"), the functional equivalent of express advocacy, and public communications that reference a clearly identified candidate and are disseminated in that candidate's jurisdiction within a specific period before an election. *Id.* § 109.21(c).

<sup>31</sup> See *id.* § 100.26 (defining "public communication"—a term that appears repeatedly in the coordination test—as "any broadcast, cable, or satellite communication, newspaper, magazine, outdoor advertising facility, mass mailing, or telephone bank to the general public, or any other form of general public political advertising," excluding "communications over the Internet, except for communications placed for a fee on another person's Web site").

campaign's electoral activity, raising the same concern. Yet for the moment, at least, the coordinated communication test appears unable to address that concern.

### *Direct Conduct*

The FEC's permissive approach to the *conduct* involved in coordination presents additional problems. The most glaring issue is the FEC's pronouncement that an outside group acting "in cooperation, consultation, or concert with" a candidate *isn't* coordination if it is done openly, in a public forum. The FEC's coordination test covers scenarios in which a candidate or their campaign is directly involved in making or distributing a third party's communication, including by making a "request or suggestion" for, being "materially involved in decisions" about, or having "one or more substantial discussions" regarding the communication.<sup>32</sup> Of course, what makes a candidate's involvement "material," or what makes a discussion "substantial," is up to the FEC to decide "on a case-by-case basis."<sup>33</sup> Given the agency's frequent gridlock, partisanship, and general inability to reach consensus on important issues, the subjectivity of these standards is itself a challenge.

But the "public information" caveat fundamentally undermines this framework. The FEC has explained that a candidate would be coordinating by providing requests, suggestions, or material information regarding electoral communications to "a select audience"—e.g., supplying such information to supportive outside spending groups in an email or conference call—but would not be coordinating by providing the same information "to the public generally"—e.g., publishing, on a public-facing campaign website, the campaign's requested messages for ads, suggested categories of voters to target, or strategic information about the candidate's poll-tested strengths and weaknesses.<sup>34</sup> As explained later in this report, this caveat has thrown open the doors to an insidious tactic known as "redboxing," a common and

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<sup>32</sup> *Id.* § 109.21(d)(1)–(3).

<sup>33</sup> Coordinated and Independent Expenditures, 68 Fed. Reg. 421, 433 (Jan. 3, 2003) ("2003 Coordination E&J") (explaining that "the term 'materially involved in decisions' does not encompass all interactions, only those that are important to the communication . . . [and excludes] incidental participation that is not important to, or does not influence, decisions regarding a communication"); *id.* at 435 (explaining that a discussion is "substantial" if the candidate or campaign conveys information about its "plans, projects, activities, or needs . . . that is material to the creation, production, or distribution of the communication").

<sup>34</sup> *Id.* at 432; see *id.* at 434 ("[A]s with the 'request or suggest' standard, the 'material involvement' standard would not be satisfied, for example, by a speech to the general public, but is satisfied by remarks addressed specifically to a select audience, some of whom subsequently create, produce, or distribute public communications.").

egregious tool that candidates use to coordinate with outside spending groups like super PACs.

### *Indirect Conduct*

The test for coordination has proven nearly insurmountable when the coordinating conduct is indirect, as in the case of coordination through a common vendor or former employee. The FEC's regulations provide that a commercial vendor providing services to both an outside spending group and a campaign cannot share material information about the campaign with the outside group, or use such information in creating or disseminating the outside group's communications.<sup>35</sup> A similar rule governs anyone who previously worked for a campaign—as either an employee or an independent contractor—and then changed jobs to work for an outside spending group.<sup>36</sup> In both cases, however, exemptions create ample room for manipulation and gaming.

For starters, these provisions are time-limited by a 120-day “cooling off” period: Neither a vendor nor a former campaign worker is covered by the test if they have not provided services to the campaign for 120 days.<sup>37</sup> As campaigns often last far longer than 120 days, particularly in hotly contested races, there's often ample time for former campaign vendors or workers to put the information gleaned from their campaign work to use on behalf of a super PAC, without running the risk of violating the coordination rules. On top of this temporal limit, the test requires that only “material” information shared by a common vendor or former campaign worker is subject to the test, which once again gives the FEC plenty of room to decide that the information shared isn't “material.”

But the biggest problem in regulating coordination via common vendors and former employees stems from the FEC's approach to “firewall” policies. A coordination finding is foreclosed when a common vendor or former employee has adopted or is subject to a written “firewall” policy designed to prevent the sharing of material information from the campaign with an outside spending group.<sup>38</sup> The problem is that when faced with an accusation that material information was improperly shared with or used by an outside spending group, the vendor or former campaign employee often claims there was a firewall policy in effect, and the FEC tends to

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<sup>35</sup> 11 C.F.R. § 109.21(d)(4).

<sup>36</sup> *Id.* § 109.21(d)(5).

<sup>37</sup> *Id.* § 109.21(d)(4), (5).

<sup>38</sup> *Id.* § 109.21(h).

accept such claims at face value, without probing whether the policy was actually enforced. That credulous approach makes it much too easy for anyone to successfully evade accountability, even when they are caught red-handed, by simply asserting that there was a firewall policy in effect.

### *The FEC's Failure to Enforce the Coordinated Communication Regulations*

A regulation is only as strong as an agency's willingness to enforce it. In the case of the FEC's coordinated communication rules, the FEC's application of its rules is perhaps most notable for the myriad exceptions the agency has created. It has also essentially imposed a nearly impossible burden of proof at the complaint stage—one not required by law—effectively requiring the violation to be proven even before an investigation has taken place.

## **In the 13 years since *Citizens United*, the FEC has *never* found a violation of the coordinated communication regulations.**

The cumulative result of the FEC's anti-enforcement posture is that since *Citizens United*, the FEC has *never* found a violation of the coordinated communication regulations.<sup>39</sup> The FEC's egregiously lax enforcement history sends a clear message to the regulated community that coordination will almost always go unpunished, which has emboldened political actors to engage in activities that were completely unthinkable at the time the *Citizens United* Court announced that independent expenditures would be fully independent of candidates.

Further compounding the problem, the FEC has not updated the coordinated communication regulations since 2006. In other words, the legal test for coordination pre-dates *Citizens United*, the existence of super PACs, and the resulting colossal increase in outside election spending. With the growing prominence of outside spending in the political system, there has been more motivation for groups to find new "loopholes" in the coordination regulations and exploit them. The FEC is keenly aware of many of these tactics, yet it has done nothing to update the regulations to counteract them. The final section of this report proposes regulatory fixes that could

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<sup>39</sup> See *FEC Responses*, *supra* note 14. The FEC made one preliminary "reason to believe" finding of coordination in 2019, in an enforcement matter involving Governor John Kasich's 2016 presidential campaign—before ultimately dismissing the matter for discretionary reasons over two years later. See MURs 6955 and 6983 (Kasich, *et al.*), <https://www.fec.gov/data/legal/matter-under-review/6955/>.

help ensure the “independence” of outside groups like super PACs, restoring confidence in our electoral system.

### *The General Standard for Coordinated Expenditures*

For as little attention as the FEC has paid to updating the particular rules governing coordinated communications, it has ignored or utterly refused to apply the general standard governing coordinated expenditures other than coordinated communications for far longer. The regulation generally defining coordinated expenditures has essentially remained the same since the 1970s,<sup>40</sup> defining coordination as “made in cooperation, consultation or concert with, or at the request or suggestion of, a candidate.”<sup>41</sup>

Part of why the FEC has ignored this regulation for so long is because it rarely finds reason to apply it.<sup>42</sup> Though there are a host of campaign activities that could be analyzed under this general standard, other than those addressed under the narrower “coordinated communications” standard—e.g., a super PAC coordinating with a candidate’s campaign with regard to the super PAC’s events, canvassing efforts, or the provision of on-the-ground support for the campaign—the FEC usually finds a way to shoehorn outside groups’ activities into the coordinated communication test, only to then conclude that those rules do not apply.

Alternatively, where the factual record leaves no room to doubt that an outside group provided free services to influence an election at the request of and “in partnership with” a political party, the FEC has resorted to untenable and noncredible legal and factual analyses to avoid enforcing the law. That is what happened in a matter involving alleged coordination between a nonprofit corporation called “True the Vote” and the Georgia Republican Party, in which True the Vote announced a request from and its “partnership” with the Georgia GOP to perform a variety of so-called

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<sup>40</sup> See *Explanation and Justification for Part 100, Independent Expenditures*, House Doc. 95-4a at 54–55 (Jan. 12, 1977), <https://www.fec.gov/resources/cms-content/documents/95-44.pdf#page=17> (describing the prevailing standard for “arrangements or conduct that remove the independent nature of the expenditures”).

<sup>41</sup> 11 C.F.R. § 109.20(a).

<sup>42</sup> The FEC may increasingly start to see complaints alleging coordination under the regulation governing coordinated expenditures, as super PACs are increasingly coordinating with candidates to provide general campaign support, such as paying for campaign travel and on-the-ground logistical support. See, e.g., Michael Scherer, et al., *DeSantis Group Plans Field Program, Showing the Expanding Role of Super PACs*, Wash. Post (Apr. 19, 2023), <https://www.washingtonpost.com/politics/2023/04/19/desantis-super-pac-campaign/>; Shane Goldmacher, et al., *DeSantis Allies’ \$200 Million Plan for Beating Trump*, N.Y. Times (May 24, 2023), <https://www.nytimes.com/2023/05/24/us/politics/ron-desantis-2024-super-pac.html>.

“voter integrity” activities, including signature verification and ballot drop box monitoring. These efforts were intended to influence the 2021 U.S. Senate election in Georgia, in which True the Vote ultimately challenged the eligibility of more than 360,000 Georgia voters. After the FEC refused even to begin an investigation into True the Vote’s coordination with the Georgia GOP, a federal district court issued a scathing opinion rejecting the FEC’s inaction in that case as “arbitrary and capricious.”<sup>43</sup>

The court found that “True the Vote’s public statements gave the Commission clear reason to believe that it coordinated with, or acted at the request or suggestion of, the Georgia Republican Party during the 2021 runoff,” and that “[t]he context of True the Vote’s comments”—including a private email informing a True the Vote donor that “‘Republicans’ had ‘reach[ed] out to ask if we will play’ in the Georgia runoff election”—made the nature of its activities even clearer.<sup>44</sup> The Court concluded that the agency’s refusal to investigate was “factually and legally unreasonable” and lacked “markers of ‘principled and reasoned decisionmaking supported by the evidentiary record.’”<sup>45</sup>

Indeed, it appears the FEC has only once used the general coordinated expenditure standard to find a violation: when American Media, Inc. (AMI), the parent company of the National Enquirer, entered into an agreement with then-presidential candidate Donald Trump to “catch and kill” a story—*i.e.*, purchase the rights to the story and bury it—for the purpose of aiding and protecting Trump’s 2016 presidential campaign.<sup>46</sup> But most of the facts underlying the coordination finding came from AMI’s settlement of a criminal case with the Department of Justice, not from any FEC investigation, leaving open the question of whether the FEC on its own would have found coordination even here.

Between outdated regulations littered with holes and the FEC’s refusal to enforce the laws on its own books, it is little wonder that coordination has flourished.

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<sup>43</sup> *Common Cause Ga.*, *supra* note 15.

<sup>44</sup> *Id.*

<sup>45</sup> *Id.* The court likewise rejected the FEC’s finding that True the Vote’s activities were not intended to influence the 2021 Senate runoff elections in Georgia, explaining that “[e]ven affording the Commission’s factfinding deference, its conclusion that True the Vote aimed only to influence ‘how elections . . . are administered’ ran ‘counter to the evidence’ before it.” *Id.*

<sup>46</sup> Conciliation Agreement, MUR 7324, *et al.* (American Media, Inc.), [https://www.fec.gov/files/legal/murs/7324/7324\\_26.pdf](https://www.fec.gov/files/legal/murs/7324/7324_26.pdf).

## The Disappearing Phenomenon of “Direct” Coordination

The most obvious forms of illegal coordination are where a candidate, either personally or through their campaign or agent, interacts directly with an outside spending group like a super PAC to procure or influence spending in support of their candidacy. This includes scenarios where a candidate (or their campaign or agent) makes a request or suggestion to an outside group about a communication,<sup>47</sup> is materially involved in decisions regarding a communication funded by such a group,<sup>48</sup> or engages in a “substantial discussion” with the group regarding the communication.<sup>49</sup> Thus, for instance, a candidate can’t meet with a super PAC’s staffer and instruct, ask, or drop hints about what messages the super PAC’s ads should convey, where its ads should be running, or what other ways the super PAC might help get the candidate elected. A candidate’s campaign manager likewise can’t send an email to a super PAC’s creative director, offering feedback on draft ad concepts or giving a “thumbs up or down” on demographic groups the super PAC is thinking of targeting. A candidate may not have a phone call with a super PAC’s president to provide a general 10,000-foot view of the campaign’s strengths or specific problem issues where the candidate might be vulnerable.

Each of these scenarios is illegal because it involves direct, private contact and communication between the two sides, on confidential issues that are clearly germane to the creation or distribution of the “independent” group’s electoral communications.

An FEC enforcement matter involving the 2016 presidential campaign of Governor John Kasich presents a real-world example of such direct coordination. The FEC found “reason to believe”<sup>50</sup> Kasich’s campaign coordinated with a super PAC called

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<sup>47</sup> 11 C.F.R. § 109.21(d)(1).

<sup>48</sup> *Id.* § 109.21(d)(2). The material involvement standard identifies specific kinds of decisions regarding the communication that the candidate must be involved with, including the content, intended audience, timing or frequency, or means or mode of distribution. *Id.*

<sup>49</sup> *Id.* § 109.21(d)(3). This standard specifies that a discussion regarding a communication is “substantial” if information about the campaign’s plans, projects, activities, or needs is conveyed to the outside group, and that information is material to the creation, production, or distribution of the communication. *Id.* In this sense, the substantial discussion standard essentially incorporates the material involvement standard as a latent requirement.

<sup>50</sup> The FEC will find “reason to believe” when “a complaint credibly alleges that a significant violation may have occurred, but further investigation is required to determine whether a violation in fact occurred and, if so, its exact scope.” Statement of Policy Regarding Commission Action in Matters at the Initial Stage in the Enforcement Process, 72 Fed. Reg. 12,545, 12,545 (Mar. 16, 2007); see 52 U.S.C. § 30109(a)(2); 11 C.F.R. § 111.9; *Campaign Legal Ctr. v. FEC*, 646 F. Supp. 3d 57, 67 (Dec. 8, 2022)

New Day for America, where evidence suggested that Kasich was “heavily involved with the origination of New Day” and had a “presence on the group’s website and in the video announcing its creation,” and based on “descriptions of Kasich’s interactions with New Day in advance of Kasich’s public announcement of his candidacy.”<sup>51</sup> These “interactions” included New Day paying for Kasich to travel and speak about his position on policy issues, filming footage of Kasich that was ultimately used in the ads, and paying for political advertising during the months leading up to his declaration of candidacy.<sup>52</sup> The overall information before the Commission overwhelmingly indicated that Kasich was integrally involved in New Day’s general operations and in the specific material ultimately used in its ads, showcasing the demanding level of candidate “involvement” required by the FEC to violate the coordinated communication test.

But such real-world examples of direct coordination—particularly in this post-*Citizens United*, super PAC era—are remarkably scarce. Relatively few cases alleging coordination involve any of these “direct coordination” scenarios; the FEC appears to have investigated very few and penalized no one for violating the law. In short, direct coordination appears to be a disappearing phenomenon.

Why is direct coordination disappearing? It’s theoretically possible—though extremely unlikely—that direct coordination simply isn’t happening and yet, by sheer coincidence, every election cycle super PACs continue to run ads that are tailored and targeted precisely to candidates’ electoral needs. The more probable explanation is that direct coordination simply escapes detection, since private methods of communicating—e.g., phone calls, text messages, and encrypted apps like WhatsApp, Signal, or Telegram—make it easy to conceal coordination without regulators, watchdog groups, or the general public being any the wiser. Absent a whistleblower, leaked information, or a misdirected message, the only people who

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(describing the reason to believe standard as “a low bar” that does not require “conclusive evidence” that a violation occurred or even “evidence supporting probable cause” for finding a violation, but instead requires “only a credible allegation” of a violation).

<sup>51</sup> Factual and Legal Analysis at 23–24, MURs 6955 and 6983 (Kasich, *et al.*), [https://www.fec.gov/files/legal/murs/6983/6983\\_16.pdf](https://www.fec.gov/files/legal/murs/6983/6983_16.pdf). Following this preliminary finding, the Commission lost quorum for over a year, and by the time the Commission considered this matter at the probable cause stage, the five-year statute of limitations had elapsed. Three commissioners then voted to dismiss the case, citing the lapse of the statute of limitations. Statement of Reasons of Vice Chair Allen J. Dickerson and Comm’rs Sean J. Cooksey and James E. “Trey” Trainor III, MURs 6955 and 6983 (Kasich, *et al.*), [https://www.fec.gov/files/legal/murs/6955/6955\\_35.pdf](https://www.fec.gov/files/legal/murs/6955/6955_35.pdf).

<sup>52</sup> See Factual and Legal Analysis at 13, *supra* note 51.



would be aware of a privately orchestrated coordination scheme would be the small cohort involved in the illegal activity.

Another explanation for the disappearance of direct coordination cases is the emergence of new ways to coordinate that the FEC has indicated it will *permit*. Indeed, there is ample evidence that coordination is now happening all the time, either *in plain view* or indirectly through conduits or legal loopholes.

## **Coordination has grown so commonplace and accepted, it's basically indistinguishable from everyday campaign activity.**

It is unsurprising that coordination happens in plain view; the FEC practically invited it by concluding, through its regulations, policy statements, and enforcement matters, that coordination does not result from the public sharing of information.<sup>53</sup> The FEC has explained that material which is publicly accessible, even when directed toward a specific audience, will not support a coordination claim, drawing a distinction, *e.g.*, between an “email to a discrete group of recipients” and a request posted on a public webpage.<sup>54</sup> This myopic interpretation means that a campaign can get away with conveying even the most detailed strategic information to a super PAC, as long as it does so via a medium “that is available to the general public,” even when the information is neither understandable nor relevant to the general public.

In light of this extraordinarily permissive position, there is little need or benefit for candidates and super PACs to run the risk of coordinating in secret because they can readily coordinate on the internet. For example, as discussed in the next section, the phenomenon of “redboxing” exposes a gaping loophole in existing coordination regulations: Candidates and political parties regularly use public-facing digital media channels to provide explicit, detailed instructions and guidance to allied super PACs regarding the content, strategy, and even target demographics for supportive

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<sup>53</sup> 2003 Coordination E&J at 432 (explaining that “the [request or suggestion] standard is intended to cover requests or suggestions made to a select audience, but not those offered to the public generally”); see 11 C.F.R. § 109.21(d)(2) (providing that the material involvement standard “is not satisfied if the information material to the creation, production, or distribution of the communication was obtained from a publicly available source”); *id.* § 109.21(d)(3) (providing the same for the “substantial discussion” standard); Statement of Reasons of Chairman Allen J. Dickerson and Comm’rs Sean J. Cooksey, James E. “Trey” Trainor III, and Ellen L. Weintraub at 2–3, MUR 7700 (VoteVets, *et al.*), [https://www.fec.gov/files/legal/murs/7700/7700\\_14.pdf](https://www.fec.gov/files/legal/murs/7700/7700_14.pdf) (“VoteVets SOR”).

<sup>54</sup> VoteVets SOR at 2.

advertising to be paid for by those super PACs, with super PACs, in turn, looking for and following these requests.

In addition to redboxing, direct coordination may have also been supplanted by more attenuated or indirect forms of coordination, such as using a common vendor with detailed knowledge of a campaign's strategy and objectives to provide services to a supportive super PAC, or a super PAC's hiring of a former campaign official following their departure from a campaign. Although existing coordination rules ostensibly prohibit such schemes, the provisions have major gaps and thus do little to stop the free flow of vital strategic information between candidates and outside groups like super PACs. As described in the ensuing sections, both the caveats to the legal rule prohibiting coordination through "common vendors" and "former employees," as well as the effectively sky-high burden of proof placed on complainants alleging such coordination, work in tandem to make it a near-impossible task to ever establish coordination. The upshot is that the companies and individuals who work for both candidates' campaigns and super PACs effectively serve as an informational bridge between these two supposedly "independent" actors. And the FEC's rules do not even address scenarios in which family members or close allies, deeply familiar with a candidate's strategies and goals—and far from "independent"—launch a super PAC.

Moreover, in the critical area of fundraising, the FEC explicitly permits candidates to work directly with outside groups like super PACs and nonprofits. As discussed further below, for years, candidates have been exploiting an FEC regulation allowing them to appear as a "featured guest" at outside groups' fundraising events, speak to prospective donors, and solicit funds for the group. Super PAC fundraising featuring the candidate the super PAC intends to spend its money on presents an obvious benefit—and blurs important legal lines separating the super PAC's operation from that of the candidate's campaign. The commonplace scenario of a candidate glad-handing billionaire donors and executives of major corporate sponsors for their super PAC presents deeply troubling corruption concerns and belies any claim of the super PAC's "independence."

The incentive structure this establishes is simple and straightforward: Savvy political actors know they can get away with coordinating as long as they do so out in the open, through an intermediary, or through fundraisers. Viewed through this lens, direct coordination hasn't disappeared; it has just grown so commonplace and accepted as to be indistinguishable from the everyday functioning of electoral activity.

## Redboxing

An increasingly common form of coordination takes place in full view of the public and regulators. “Redboxing” is a practice in which candidates’ campaigns (and political parties) provide specific requests and guidance regarding message content and targeting for super PAC operatives to use in crafting and disseminating electoral communications to support the campaign. Usually these requests involve amplifying the campaign’s own messaging or complementing it with messaging the campaign would prefer to avoid making directly (such as negative ads about the candidate’s opponent).<sup>55</sup> This information is generally featured in a public forum, often the campaign’s website, but is set apart—sometimes on a separate page of the campaign website, or inside an actual red box from which the practice garnered its name—from other information and material intended to communicate the campaign’s own platform to prospective voters. Campaigns also frequently post downloadable photos, videos, and other ready-made “b-roll” media assets on their websites to provide easy access to super PACs for use in their ads. Some campaigns even post research documents with citations that super PACs can display on screen to back up the claims made in their ads.

### **Campaigns use redboxing signals and coded language to convey their wishes to supportive super PACs, circumventing federal laws prohibiting coordination.**

Redboxing frequently involves using specific words to not only catch allied super PACs’ attention but to also indicate the preferred medium for them to disseminate the campaign’s prepackaged messages. For example, the phrase “voters need to read” is a request for direct mail, “voters need to see” is asking for television ads, and “voters need to see on the go” means the campaign is asking for ads on digital and social media platforms, like Facebook, Instagram, or streaming. Campaigns also use redboxing to provide super PACs with strategic directions about particular

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<sup>55</sup> See generally Kaveri Sharma, *Voters Need to Know: Assessing the Legality of Redboxing in Federal Elections*, 130 Yale L.J. 7 (May 2021), <https://www.yalelawjournal.org/note/voters-need-to-know>; Shane Goldmacher, *The Little Red Boxes Making a Mockery of Campaign Finance Laws*, N.Y. Times (May 16, 2022), <https://www.nytimes.com/2022/05/16/us/politics/red-boxes-campaign-finance-democrats.html>; Saurav Ghosh, *Voters Need to Know What “Redboxing” Is and How It Undermines Democracy*, Campaign Legal Ctr. (May 13, 2022), <https://campaignlegal.org/update/voters-need-know-what-redboxing-and-how-it-undermines-democracy>.

audiences to be targeted—detailing demographic categories and/or geographic locations—for maximum impact. As redboxing has grown more common, campaigns have even begun directly asking for different types of media support, eschewing the traditional coded language—e.g., “voters need to see”—used to mask the nature of their request, as illustrated in paragraph two of the example below:

**OVERVIEW**

**Robert Asencio is a working class public servant who began his career in the Army and then served as a police officer, where he put protecting people and keeping our community safe first. Carlos Gimenez is a career politician who has always put himself, his donors and his partisan agenda ahead of the people.**

**SUMMARY**

**Likely voters in South Florida, particularly Hispanics, who score between 25 and 70 on Party Support modeling need to see direct mail, digital ads, OTT, and television that outline the contrast between Robert Asencio’s law enforcement background and people first approach and Carlos Gimenez’s partisan agenda.**

**Asencio spent over three decades putting people first in the Army Reserves, in law enforcement, and as a state legislator. Having been raised in the working class, supporting himself since he was 15 years old, and working closely with diverse communities throughout Miami, Robert understands what families need right now. He’s running for Congress because Washington politicians put their partisan agendas before helping people. Robert will be different, put people first, and focus on the right priorities, including reducing costs and building our economy, strengthening public safety while opposing defunding the police, and protecting health care.**

**Gimenez voted to keep health care expensive, opposing efforts to reduce prescription drug costs and voting against capping the cost of insulin at \$35 so more Americans could afford it. And he’s taken tens of thousands of dollars from the insurance industry and lobbyists while voting to allow insurance companies to charge higher premiums to people with pre-existing conditions.**

**Gimenez supports making abortion illegal and celebrated the Supreme Court’s overturning of Roe v. Wade. He will join with those in his party who are pushing a national law making abortion illegal in all circumstances, including rape, incest, human trafficking, or if the woman’s life is at risk.**

**ADDITIONAL RESOURCES**

**Hispanic voters should see and hear communication in both Spanish and English.**

**CLICK HERE FOR PHOTOS**

**BACK UP**

Redboxing has developed to circumvent coordination laws, creating a path for campaigns to provide guidance to super PACs about how to use their supportive election spending while claiming to be complying with coordination laws. Although redboxing involves a candidate or their agents making a “request or suggestion” to an ostensibly independent group like a super PAC regarding ads that the campaign would like the super PAC to run, the FEC has concluded that coordination rules do not apply to such arrangements because the “request or suggestion” is shared publicly. For example, the FEC dismissed allegations that a federal candidate’s campaign coordinated with a super PAC by posting instructions for the super PAC’s ads on Twitter (now known as X), reaffirming the agency’s refusal to apply coordination rules to instructions issued in a public forum: “The request or suggestion standard [of the coordination regulations] is meant to cover requests to

select audiences, not statements to the general public.”<sup>56</sup> Referring to 20-year-old guidance—issued before the widespread adoption of social media platforms—the FEC distinguished between coordination via a request “posted on a web page that is available to the general public” and “an email to a discrete group of recipients,” only the latter of which is covered by the rules.<sup>57</sup>

Statements like this illustrate the FEC’s apparent disregard of the everyday reality that a statement made *available* to the public can still present a request specifically *directed* toward, heard, and acted upon by a select audience, namely a super PAC that has amassed special interest money to support the campaign and is waiting for instructions on how best to do so. Campaign websites, X (formerly Twitter), and other social media platforms are the modern-day mechanism for candidates to issue requests or suggestions for outside spending, using visual cues and language specifically designed and understood to serve the purpose of conveying those requests to a particular audience.

Indeed, this distinctive use of coded language and cues to convey ad instructions—including phrases that would appear bizarre to an ordinary person viewing the redbox material—shows that the message is intended to guide outside groups’ election spending rather than communicate a persuasive message to voters. For instance, Julia Brownley’s 2022 campaign in CA-26 posted a redbox stating that “Women voters—especially independent women of all ages, younger Latina women, and liberal Republican pro-choice women—*need to see on OTT and digital* that a vote for Matt Jacobs could make abortion illegal here in California.”<sup>58</sup> Similarly, as shown in the example above, Robert Asencio’s 2022 campaign in FL-28 provided a redbox stating “Likely voters in South Florida, particularly *Hispanics who score between 25 and 70 on Party Support modeling* need to see *direct mail, digital ads, OTT, and television* that outline the contrast between Robert Asencio’s law enforcement background and people first approach and Carlos Gimenez’s partisan agenda.”<sup>59</sup> These phrases and terms would probably be incomprehensible to the general public but would make perfect sense to those who work in the political

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<sup>56</sup> VoteVets SOR at 1.

<sup>57</sup> *Id.* at 2.

<sup>58</sup> Julia Brownley for Congress, archived at <https://web.archive.org/web/20230409081230/https://www.juliabrownley.com/> (last visited Nov. 20, 2023) (emphasis added).

<sup>59</sup> Robert Asencio for Congress, “Voters Need to Know,” archived at <https://web.archive.org/web/20230306214743/https://www.voterobertasencio.com/voters-need-to-know> (last visited Nov. 20, 2023) (emphases added).

consulting industry, strongly indicating that the latter was, indeed, these campaigns' intended audience.

Super PACs, in turn, often respond to campaigns' redboxing messages by crafting and distributing their election ads as requested, at which point the super PAC has effectively become a special interest-funded arm of the candidate's campaign. Super PAC spending that directly responds to candidates' requests is coordination as defined in federal regulations, and the very sort of "prearrangement and coordination" that a majority of the Supreme Court presumed wouldn't happen when it decided *Citizens United*. In fact, just three days after the Brownley campaign's redbox was posted, a super PAC paid for ads using language that closely tracked the requested messaging in the redbox.<sup>60</sup>

The table on the next page provides examples from the 2022 election where outside spending groups' ads used similar messaging themes—and sometimes identical language—from campaigns' redboxes.<sup>61</sup>

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<sup>60</sup> *Stop, Center Forward Comm.*, <https://adstransparency.google.com/advertiser/AR14874683751459192833/creative/CR03012495077936201729?region=US> (last visited Nov. 29, 2023).

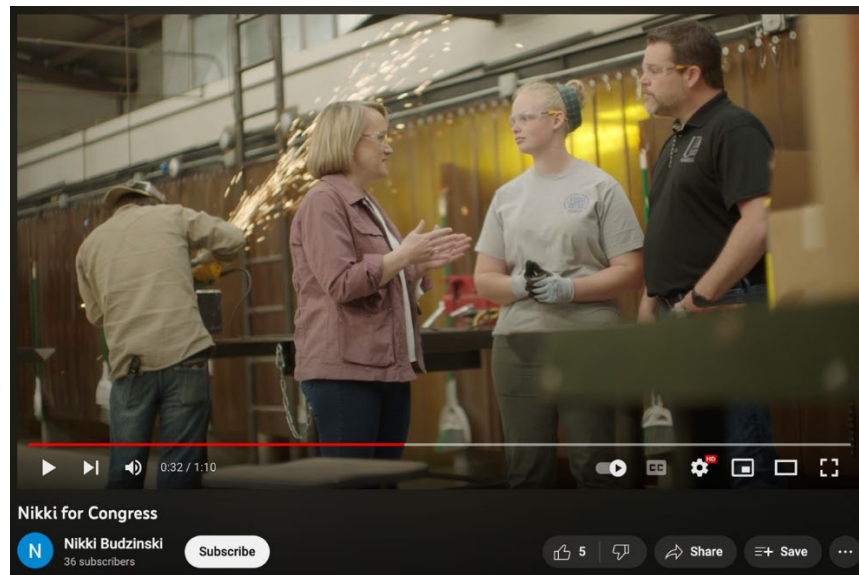
<sup>61</sup> Karen Carter Peterson for Congress, *What Voters Need to Know*, archived at [https://web.archive.org/web/20221014011719/https://www.karencarterpeterson.com/what\\_voters\\_need\\_to\\_know/](https://web.archive.org/web/20221014011719/https://www.karencarterpeterson.com/what_voters_need_to_know/) (last visited Nov. 28, 2023); *Delivers*, Congressional Progressive Caucus PAC, <https://www.youtube.com/watch?v=1J8r4AknGxE> (last visited Nov. 28, 2023); Brownley, *supra* note 5858; *Stop*, *supra* note 6060; Asencio, *supra* note 5959; *The Choice*, Democrats Serve, <https://www.youtube.com/watch?v=1GanWp883DI> (last visited Nov. 28, 2023); Nikki for Congress, *What Voters Need to Know*, archived at <https://web.archive.org/web/2022109095045/https://nikkiforcongress.com/important/> (last visited Nov. 28, 2023); *IL-13 – Working*, House Majority PAC, <https://www.youtube.com/watch?v=NbQBShR6lZg> (last visited Nov. 28, 2023); *IL-13 – Gets It*, House Majority PAC, <https://www.youtube.com/watch?v=t1O63C73eMY> (last visited Nov. 28, 2023).

<b>CAMPAIGN REDBOX</b>	<b>OUTSIDE SPENDING GROUP'S AD</b>
<b><i>Karen Carter Peterson</i></b>	<b><i>Congressional Progressive Caucus PAC</i></b>
When Republicans refused to expand health care to hundreds of thousands of people in our community, she did something about it and led the fight to get Medicaid expansion done.	When Republicans refused to expand Medicaid, and the insiders said it couldn't happen, it was Karen who got it done.
And in Congress she'll do the same – Karen is a leader we can trust to deliver for Louisiana families and expand Medicare for all.	She's the only candidate who'll lead the fight to expand Medicare for All, so no Louisiana family goes without quality health care ever again.
<b><i>Julia Brownley</i></b>	<b><i>Center Forward Committee</i></b>
[A] vote for Matt Jacobs could make abortion illegal here in California.	With Matt Jacobs, abortion could be illegal right here.
Matt Jacobs admitted that he believes the Supreme Court "correctly" overturned Roe v. Wade, taking away a woman's right to abortion.	He's told us that overturning Roe was a "sound decision."
Politicians like Matt Jacobs should not be making decisions about our reproductive rights or personal freedoms.	To avoid extremist politicians making health care decisions for us, we have to stop Matt Jacobs.
<b><i>Robert Asencio</i></b>	<b><i>Democrats Serve</i></b>
Asencio spent over three decades putting people first in the Army Reserves, in law enforcement, and as a state legislator. Having been raised in the working class . . . Robert understands what families need now.	Robert Asencio grew up in a hardworking family, served America in the Army, and our community as a police officer. . . . In Congress he'll always put working people first.
Gimenez is a career politician who has always put himself, his donors, and his partisan agenda ahead of the people. . . . Gimenez voted to keep health care expensive, opposing efforts to reduce prescription drug costs and voting against capping the cost of insulin[.]	Carlos Gimenez has put partisanship and profits ahead of us, taking tens of thousands of dollars from the insurance industry and opposing efforts to reduce prescription drug costs.
<b><i>Nikki Budzinski</i></b>	<b><i>House Majority PAC</i></b>
Regan Deering celebrated the Supreme Court's ruling overturning <i>Roe v. Wade</i> , which opened the door for a nationwide abortion ban.	Regan Deering celebrated the overturning of <i>Roe vs. Wade</i> , enabling a nationwide ban on abortion.
[Deering] was endorsed by a far-right anti-choice organization that says birth control is dangerous and wants to ban abortion even in cases of rape and incest.	Regan Deering, endorsed by extremists who want to ban abortion – no exceptions, not for rape or incest.
Wealthy heiress Regan Deering inherited tens of millions of dollars but wants to end the \$7.25 federal minimum wage.	Wealthy heiress Regan Deering doesn't get it, at all. Deering inherited tens of millions, but opposes the minimum wage.



## Republication

On top of the coordination that occurs when super PACs publish ads pursuant to redbox guidance, super PACs often also incorporate campaign-provided photos and visuals into their ads, a legally fraught practice known as “republication.” For example, when Nikki Budzinski’s 2022 congressional campaign in Illinois’s 13th district provided a redbox and b-roll video on its website, the super PAC Protect Our Future produced an ad that not only echoed the messaging provided in the redbox but also used the downloadable b-roll video:



*B-roll video footage provided by the Budzinski campaign as part of its redboxing page*



*Ad paid for by the Protect Our Future super PAC, using the same footage*



The FEC's regulations state that, even if there is no additional coordination, any payment to re-disseminate or republish, in whole or in part, any materials prepared by a campaign—including broadcast, graphic, and written materials—is a contribution by the payor.<sup>62</sup> Because super PACs and nonprofits cannot lawfully make contributions to campaigns, outside spenders are barred from republishing campaign materials, yet they nevertheless regularly do so—because the FEC does not effectively enforce the regulation prohibiting republication.

In a series of enforcement matters, the FEC has allowed outside spenders to use b-roll provided by candidates specifically for use in advertising as the visual content for up to 50% of a given ad.<sup>63</sup> That means that, on top of incorporating a candidate's desired messaging into communications, super PACs are also incorporating vast quantities of a candidate's preferred imagery—*i.e.*, they are depicted in super PAC ads using their hand-selected images and video. Campaigns are thus directly helping create super PACs' ads, but the FEC refuses to treat the money the super PAC spends on the ad as an unlawful campaign contribution.

Rather than correcting this issue, the FEC is backing away from the republication regulation even more. A controlling bloc of FEC commissioners recently asserted that the regulation is itself illegal and that, in the absence of additional coordination, it is perfectly legal for super PACs to republish campaign materials.<sup>64</sup> Therefore, we are unlikely to see the practice stop anytime soon.

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<sup>62</sup> 11 C.F.R. § 109.23(a).

<sup>63</sup> See First Gen. Counsel's Report at 3, MUR 6357 (American Crossroads, *et al.*), <https://www.fec.gov/files/legal/murs/6357/12044312188.pdf> (explaining that 10–15 seconds of a 30-second ad was candidate b-roll); Statement of Reasons of Chair Caroline C. Hunter and Comm'rs Donald F. McGahn and Matthew S. Peterson, MUR 6357 (American Crossroads, *et al.*), <https://www.fec.gov/files/legal/murs/6357/12044312281.pdf> (explaining that they voted against finding reason to believe a republication violation occurred).

<sup>64</sup> See Statement of Reasons of Vice Chairman Sean J. Cooksey and Comm'rs Allen J. Dickerson and James E. "Trey" Trainor III, MUR 7760 (SMP), [https://www.fec.gov/files/legal/murs/7760/7760\\_20.pdf](https://www.fec.gov/files/legal/murs/7760/7760_20.pdf).

## Coordination through Common Vendors

Coordination does not have to involve direct contact between a campaign and a super PAC. Sometimes these political entities share strategic campaign information by using the same firms or consultants for their political messaging. Shared vendors present an ideal channel for moving strategies or information from a campaign to a super PAC without direct interaction. Congress recognized the potential for “common vendors” to play a role in coordination schemes and ordered the FEC to include some types of shared use of “common vendors” in its coordinated communication regulation. However, the FEC’s lax application of its resulting common vendor rule renders it effectively toothless.

Under the FEC’s common vendor rule, if a campaign and super PAC use the same commercial vendor for services like ad creation or placement, and the vendor (a) shares information from the campaign with the super PAC, (b) fails to prevent the super PAC from learning campaign information, or (c) uses campaign information in providing services to the super PAC, and the super PAC’s resulting communication uses that campaign information, then the communication is coordinated.<sup>65</sup>

This rule has two features that have, in practice, facilitated the FEC’s refusal to find coordination even in reasonably clear cases.

First, the FEC’s interpretation of the regulation governing firewall policies gives vendors a free pass to escape accountability. The regulation is supposed to protect vendors that establish and implement a written firewall policy that actually ensures informational separation between the vendor’s employees working for super PACs and those working for candidates. The firewall theoretically prohibits these distinct internal groups from discussing their work with each other, and technical safeguards have to ensure that the two groups cannot see each other’s files on shared drives, among other potential measures to prevent impermissible information-sharing. Conversely, the FEC’s firewall policy regulation *doesn’t* shield vendors whose policy isn’t properly implemented, or whose employees fail to comply with the policy—*i.e.*, they share material information about the candidate’s or campaign’s plans with those working on a super PAC’s communications.<sup>66</sup> But in practice, the FEC fails to undertake the necessary scrutiny when a firewall defense is raised; the agency

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<sup>65</sup> 11 C.F.R. § 109.21(d)(4).

<sup>66</sup> *Id.* § 109.21(h).

routinely treats the mere claim of a firewall as dispositive, effectively ignoring the purpose of the rule: to prevent coordination.

Second, while the common vendor coordination rule covers the sharing, through a mutual vendor, of campaign information or services that are “material to the creation, production, or distribution of the [super PAC’s] communication,”<sup>67</sup> the FEC has narrowly construed the term “material,” which is not defined in the agency’s regulations.

A pending lawsuit filed by CLC Action on behalf of the gun safety organization Giffords, against the National Rifle Association (“NRA”) and others, perfectly illustrates the problems with the common-vendor coordination rule.<sup>68</sup> The Giffords lawsuit arose from a series of FEC enforcement matters centering on the political activities of the NRA and a super PAC called America First Action (“AFA”).<sup>69</sup> According to the allegations in the lawsuit and the underlying FEC complaints, the NRA-AFA scheme spanned three election cycles and seven federal races, involved tens of millions of dollars in illegal spending, and relied on a series of shell corporations acting as “common vendors” in the provision of media production and placement services. The FEC complaints alleged that, through common vendors, the NRA and AFA used nonpublic information from candidates to craft their electoral strategies, thereby flouting federal contribution limits, source prohibitions, and disclosure requirements. Although the complaints presented extensive documentary evidence that the NRA and AFA coordinated through common vendors, the FEC declined to find any violations or hold anyone accountable. The Giffords lawsuit seeks to redress these alleged violations and impose penalties for any unlawful coordinated spending.<sup>70</sup>

### *NRA/AFA Case Study*

As detailed in the filings in Giffords’s lawsuit, over the course of the 2014, 2016, and 2018 election cycles, the NRA, through its nonprofit and PAC, spent approximately \$35 million on “independent expenditures”—that were, at least in part, impermissible

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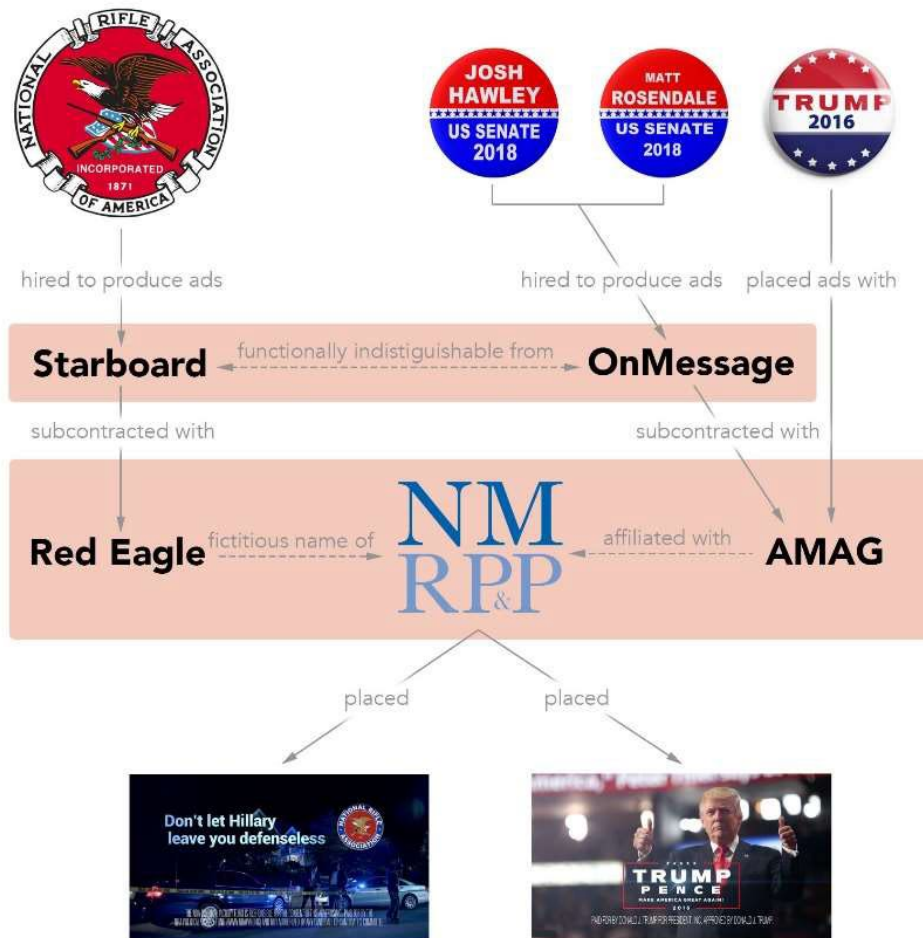
<sup>67</sup> *Id.* § 109.21(d)(4)(iii).

<sup>68</sup> See Compl., *Giffords v. NRA*, Case No. 1:21-cv-02887 (Nov. 2, 2021), <https://campaignlegal.org/sites/default/files/2021-11/Giffords%20v.%20NRA%20Complaint%20%28filed%29.pdf> (“*Giffords* Compl.”).

<sup>69</sup> See MUR 7427, *et al.* (NRA, *et al.*), <https://www.fec.gov/data/legal/matter-under-review/7427/>; MUR 7558, *et al.* (NRA, *et al.*), <https://www.fec.gov/data/legal/matter-under-review/7558/>; MURs 7654 and 7660 (America First Action, Inc., *et al.*), <https://www.fec.gov/data/legal/matter-under-review/7654/>.

<sup>70</sup> Giffords sued the FEC when it failed to take action on the administrative complaints within a reasonable timeframe, and when the FEC still did not issue a decision on the complaints during the pendency of the lawsuit, the court confirmed that Giffords could sue the NRA and candidates directly, which it did. *Giffords* Compl. ¶¶ 127–130. That lawsuit is still pending.

coordinated communications—supporting seven federal candidates, including Donald Trump, Josh Hawley, and Matt Rosendale.<sup>71</sup> As described in the lawsuit, the alleged scheme had two “layers”: coordination on ad production and coordination on ad placement, all relying on common vendors, as illustrated below.<sup>72</sup>



With regard to ad production, the lawsuit claims that the NRA paid a vendor operating under the name Starboard Strategies, Inc. to create political ads supporting federal candidates, including Hawley and Rosendale, at the same time that Hawley and Rosendale’s campaigns paid the same vendor, under the name OnMessage, to make their ads.<sup>73</sup> As asserted in court filings, because

<sup>71</sup> *Id.* ¶¶ 2–3, 25.

<sup>72</sup> *Id.* ¶ 50.

<sup>73</sup> *Id.* ¶¶ 51–52, 106, 109–110.

OnMessage/Starboard was effectively the same vendor making ads for both the NRA and candidates like Hawley and Rosendale, it could have used or conveyed information about the candidates' ads as it assisted the NRA in developing its own ads.<sup>74</sup> Evidence indicates that at least one individual may have been advising both the NRA and Hawley's campaign, raising doubts about whether there was a written firewall policy in place and, if so, whether it was actually followed.<sup>75</sup>

With regard to ad placement, the Giffords lawsuit alleges that an entity called National Media Research, Planning & Placement, LLC ("National Media") played the central role.<sup>76</sup> National Media operated under the names Red Eagle Media ("Red Eagle") and American Media & Advocacy Group ("AMAG").<sup>77</sup> The lawsuit contends that Starboard subcontracted with Red Eagle to place the NRA ads and that OnMessage subcontracted with AMAG to place the candidate ads.<sup>78</sup> The Trump campaign also assertedly contracted directly with AMAG for its ad placement.<sup>79</sup> Accordingly, this arrangement allowed National Media to place both the NRA's and campaigns' ads using different names, and public records cited in the court complaint revealed that at least four National Media employees placed ads for the NRA at the same time as the candidates, sometimes scheduling the ads to air during the same programs or on the same channels.<sup>80</sup> The complaints further allege that the overall pattern of when the NRA ads aired suggested that the NRA was bolstering or filling gaps in the candidates' media programs.<sup>81</sup> National Media presented a firewall policy to the FEC, but that policy expressly did not cover managerial and administrative personnel,<sup>82</sup> and may not have been enforced, potentially allowing a

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<sup>74</sup> *Id.* ¶ 115.

<sup>75</sup> See Tarini Parti and Henry J. Gomez, *An Expanding Front In the Republicans' Culture Wars: The NFL*, BuzzFeed News (Sep. 5, 2018), <https://www.buzzfeednews.com/article/tariniparti/nfl-protests-football-republicans-midterm-elections>; Mike Spies, *The Mystery Firm That Became the NRA's Top Election Consultant*, Politico Magazine (Jul. 13, 2018), <https://www.politico.com/magazine/story/2018/07/13/mystery-firm-nra-consultant-219004>.

<sup>76</sup> *Giffords Compl.* ¶ 43.

<sup>77</sup> A business entity search for "Red Eagle Media" on the Virginia Corporation Commission website reveals that Red Eagle is a "fictitious name" or "trade name" for National Media. A representative of National Media has also publicly stated that National Media and AMAG are affiliated organizations. Betsy Swan, *Trump's Already Part of the D.C. Swamp, Whether He Knows It or Not*, Daily Beast (Apr. 13, 2017), <https://www.thedailybeast.com/trumps-already-part-of-the-dc-swamp-whether-he-knows-it-or-not>.

<sup>78</sup> *Giffords Compl.* ¶¶ 79, 107, 112.

<sup>79</sup> *Id.* ¶¶ 79, 81.

<sup>80</sup> *Id.* ¶¶ 83, 91–92, 102, 107, 113.

<sup>81</sup> See, e.g., *id.* ¶¶ 82, 92.

<sup>82</sup> First Gen. Counsel's Report at 19–21, MUR 7427, *et al.* (NRA, *et al.*), [https://www.fec.gov/files/legal/murs/7427/7427\\_38.pdf](https://www.fec.gov/files/legal/murs/7427/7427_38.pdf).

crucial handful of National Media employees to provide services to both the NRA and campaigns using or conveying materially important information from the campaigns in its work for the NRA.<sup>83</sup>

In 2018, AFA, a Trump-aligned super PAC,<sup>84</sup> allegedly also started participating in the scheme. According to the FEC complaints and reports issued by the FEC's Office of General Counsel, AFA paid National Media (operating as Red Eagle) \$6.6 million to place ads supporting the campaigns of Josh Hawley, Richard Burr,<sup>85</sup> and Pete Sessions.<sup>86</sup> Hawley and Sessions simultaneously paid nearly \$10 million for media services to OnMessage,<sup>87</sup> which in turn appears to have subcontracted with National Media (operating as AMAG),<sup>88</sup> while Burr paid more than \$9 million to National Media (operating as AMAG) directly.<sup>89</sup> In short, the FEC complaints alleged that both AFA and three candidates' campaigns were directly or indirectly receiving services from National Media at the same time, and here again, public records indicated that the same National Media employee may have placed AFA's and the campaigns' ads, sometimes on the same channels or during the same programs.<sup>90</sup>

Although the complaints provided the FEC with ample, undisputed evidence of coordination, the agency failed to seriously investigate or credit the allegations. The commissioners who voted against finding violations released a statement asserting their view that National Media's firewall policy was sufficient and suggesting that the employees operating on both sides of the firewall did not have the type of information that could be material to the NRA's and AFA's decisions about ad

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<sup>83</sup> *Id.*

<sup>84</sup> See, e.g., Brian Schwartz, *Pro-Trump Super PAC America First Action Raised Over \$42 Million in September*, CNBC (Oct. 20, 2020), <https://www.cnbc.com/2020/10/20/pro-trump-super-pac-america-firston-raised-over-42-million-in-september.html>.

<sup>85</sup> Independent Expenditures by America First Action, Inc., with office sought "Senate" and payee "red eagle," [https://www.fec.gov/data/independent-expenditures/?data\\_type=processed&q\\_spender=C00637512&is\\_notice=true&most\\_recent=true&candidate\\_office=S&payee\\_name=red+eagle](https://www.fec.gov/data/independent-expenditures/?data_type=processed&q_spender=C00637512&is_notice=true&most_recent=true&candidate_office=S&payee_name=red+eagle) (last visited Nov. 29, 2023).

<sup>86</sup> First Gen. Counsel's Report at 4–5, MURs 7654 and 7660 (America First Action, Inc.), [https://www.fec.gov/files/legal/murs/7654/7654\\_23.pdf](https://www.fec.gov/files/legal/murs/7654/7654_23.pdf).

<sup>87</sup> Disbursements by Pete Sessions for Congress or Josh Hawley for Senate to "onmessage," 2015–2016 or 2017–2018, [https://www.fec.gov/data/disbursements/?data\\_type=processed&committee\\_id=C00303305&committee\\_id=C00652727&recipient\\_name=onmessage&two\\_year\\_transaction\\_period=2016&two\\_year\\_transaction\\_period=2018](https://www.fec.gov/data/disbursements/?data_type=processed&committee_id=C00303305&committee_id=C00652727&recipient_name=onmessage&two_year_transaction_period=2016&two_year_transaction_period=2018) (last visited Nov. 29, 2023).

<sup>88</sup> First Gen. Counsel's Report at 5, MURs 7654 and 7660.

<sup>89</sup> Disbursements by The Richard Burr Committee to "national media," 2015–2016, [https://www.fec.gov/data/disbursements/?data\\_type=processed&committee\\_id=C00385526&recipient\\_name=national+media&two\\_year\\_transaction\\_period=2016](https://www.fec.gov/data/disbursements/?data_type=processed&committee_id=C00385526&recipient_name=national+media&two_year_transaction_period=2016) (last visited Nov. 29, 2023).

<sup>90</sup> First Gen. Counsel's Report at 9–13, MURs 7654 and 7660.

creation and placement.<sup>91</sup> The NRA-AFA matters put on full display the FEC's failure to meaningfully enforce its own regulations and its willingness to create loopholes for "independent" groups to coordinate with candidates. The *Giffords* litigation—which remains pending in federal court—presents an opportunity for a judicial course correction by clarifying when the use of a common vendor amounts to unlawful coordination.

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<sup>91</sup> Statement of Reasons of Vice Chair Allen J. Dickerson and Comm'r James E. "Trey" Trainor III at 6, MUR 7427, *et al.* (NRA, *et al.*) (Dec. 23, 2021), [https://www.fec.gov/files/legal/murs/7654/7654\\_37.pdf](https://www.fec.gov/files/legal/murs/7654/7654_37.pdf).



## The “Featured Guest” Problem: Candidate Fundraising on Behalf of Super PACs

With respect to fundraising, the FEC has construed “coordination” far too narrowly, allowing candidates and super PACs to develop an intimate financial relationship that belies any real independence. Under the FEC’s rules, candidates can “attend, speak at, or be a featured guest at” fundraisers for outside spending groups like super PACs,<sup>92</sup> and can even ask prospective donors at such events to give money within federal contribution limits and prohibitions. Moreover, the candidate’s name and likeness may be used in publicizing or advertising such an event.<sup>93</sup> These unseemly appearances routinely involve candidates fundraising for outside groups that are primarily—if not exclusively—focused on electing them to office. The reality of special interest access, influence, and capture is never more obvious, and “independence” more illusory, than when a candidate raises money for a super PAC working to get them elected.

**Special interests’ power is never more obvious, and “independence” more illusory, than when a candidate raises money for a super PAC working to get them elected.**

The outcome is that super PAC fundraisers can provide ample opportunities for a “featured guest” candidate to mingle and mix with the representatives of corporations that are legally barred from contributing to their campaigns, as well as wealthy individuals whose donations to their campaign are dwarfed by the contributions they can make to the super PAC. The super PAC fundraiser provides a forum for these special interests to gain access to the candidate and provide unlimited support for their candidacy—albeit indirectly, through the super PAC.

Two examples of the troublingly cozy fundraising relationship between super PACs and the candidates they support show how legal fundraising appearances are, in practice, effectively indistinguishable from illegal coordination.

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<sup>92</sup> 11 C.F.R. § 300.64(b); see Advisory Op. 2015-09 at 8 (Senate Majority PAC and House Majority PAC), <https://www.fec.gov/files/legal/aos/2015-09/2015-09.pdf>.

<sup>93</sup> 11 C.F.R. § 300.64(c).



## *Jeb Bush and Right to Rise*

In 2015, Jeb Bush, then seeking the Republican nomination for President, appeared as a “special guest” at numerous fundraising events for a super PAC, Right to Rise,<sup>94</sup> that he helped establish and control, and which would ultimately spend more than \$83 million to support his presidential candidacy.<sup>95</sup>

Bush started raising funds for Right to Rise even before he publicly declared his candidacy—a decision he appears to have delayed announcing for several months in order to more readily amass a super PAC war chest supporting his candidacy—offering those who attended its events the promise of direct access to a probable leading candidate for the White House in 2016.<sup>96</sup>

For instance, an April 2015 event in Miami, Florida—headlined by “Special Guest Governor Jeb Bush”—required a minimum contribution of \$50,000, and the event invitation indicated that guests would join in “policy, political, and finance briefings with the Governor and our team.” In the easy-to-overlook fine print, the invitation clarified that “Right to Rise Super PAC, Inc.’s spending is independent.”<sup>97</sup>

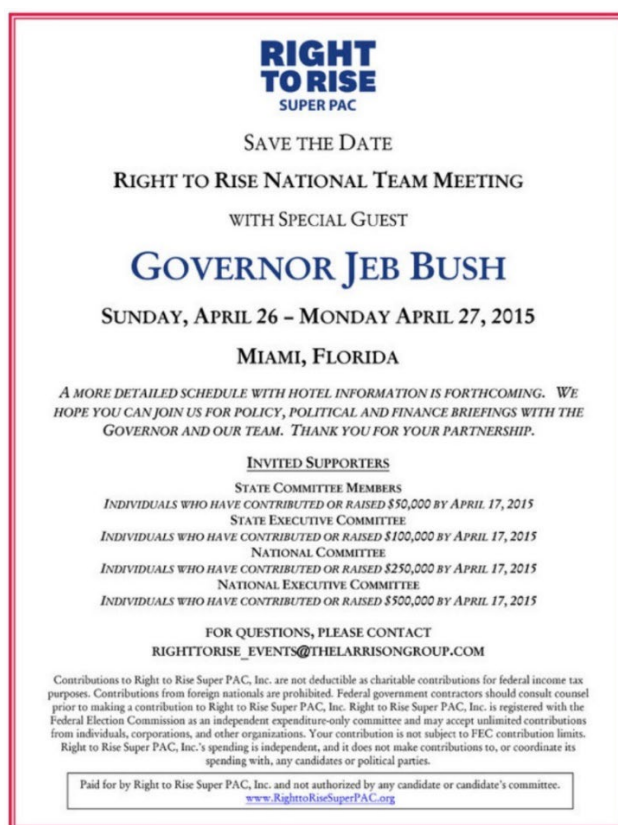
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<sup>94</sup> Stephanie Condon, *Jeb Bush Appears as “Special Guest” at Super PAC Event*, CBS News (Oct. 26, 2015), <https://www.cbsnews.com/news/jeb-bush-appears-as-special-guest-at-super-pac-event/>.

<sup>95</sup> Right to Rise USA, Independent Expenditures, 2015–16, <https://www.fec.gov/data/committee/C00571372/?cycle=2016&tab=spending#independent-expenditures> (last visited Nov. 29, 2023).

<sup>96</sup> Bush’s fundraising on Right to Rise’s behalf during the period he claimed to be “testing the waters” of candidacy was subject to the same federal contribution limits and prohibitions that apply to candidates: Under the FEC’s “testing the waters” regulations, funds that someone raises and spends solely to determine whether to run for office are not “contributions” or “expenditures,” respectively, but must still comply with federal contribution limits, source prohibitions, and recordkeeping requirements, and must later be reported to the FEC if the person does run for office. 11 C.F.R. §§ 100.72, 100.131. Moreover, only federally permissible funds may be used for such activity, precluding anyone from raising and spending “soft money” to test the waters of candidacy. *Id.*; see Advisory Op. 2015-09 at 5, *supra* note 92 (explaining that the “use of funds raised outside of the Act’s limitations and prohibitions to pay for individuals’ testing-the-waters activities would violate Commission regulations if those individuals decide to become candidates”).

<sup>97</sup> Nicholas Confessore, *First Draft: Lines Are Blurred in Donor Event for Jeb Bush ‘Super PAC,’* N.Y. Times (Mar. 12, 2025), <https://archive.nytimes.com/www.nytimes.com/politics/first-draft/2015/03/12/lines-are-blurred-in-a-jeb-bush-super-pac-donor-event/>.



Another Right to Rise event, in Houston in October 2015, was “coincidentally” held in the same hotel in which Jeb Bush’s campaign was holding its own donor events, which also featured his father and brother, former Presidents George H.W. Bush and George W. Bush.<sup>98</sup>

Jeb Bush’s appearances were the central element of a super PAC fundraising blitz: He appeared at dozens of Right to Rise fundraisers across the country, over a period of more than six months in 2015—spanning both his purported “testing the waters” exploratory phase and his early months as a declared presidential candidate.<sup>99</sup> Bush’s appearances were a pivotal part of Right to Rise’s appeal to potential donors, including corporations and unions, which gave over \$22 million to the super PAC, money that they would not have been permitted to contribute directly to Bush’s campaign.

Bush’s central involvement in Right to Rise’s fundraising—and the massive haul of cash that it raised to back his White House bid—were groundbreaking, providing a

<sup>98</sup> Condon, *supra* note 94.

<sup>99</sup> See Theodore Schleifer, *Bush Raises Over \$100 million to Help His Campaign*, CNN (Jul. 10, 2015), <https://www.cnn.com/2015/07/09/politics/bush-fundraising-second-quarter/index.html>.

test case for future candidates looking at how to make maximal use of a single-candidate super PAC to bolster their odds of electoral success.

### *Ron DeSantis and Never Back Down*

The 2024 election features another prime example of a single-candidate super PAC raising millions of dollars from events featuring a presidential candidate: Florida Governor Ron DeSantis and the primary super PAC backing his candidacy, Never Back Down. DeSantis and Never Back Down have maintained a remarkably close relationship since the super PAC formed in February of 2023. DeSantis has appeared at both Never Back Down fundraising events<sup>100</sup> and on its donor calls,<sup>101</sup> where the presidential candidate can speak directly with wealthy contributors. Like Jeb Bush in 2015, DeSantis routinely appears at fundraising events hosted by the super PAC exclusively and explicitly working to send him to the White House. In fact, DeSantis often travels to and from (and between) such events on Never Back Down buses, accompanied by Never Back Down staffers,<sup>102</sup> and under the umbrella of paying costs associated with DeSantis's featured guest appearances, Never Back Down has reportedly shouldered a major portion of DeSantis's travel costs, including flights on private planes. Overall, the super PAC "appears to have cut the campaign's travel bills by hundreds of thousands of dollars in September [2023] alone."<sup>103</sup>

Never Back Down has integrated its operations with DeSantis far beyond that of previous single-candidate super PACs like Right to Rise, further blurring the legal lines that supposedly separate super PACs from candidates. Indeed, an overt goal of the organization is to use the unlimited sums it can raise to take over many of the operational duties that are ordinarily the responsibility of a candidate's campaign. Top super PAC officials reportedly told donors that they "intend to push the bounds

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<sup>100</sup> Justin Wise, *DeSantis Crashes Trump in Cash From Lawyers Seeking Alternative*, Bloomberg Law (Aug. 16, 2023), <https://news.bloomberglaw.com/business-and-practice/desantis-crashes-trump-in-cash-from-lawyers-seeking-alternative>.

<sup>101</sup> Alex Leary, *Ron DeSantis Set to Launch 2024 Presidential Bid Next Week*, Wall St. J. (May 18, 2023), <https://www.wsj.com/amp/articles/ron-desantis-set-to-launch-2024-presidential-bid-next-week-422b1df3>.

<sup>102</sup> Nick Robertson, *Pro-DeSantis Super PAC Hosting 2023 Candidate on Bus Tour of Iowa*, The Hill (Jul. 26, 2023), <https://thehill.com/homenews/campaign/4121923-pro-desantis-super-pac-hosting-2024-candidate-on-bus-tour-of-iowa/>.

<sup>103</sup> Rebecca Davis O'Brien, et al., *DeSantis Super PAC Helps Pay for Private Flights, in Unusual Move*, N.Y. Times (Oct. 20, 2023), <https://www.nytimes.com/2023/10/20/us/politics/desantis-campaign-funding-money.html>.

of what an independent effort can do in presidential years.”<sup>104</sup> Never Back Down has even insinuated itself into early-state organizing—historically undertaken by the candidates themselves—including canvassing, field organizing, securing endorsements, sending mailers, and even fundraising for DeSantis’s campaign.<sup>105</sup> Voters who traditionally might have been approached by a volunteer or grassroots organizer for a candidate’s campaign are instead being met by the paid staffers for a super PAC receiving extraordinary sums of money from a handful of wealthy mega-donors and corporations.

This blurring of important legal lines was perhaps best illustrated in a May 2023 incident where former President Trump canceled a rally in Des Moines, Iowa, providing an opening for DeSantis to court his supporters in the area: DeSantis decided to appear at a BBQ restaurant, and Never Back Down staff helped provide operational support for the last-minute event. According to reporting, Never Back Down, “working with Mr. DeSantis’s team, sent a flurry of texts and calls to assemble a crowd.”<sup>106</sup>

Never Back Down has raised over \$91 million in unlawful “soft money,” some of which was raised by DeSantis’s state PAC from contributors that would have been barred from contributing to DeSantis’s presidential campaign.<sup>107</sup>

Right to Rise and Never Back Down are just examples: There are numerous other instances in which candidates have fundraised for and relied upon a single-candidate super PAC to advance their electoral prospects. Former president Trump has a similarly intimate connection with the super PAC Make America Great Again, Inc., which received a \$60 million infusion of soft money from Trump’s leadership PAC, Save America.<sup>108</sup> And virtually every 2024 presidential primary candidate has a

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<sup>104</sup> Michael Scherer, *et al.*, *DeSantis Group Plans Field Program, Showing the Expanding Role of Super PACs*, Wash. Post (Apr. 19, 2023), <https://www.washingtonpost.com/politics/2023/04/19/de-santis-super-pac-campaign/>.

<sup>105</sup> Shane Goldmacher, *et al.*, *DeSantis Allies’ \$200 Million Plan for Beating Trump*, N.Y. Times (May 24, 2023), <https://www.nytimes.com/2023/05/24/us/politics/ron-desantis-2024-super-pac.html>.

<sup>106</sup> See *id.*

<sup>107</sup> Brendan Quinn, *The FEC Should Hold DeSantis Accountable for Soft Money Violations*, Campaign Legal Ctr. (May 30, 2023), <https://campaignlegal.org/update/fec-should-hold-desantis-accountable-soft-money-violations>; Saurav Ghosh, *DeSantis’s Soft Money Operation Opens the Door to Foreign Election Influence*, Campaign Legal Ctr. (Jun. 27, 2023), <https://campaignlegal.org/update/desantis-soft-money-operation-opens-door-foreign-election-influence>.

<sup>108</sup> Janel Forsythe, *Soft Money Violations are Illegal – Even for Former Presidents*, Campaign Legal Ctr. (May 17, 2023), <https://campaignlegal.org/update/soft-money-violations-are-illegal-even-former-presidents>.

dedicated super PAC behind them, usually flush with financing from a handful of corporations and extremely wealthy individuals coveting and cultivating access to a potential future president.<sup>109</sup>

While the “featured guest” fundraising relationship between super PACs and the candidates they support has the FEC’s blessing, it is incompatible with any commonsense understanding of what “independence” actually means.

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<sup>109</sup> See, e.g., Press Release, *Campaign Legal Center Alleges “SHBT, LLC” Was a Straw Donor to Pro-Christie Super PAC*, Campaign Legal Ctr. (Aug. 10, 2023), <https://campaignlegal.org/press-releases/campaign-legal-center-alleges-shbt-llc-was-straw-donor-pro-christie-super-pac> (detailing \$1 million alleged straw donation to super PAC supporting former New Jersey Governor and 2024 presidential candidate Chris Christie).

## The Inner Circle Problem: Why Super PACs Run by Candidates' Allies Can't be "Independent"

One of the basic flaws in the FEC's approach to maintaining the genuine independence of super PACs and other outside spending groups is that it analyzes "coordination" on a transaction-by-transaction basis. The FEC's test looks at whether a particular expenditure or communication is coordinated; it does not examine whether the super PAC itself, by virtue of its leaders' relationship with the candidate, is so connected that it cannot be "independent" in a meaningful sense.

Because the laws governing coordination don't even *consider* the overall relationship between a candidate and an outside spending group, a candidate's family member, close friend, or longtime associate will often take up the task of forming and running a super PAC that will support the candidate's campaign. A super PAC formed and run by someone already deeply familiar with the candidate's plans, goals, and strategies will, in all likelihood, be able to align its electoral spending with the campaign's, even without the additional instructions, requests, or material involvement that the law prohibits.

**The coordination rules don't even *consider* the overall relationship between a candidate and an outside spending group. So a family member, close friend, or longtime advisor will often take up the task of forming and running a supportive super PAC.**

When someone from a candidate's inner circle departs to form and run a super PAC dedicated to electing them, the most reasonable conclusion is that this "independent" group's election spending will be guided by the candidate's overarching campaign strategy, which is tantamount to coordination on a broad scale. Perhaps because the law doesn't even contemplate this type of coordination, the practice has become widespread and widely accepted.

For example, *The Washington Post* reported that Steve Schmidt, who helped launch Rep. Dean Phillips's 2024 presidential campaign, "plans to decamp from Phillips's orbit to form an independent super PAC" supporting Phillips.<sup>110</sup> Likewise, the primary

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<sup>110</sup> Michael Scherer and Tyler Pager, *Dean Phillips Hires Top Bernie Sanders and Andrew Yang Advisers*, Wash. Post (Nov. 9, 2023), <https://www.washingtonpost.com/politics/2023/11/08/dean-phillips-sanders-yang-advisers/>.

super PAC supporting Donald Trump’s 2024 presidential campaign, Make America Great Again, Inc. (“MAGA, Inc.”), was organized by his longtime spokesman, Taylor Budowich, who serves as the super PAC’s executive director.<sup>111</sup> MAGA Inc. has raised and spent millions of dollars supporting not only Trump’s 2024 presidential campaign, but also the campaigns of Trump-endorsed candidates for Congress. A super PAC formed in 2019 and run by political operatives similarly close to Joe Biden raised and spent nearly \$50 million backing Biden’s 2020 presidential campaign.<sup>112</sup> And in 2015, the super PAC “America’s Liberty PAC,” which supported presidential candidate Rand Paul, was formed and run by Jesse Benton, a well-known political operative and Paul’s relative by marriage (Benton married a granddaughter of Rand’s father Ron Paul).<sup>113</sup> The super PAC ultimately raised and spent over \$5 million backing Paul’s 2016 presidential campaign.<sup>114</sup>

These examples illustrate the basic problem with—not to mention frequency of—super PACs formed by close allies and family members: They’re the opposite of independent from their inception, so the money that they raise and spend to help elect a candidate is inherently adding to the reality or appearance of corruption and influence-buying by those contributing to these obviously well-connected super PACs. Just as it’s problematic for a super PAC to have a handful of its election ads guided by material information from a candidate or their campaign, it’s also problematic for a super PAC to have its overarching strategy informed and possibly even preapproved by the candidate—which would guide not just a handful but essentially *all* of the super PAC’s election ads. The laws governing coordination need to grapple with the latter scenario, which, for the moment, they simply don’t address.

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<sup>111</sup> Jill Colvin, *Donald Trump Allies Create a New Super PAC Called MAGA Inc.*, PBS News Hour (Sep. 23, 2022), <https://www.pbs.org/newshour/politics/donald-trump-allies-create-a-new-super-pac-called-maga-inc>.

<sup>112</sup> Theodor Meyer and Maggie Severns, *Ex-Biden Aide Forms Unite the Country Super PAC*, Politico (Oct. 29, 2019), <https://www.politico.com/news/2019/10/29/ex-biden-aide-super-pac-unite-the-country-061096>; Unite the Country, 2019–2020 Financial Summary, <https://www.fec.gov/data/committee/C00701888/?cycle=2020> (last viewed Nov. 29, 2023).

<sup>113</sup> Luke Brinker, *Rand Paul Shocker: Longtime Ally, Head of Super PAC Hit with Federal Indictment*, Salon (Aug. 5, 2015), [https://www.salon.com/2015/08/05/rand\\_paul\\_shocker\\_longtime\\_ally\\_head\\_of\\_super\\_pac\\_hit\\_with\\_federal\\_indictment/](https://www.salon.com/2015/08/05/rand_paul_shocker_longtime_ally_head_of_super_pac_hit_with_federal_indictment/).

<sup>114</sup> America’s Liberty PAC, 2015–2016 Financial Summary, <https://www.fec.gov/data/committee/C00532572/?cycle=2016> (last viewed Nov. 29, 2023).



## Solutions: Curtailing Coordination

As illustrated throughout this report, the relationship between candidates' campaigns and their supportive super PACs and other outside spending groups is often anything but "independent." Instead, through a variety of tactics and mechanisms, including those discussed here, campaigns and super PACs routinely work hand in glove toward a shared common purpose: electing specific candidates to public office. Consequently, the special interests and wealthy individuals funding super PACs and other supposedly independent groups are able to directly support candidates' electoral prospects. This can skew the policy choices of candidates elected to public office in favor of the interests of a tiny, unrepresentative group of benefactors, while effectively leaving ordinary constituents unheard and their policy interests—especially ones unique to underrepresented groups—ignored.<sup>115</sup> In the most egregious scenarios, legal loopholes and lax enforcement of coordination allow super PACs to function as an operational arm of a candidate's campaign, such that the super PAC's donors are effectively underwriting campaign expenses. That dynamic creates a troubling financial relationship in which the candidates receiving super PAC support are, or at least publicly appear to be, beholden to the donors bankrolling those super PACs.

Solutions to this problem must confront both the failure to enforce existing coordination rules, as well as the need to redefine the term "coordination" to better confront emerging tactics. To ensure that our political system truly protects the right of all citizens to participate,<sup>116</sup> prevent real or apparent corruption, and end the erosion of voters' trust in the democratic process,<sup>117</sup> the campaign finance regulatory

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<sup>115</sup> See David Callahan and J. Mijin Cha, *Stacked Deck: How the Dominance of Politics by the Affluent & Business Undermines Economic Mobility in America* at 11, Demos (Feb. 13, 2013), <https://www.demos.org/research/stacked-deck-how-dominance-politics-affluent-business-undermines-economic-mobility-america> ("While low-income Americans are voting at the highest rates since the mid-1960s, they are still underrepresented in civic life and struggle to be heard in the political process."); *id.* at 20 ("[O]n core issues of how the economy works and how fair it is, the affluent wield the greatest influence. Research by the political scientist Larry Bartels finds that, in contrast to the affluent, low-income Americans have little or any influence over policy outcomes.").

<sup>116</sup> See *Reynolds v. Sims*, 377 U.S. 533, 565 (1964) ("Representative government is in essence self-government through the medium of elected representatives of the people, and *each and every citizen has an inalienable right to full and effective participation in the political processes* of his State's legislative bodies.") (emphasis added); *Globe Newspaper Co. v. Superior Ct. for Norfolk Cty.*, 457 U.S. 596, 604 (1982) ("[T]he First Amendment serves to ensure that the individual citizen can effectively participate in and contribute to our republican system of self-government.").

<sup>117</sup> See Spencer and Theodoridis, *supra* note 12 (presenting research indicating that while "quid pro quo bribery is the respondents' clear choice for most corrupt behavior [by an elected official], . . . the next most corrupt behavior—an elected official that promotes the interests of campaign donors at



system must erect and enforce a genuinely prophylactic barrier between candidates and political parties on one side, and super PACs and outside spending groups on the other.

Within the FEC, prospects for any real reform currently look bleak. As noted in this report, the FEC's failure to enforce existing coordination laws—along with its conclusion that anything said or done in a digital public forum *per se* fails to support a finding of coordination—all but ensures that super PACs and campaigns will continue openly coordinating their efforts. There is also virtually no prospect that the FEC, as currently composed, will opt to revise its coordination regulations to adopt a commonsense approach to defining coordination, or revise its longstanding regulation, now being openly exploited, allowing candidates to appear and speak at super PAC events.

Several proposals introduced during recent sessions of Congress would significantly improve the situation. Congress could dramatically enhance the FEC's overall functioning by structurally reforming the agency, including changing the number of commissioners, revising the nomination process for new commissioners, and making it easier for the agency to investigate alleged violations of federal campaign finance laws, all of which were part of the Restoring Integrity to America's Elections Act.<sup>118</sup> Overhauling the government agency that has failed, for over thirteen years, to meaningfully implement and enforce the federal laws prohibiting coordination would be a watershed moment in protecting the integrity of the democratic process.

Other proposed federal legislation would specifically target coordination. For example, the Political Accountability and Transparency Act ("PATA"), which was introduced during the 116th Congress (2019-2020), would have clarified that a candidate and super PAC have violated the law by coordinating their future plans before the individual formally declares their candidacy (addressing situations like those described earlier in this report involving Jeb Bush and John Kasich).<sup>119</sup> PATA also would have (a) barred any super PAC from spending on the race of any candidate who fundraised for that super PAC, or appeared as a featured guest at that super PAC's events, within the previous two years; (b) extended the "cooling off" period in the common vendor and former employee or contractor standards; (c)

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the expense of the public—was rated 'very corrupt' or more by 74% of respondents").

<sup>118</sup> Restoring Integrity to America's Elections Act, H.R. 1414, 117th Cong. (2021), <https://www.congress.gov/bill/117th-congress/house-bill/1414/>.

<sup>119</sup> Political Accountability and Transparency Act, H.R. 679, 116th Cong. (2019), <https://www.congress.gov/bill/116th-congress/house-bill/679>.

required firewall policies to cover executives and supervisors; and (d) defined specific types of coordinating conduct that would apply to coordinated expenditures that do not fall under the FEC's test for coordinated communications, addressing an area long neglected by the FEC.<sup>120</sup> Similar measures from the 117th Congress (2021-2022), such as the Stop Super PAC-Candidate Coordination Act and omnibus Anti-Corruption and Public Integrity Act, included comparable provisions and would have flatly prohibited candidates and federal officeholders from fundraising for super PACs.<sup>121</sup> These reforms would help prevent candidates from establishing, strategizing with, or fundraising on behalf of outside spending groups backing their candidacy, as well as curbing indirect coordination efforts through common vendors and former employees, while also developing rules for the growing area of coordinated expenditures that are not treated as coordinated communications.

In the 118th Congress (2023–2024), legislators have rolled many of those previous measures into the Freedom to Vote Act, a comprehensive elections reform bill that,<sup>122</sup> among many other things, would require respondents in an FEC enforcement matter seeking to avoid liability under the firewall safe harbor to produce both a copy of the firewall policy and employee affidavits confirming their compliance with the policy.<sup>123</sup> The Freedom to Vote Act would also effectively prevent a person from establishing a super PAC or tasking their close associates with doing so before declaring their candidacy, foreclosing the common practice through which candidates ensure that loyal allies use a super PAC war chest to support their candidacy.<sup>124</sup>

Although Congress is unlikely to pass these bills in the near term, the proposals at least reflect legislators' awareness of the damaging coordination tactics described in

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<sup>120</sup> *Id.* PATA would address coordinated non-communications by extending the conduct standards that apply to communications to a list of expenses that are not directly related to communications, including payments for research, polling, analytics, "design and production costs," and voter registration and get-out-the-vote activities. *Id.*

<sup>121</sup> Stop Super PAC-Candidate Coordination Act, H.R. 1172, 117th Cong. (2021), <https://www.congress.gov/bill/117th-congress/house-bill/1172>; Anti-Corruption and Public Integrity Act, H.R. 9623, 117th Cong. § 732 (2022), <https://www.congress.gov/bill/117th-congress/house-bill/9623>. By the end of the session, these ideas became part of the larger Freedom to Vote and For the People Acts. See Freedom to Vote Act, H.R. 5746, 117th Cong. § 7001-7002 (2022), <https://www.congress.gov/bill/117th-congress/house-bill/5746>; For the People Act of 2021, H.R. 1, 117th Cong. §§ 6101–6103 (2021), <https://www.congress.gov/bill/117th-congress/house-bill/1>.

<sup>122</sup> Freedom to Vote Act, H.R. 11, 118th Cong. §§ 7001–7002 (2023), <https://www.congress.gov/bill/118th-congress/house-bill/11>.

<sup>123</sup> *Id.* § 7002.

<sup>124</sup> *Id.*

this report and the need for a solution. In the absence of federal action, many state and local officials have stepped in and proactively enacted meaningful campaign finance reforms, including effective measures to combat coordination.

**Congress should structurally reform the FEC, enact new laws that address crucial coordination concerns, or both. For now, state and local regulators are leading the way in the fight to end coordination.**

New York has succeeded in implementing many of the ideas currently languishing in Congress. Its coordination statute includes a two-year “cooling off” period for common vendors and employees and states that if a candidate participated in the creation of a super PAC or fundraised for it in the two years before an expenditure, that expenditure is considered coordinated with that candidate.<sup>125</sup> New York also enforces physical separation between super PACs and campaigns, such as by deeming a super PAC’s expenditure coordinated with a campaign if the campaign rents office space with or from that super PAC—a practice that is hard to square with the independence of super PACs.<sup>126</sup>

California, likewise, has robust coordinated communication regulations. The California Fair Political Practices Commission has eliminated the “materiality” and “substantiality” requirements that the FEC built into several of its conduct standards—so if a campaign has participated in *any* discussions regarding a super PAC’s communication, that interaction indicates coordination.<sup>127</sup> California’s regulation also applies a rebuttable presumption that coordination has occurred if the candidate and outside spender share a common vendor, the outside spender employs a former campaign employee, the candidate has fundraised or appeared as a speaker on behalf of the outside spender, or the outside spender’s communication republishes campaign material.<sup>128</sup>

While these states and others have crafted innovative anti-coordination measures, local election regulators have been the nimblest in responding to evolving coordination tactics. Several localities have explicitly addressed one of the most

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<sup>125</sup> N.Y. Elec. Law § 14-107(1)(d).

<sup>126</sup> *Id.* § 14-107(1)(d)(vi).

<sup>127</sup> Cal. Code Regs. tit. 2, § 18225.7(c).

<sup>128</sup> *Id.* § 18225(d).

pervasive forms of coordination in use today: redboxing. For instance, in September 2022, the Philadelphia Board of Ethics adopted a new rule<sup>129</sup> under which, when a campaign publicly issues instructions directed toward an outside group’s election spending—including requests that their ad content contain specific types of messaging and be distributed through particular media platforms—and an outside group responds by spending on ads that satisfy those requests, the expenditures will be considered coordinated and subject to campaign contribution limits.<sup>130</sup> Under the Philadelphia rule, a coordinated “redbox” involves a campaign providing both “a suggestion that the electorate or segment thereof be made aware of information identified” in the redbox and a suggested “manner in which the information should be presented.” The Philadelphia rule also provides a non-exhaustive list of examples, giving campaigns and outside spending groups a clearer idea of how to comply with the rule and avoid making coordinated expenditures, while offering regulators examples to use when seeking to enforce the rule.

Like the rebuttal presumption incorporated into California’s campaign finance regulations, the Philadelphia redboxing rule provides that “[c]oordination will not be found if” the outside spending group accused of coordinating its expenditures “can demonstrate that [it] had an independent basis for making the expenditure.” This provision appears to offer some measure of security for outside spending groups whose ads are genuinely independent but are nevertheless consistent with a campaign’s requests. For instance, if a super PAC independently develops ads that echo themes from the ads of the candidate they support, that would not be viewed as coordinated activity, provided the super PAC can establish an independent process through which it developed its ads echoing the campaign’s messaging. Indeed, one of the examples outlined in the rule illustrates how an outside group might be able to establish that its spending was *not* coordinated: providing documents that show its expenditures preceded the publication of a candidate’s request for ads relaying the same message contained in the outside group’s ad.

An anti-redboxing rule enacted in Allegheny County, Pennsylvania—the county encompassing Pittsburgh—takes a similar tact. Allegheny County’s ordinance includes a species of coordination unrecognized by federal law: An expenditure is “coordinated” if it is made “based on instructions received from” a candidate,

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<sup>129</sup> See Sean Collins Walsh, *Philly’s Board of Ethics Voted to Close a Loophole that Super PACs Use to Get Instructions from Campaigns*, Philadelphia Inquirer (Sep. 21, 2022), <https://www.inquirer.com/news/philadelphia-ethics-board-super-pac-coordination-mayors-race-redboxing-20220921.html>.

<sup>130</sup> Phila. Bd. of Ethics Reg. No. 1 ¶ 1.33(g), <https://www.phila.gov/media/20221004102031/BOE-regulation-1.pdf>.

including via a “public communication” that both: (1) “includes a suggestion that the electorate or segment thereof be made aware of information identified in the communication,” and (2) “suggests the manner in which the information should be presented, including (but not limited to) instances in which the communication includes a phrase such as “voters need to hear” or “voters need to see.”<sup>131</sup> This measure, in short, is directly aimed at curtailing redboxing.

Allegheny County’s ordinance also allows outside spending groups to refute a finding that an expenditure was coordinated: “Despite the presence of these factors, coordination will not be found if the person can demonstrate that they had an independent basis for making the expenditure.”<sup>132</sup> This safe harbor establishes a clear path for super PACs to spend on elections, provided they can demonstrate that such spending is genuinely independent.

**Real solutions must balance outside groups’ private interest in election spending with the public’s interest in ensuring that such spending is genuinely independent.**

By incorporating a rebuttable presumption into their robust anti-coordination rules, regulators in California, Philadelphia, and Allegheny County have appropriately balanced the interests of outside spending groups seeking to engage in genuinely independent election spending with the public interest in ensuring that such spending is truly independent. By contrast, the current federal approach effectively requires a complainant to gather facts about behind-the-scenes interactions that can easily be kept hidden from the public, and all but ensures that no complaint can ever make the necessary showing, regardless of the fact that, from the public’s perspective, it appears that the outside group is obviously too cozy with a candidate or political party. Under current federal regulations, for example, successfully alleging coordination effectively requires the person filing a complaint to present the proverbial “smoking gun” that a super PAC’s ads specifically responded to a private communique conveying the campaign’s desired messaging or strategic plans. This

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<sup>131</sup> Allegheny Cty. Code of Ordinances § 220-7 part G, <https://alleghenycounty.legistar.com/LegislationDetail.aspx?ID=6170938&GUID=787A6DC4-3D2A-4B19-AEFB-12691C9786B0&Options=Advanced&Search=&FullText=1>.

<sup>132</sup> *Id.*

is a nearly impossible feat, absent a leak or whistleblower, because proof of such a causal link—e.g., internal communications or strategy documents—would be in the exclusive possession of the campaign, super PAC, and other parties to the unlawful coordination scheme.

As these state and local regulators' well-crafted regulations demonstrate, it is possible to thread the needle, *i.e.*, to appropriately regulate coordination without limiting or preventing truly independent political advocacy by candidates and outside spenders alike.

## Conclusion

There is a severe disconnect between the aspirational vision of independent electoral advocacy outlined in *Citizens United* and the everyday reality of how super PACs, nonprofits, and other outside spending groups are operating. The lofty notion that corporate electoral spending would be “independent,” and would therefore not raise the risk of corruption, has fallen short. As this report explains, candidates and parties are using a variety of tactics to coordinate their activity with outside groups, effectively integrating special interests’ election spending with their own.

Coordination doesn’t always take place directly or privately. On the contrary, candidates, parties, and super PACs use “redboxing” to coordinate through websites and social media platforms; they use common vendors to share strategic information; they enlist allies to set up and run super PACs based on previously established plans; or they appear as a “featured guest” at super PAC fundraising events, where they can glad-hand corporate executives and billionaire mega-donors. All of these tactics, in total, have created an exceedingly grave risk of corruption and influence for candidates’ special interest benefactors.

These activities persist and have become more brazen because the FEC has not stopped them. In some instances, the agency has interpreted the law in an absurd and shortsighted fashion, and in others, it has simply refused to enforce the law and impose accountability. As a result, there is an urgent need for reform, particularly at the federal level, to prevent voters from becoming further disillusioned. Certain states and localities have adopted measures that present potential solutions to these problems, taking a meaningful stand against coordination and the corruption risk it engenders. Studies indicate that voters would likely support similar policies at the federal level, as an overwhelming proportion of Americans view the link between political spending and political influence as a significant problem.

Everyday Americans should care about coordination and the explosive growth of outside election spending. When super PACs and dark money nonprofits coordinate with candidates and parties to pour billions of dollars into elections, they drown out the voices of voters and elevate the power of special interests. That trend, which has grown every election since *Citizens United*, is ultimately incompatible with meaningful individual participation in American democracy. Reforming the campaign finance system to end coordination must become a priority for policymakers and voters alike.



## ABOUT THE AUTHORS



**Saurav Ghosh** leads CLC's Federal Campaign Finance Reform program, which works to uncover campaign finance violations, file complaints seeking administrative enforcement, and pursue legislative and regulatory reforms that strengthen federal campaign finance laws. After starting his legal career in private practice, Saurav served for nearly seven years in the Enforcement Division of the FEC's Office of General Counsel. He has also lectured on campaign finance at the U.S. Military Academy at West Point and American University's Washington

College of Law, and frequently comments on money-in-politics issues for national news publications, including *The New York Times*, *The Washington Post*, *Politico*, *CNN*, *The Daily Beast*, *Miami Herald*, *Mother Jones*, and *The Guardian*.



**Shanna (Reulbach) Ports** is a senior legal counsel on CLC's campaign finance team. She seeks to enhance transparency and accountability in our political system using a variety of legal strategies, including filing administrative complaints, engaging in litigation, and publicly advocating for reform. Prior to joining CLC, Shanna worked in the Enforcement Division of the FEC's Office of General Counsel. She also spent several years in private practice as a campaign finance attorney, advising clients on how to comply with federal election laws.



**Roger Wieand** is a senior researcher for CLC's Campaign Finance and Ethics programs. Before joining CLC, Roger served as a public policy research and advocacy consultant for a range of nonprofit clients.



**Sophia Gonsalves-Brown** is a senior researcher for CLC's Campaign Finance and Ethics programs. Prior to joining CLC, Sophia was a senior legal assistant at a plaintiff-side employment law firm in Washington, D.C. As an undergraduate, she completed a summer internship at Every Voice and served as chapter president of Democracy Matters.