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Chapter 16: Combating Dark Money in California Politics

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Chapter 16: Combating Dark Money in California Politics

Patrick Ford

Code Sections Affected

Elections Code § 9084 (amended); Government Code §§ 84222, 84223 (new), §§ 82015, 82048.7, 84105, 88001 (amended).
SB 27 (Correa); 2014 STAT. Ch. 16. (*Effective May 14, 2014*).

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“Requiring people to stand up in public for their political acts fosters civic courage, without which democracy is doomed.”¹

I. INTRODUCTION

According to the Federal Election Commission (FEC), candidates and political groups spent roughly \$7 billion during the 2012 general election.² Groups that were not required to disclose their donors to the federal government were responsible for over \$300 million of this spending.³ This marked a considerable increase in the amount of dark money spent during a single election cycle.⁴ Certain politicians and commentators have decried this phenomenon as corrosive of the democratic process.⁵ Others have argued against expanding the regulation of dark money, claiming that doing so would both hamper free speech and serve particular partisan interests.⁶ With the enactment of Chapter 16, the California legislature has taken a decidedly pro-disclosure approach to the issue of dark money.⁷ This piece of legislation, which was introduced by Senator Lou Correa, is intended to force groups contributing large amounts of money to California political campaigns to disclose their financial backers.⁸

1. *Doe v. Reed*, 130 S. Ct. 2811, 2837 (2010) (Scalia, J., concurring).

2. Tarini Parti, *\$7 Billion Spent on 2012 Campaign, FEC Says*, POLITICO (Jan. 31, 2013, 10:26 PM), <http://www.politico.com/story/2013/01/7-billion-spent-on-2012-campaign-fec-says-87051.html> (on file with the *McGeorge Law Review*).

3. *Political Nonprofits, Summary*, OPENSECRETS.ORG, https://www.opensecrets.org/outsidespending/nonprof_summ.php (last visited July 15, 2014) (on file with the *McGeorge Law Review*).

4. *Id.*; see also Tara Malloy, *A New Transparency: How to Ensure Disclosure from “Mixed-Purpose” Groups After Citizens United*, 46 U.S.F. L. REV. 425, 432 (2011) (noting that in the 2010 election, 501(c) groups constituted 42% of independent spending, a significant increase from virtually no independent spending in 2006).

5. Ann M. Ravel, *Viewpoints: California Shined a Spotlight on Dark Money*, SACRAMENTO BEE, May 2, 2014, <http://www.sacbee.com/2014/05/04/6374467/viewpoints-california-shined-a.html> (on file with the *McGeorge Law Review*); Amber Phillips, *Harry Reid Says ‘Dark Money’ in Campaigns Threatens Democracy*, LAS VEGAS SUN, June 3, 2014, <http://www.lasvegassun.com/news/2014/jun/03/harry-reid-says-dark-money-campaigns-threatens-dem/> (on file with the *McGeorge Law Review*); George Skelton, *‘Dark’ Campaign Money Needs a Little Light*, L.A. TIMES, Mar. 23, 2014, <http://www.latimes.com/local/la-me-cap-dark-money-20140324-column.html#axzz2wtXI0Hg9> (on file with the *McGeorge Law Review*).

6. *Briefing Report: The Dark Side of Disclosure*, CALIFORNIA STATE SENATE REPUBLICAN CAUCUS (Mar. 14, 2012), <http://cssrc.us/content/briefing-report-dark-side-disclosure> (on file with the *McGeorge Law Review*) [hereinafter *Republican Caucus Report*].

7. See Press Release, Fair Political Practices Comm’n, Governor Signs Legislation to Close “Dark Money” Loopholes (May 14, 2014) (on file with the *McGeorge Law Review*) [hereinafter FPPC Press Release, May 14, 2014] (describing Chapter 16’s effect on disclosure requirements for “non-profits and other Multi-Purpose Organizations”); Editorial, *Refreshing Developments: The Legislature Has Productive Week*, FRESNO BEE, May 17, 2014, <http://www.fresnobee.com/2014/05/17/3931814/our-viewrefreshing-developments.html> (on file with the *McGeorge Law Review*) (stating that “California has unmasked those secretive donors” by passing Chapter 16”).

8. See SENATE RULES COMMITTEE, COMMITTEE ANALYSIS OF SB 27, at 8 (May 7, 2014) (describing the goals of SB 27, including preventing laundering of campaign funds through nonprofits and increasing the accessibility of donor data).

II. LEGAL BACKGROUND

The Political Reform Act of 1974 (the Act) is the cornerstone of campaign finance and reporting laws in California.⁹ The Act created the Fair Political Practices Commission (FPPC) to promulgate regulations and enforce the provisions of the Act,¹⁰ including reporting requirements for nonprofit organizations.¹¹ However, these laws did not require the disclosure of certain contributions by nonprofit organizations.¹² During the 2012 general election, the ability of groups to make anonymous contributions proved to be a serious impediment to the enforcement of California's campaign finance disclosure laws.¹³

A. *The Political Reform Act of 1974*

Voters approved the Act, known at the time as Proposition 9, with a sweeping 69.8% vote, in the 1974 midterm election.¹⁴ One of the fundamental tenets of the Act was that “[p]ublic officials . . . should perform their duties in an impartial manner, free from bias caused by . . . the financial interests of persons who have supported them”¹⁵ In furtherance of this ideal, the Act established a wide array of reform measures affecting such fundamental aspects of California politics as the ballot initiative process, lobbying, and campaign finance and disclosure requirements.¹⁶ To provide for the enforcement of political reform laws, the Act created the FPPC¹⁷ and empowered the agency to develop and enforce regulations in furtherance of the Act's purposes.¹⁸

9. *History of the Political Reform Act*, FAIR POLITICAL PRACTICES COMM'N, <http://www.fppc.ca.gov/index.php?id=57> (last visited June 19, 2014) (on file with the *McGeorge Law Review*).

10. *Id.*; CAL. GOV'T CODE §§ 83100, 83112 (West 2005).

11. *See* CAL. CODE REGS. tit. 2, §§ 18215, 18412 (2014) (identifying nonprofit organizations that must disclose their sources of funds and how the disclosure is to be carried out).

12. *See infra* Part II.B (discussing the ability of nonprofit organizations to make anonymous political contributions in California).

13. *See, e.g.*, Minute Order, Fair Political Practice Comm'n v. Americans for Responsible Leadership, No. 34-2012-00131550-CU-PT-GDS (Cal. Super. Ct. Oct. 31, 2012), 2012 WL 5351247 [hereinafter Order Granting Preliminary Injunction] (granting the FPPC a preliminary injunction to compel Americans for Responsible Leadership to disclose its financial sources after the nonprofit organization claimed protection under the one-bite rule, a feature of California disclosure law that allowed a group to make one anonymous contribution if it had not made contributions in California in the past).

14. Roger Jon Diamond et al., *California's Political Reform Act: Greater Access to the Initiative Process*, 7 SW. U. L. REV. 453, 454 (1975).

15. GOV'T § 81001(b).

16. Diamond et al., *supra* note 14, at 464–65.

17. GOV'T § 83100.

18. *Id.* § 83112.

B. FPPC Regulation of Nonprofit Organizations Under the Act

Prior to Chapter 16, if a nonprofit organization made “contributions¹⁹ or independent expenditures²⁰ totaling \$1,000 or more . . . to support or oppose a candidate or ballot measure in California” the Act required the group to report the source of the funds.²¹ When making such a disclosure, the group had to first disclose donors who knew that the group would use the donations for political purposes in California.²² If a donor had given money in response to a solicitation that explicitly stated the organization’s intended political purpose, then the donor was assumed to have known of the political use of the donation.²³ Thus, the organization had to disclose that donor’s identity.²⁴

If disclosure of all donors who knew that their payments would be used for political purposes did not account for the full amount of the organization’s contributions and expenditures, the organization had to broaden its disclosure by reporting donors who “had ‘reason to know’ that all or part of their payments would be used to make expenditures or contributions.”²⁵ A donor was presumed to have reason to know that his donation would be used for political purposes only if the organization had “made expenditures or contributions of at least \$1,000 in the aggregate during the calendar year in which the payment occur[ed], or any of the immediately preceding four calendar years.”²⁶ The law required that this type of disclosure be done in reverse-chronological order (beginning with the most recent donations) until an amount equal to the organization’s contributions and expenditures had been accounted for.²⁷ If this method of disclosure still failed to account for the remaining amount of contributions and expenditures, the organization could list itself as the source of any remaining funds.²⁸

19. “A contribution is any payment made for political purposes for which full and adequate consideration is not made to the donor.” 2 CAL. CODE REGS. tit. 2, § 18215(a) (2014). Political purposes include attempts to influence voters as well as donations made in response to a request by a candidate, committee, political party, or labor union. *Id.*

20. “An expenditure is any monetary or nonmonetary payment made for political purposes,” including attempts to influence voters. *Id.* A payment is also made for political purposes if it is made by a candidate, controlled committee, political party, or organization formed primarily for political purposes. *Id.* Further, “[e]xpenditure” includes any monetary or non-monetary payment . . . that is used for communications which expressly advocate the nomination, election or defeat of a clearly identified candidate or candidates, or the qualification, passage or defeat of a clearly identified ballot measure.” *Id.* § 18225(b).

21. *Id.* § 18412(a).

22. *Id.* § 18412(b).

23. *Id.*

24. *Id.* § 18412(a)–(b).

25. *Id.* § 18412(c)(1).

26. *Id.* § 18215(b)(1).

27. *Id.* § 18412(c)(1).

28. *Id.* § 18412(c)(2).

C. *The One-Bite Rule*

One feature of this method of disclosure was the *one-bite rule*.²⁹ Assuming that an organization had not previously made a contribution or expenditure of \$1,000 or more in California or received money from donors who knew that their funds would be used for political purposes, it could make a one-time contribution or expenditure of any size without having to disclose any sources.³⁰ This is because a donor giving to an organization that had not spent \$1,000 or more on California politics was not presumed to have reason to know that his donation would be spent on California politics.³¹ Thus, the organization would only need to disclose donors who had either contributed in response to a politically oriented solicitation or requested that their funds go toward political spending in California³²—two criteria that are not readily apparent.³³ Though the FPPC has the ability to discover such information by conducting audits,³⁴ organizations are sometimes unwilling to divulge documents that might reveal their failure to comply with FPPC regulations.³⁵

D. *Fair Political Practices Commission v. Americans for Responsible Leadership*

In 2013, the FPPC brought an enforcement action against two nonprofit organizations, resulting in the largest penalty in the history of the Act.³⁶ This suit stemmed from an earlier court battle in which the FPPC sought disclosure of the sources of an \$11 million payment made to influence voting on two California ballot measures during the 2012 general election.³⁷ The Center to Protect Patient Rights (the Center), a nonprofit organization located in Phoenix, Arizona, made payments totaling \$18 million to Americans for Responsible Leadership (ARL), another Arizona-based nonprofit organization.³⁸ On the same day it received the

29. See KIM ALEXANDER, INITIATIVE DISCLOSURE REFORM: OVERVIEW AND RECOMMENDATIONS 6 (2011) (describing the one-bite rule, also known as the one-bite-at-the-apple rule).

30. FPPC Press Release, May 14, 2014, *supra* note 7.

31. CAL. CODE REGS. tit. 2, § 18215(b)(1).

32. See *Id.* § 18412(b) (describing the situations in which a committee must disclose its donors).

33. See Order Granting Preliminary Injunction, *supra* note 13, at 1 (describing the lengths to which the FPPC had to go to obtain information about American's for Responsible Leadership's \$11 million donation to the Small Business Action Committee PAC). The FPPC had to obtain an injunction in order to ascertain whether ARL had met the criteria that would require it to disclose its financial sources. *Id.*

34. CAL. GOV'T CODE § 90003 (West 2005).

35. See Order Granting Preliminary Injunction, *supra* note 13, at 1 (ordering Americans for Responsible Leadership to disclose its financial sources to the FPPC after it refused to do so in response to an FPPC audit).

36. Press Release, Fair Political Practices Comm'n, FPPC Announces Record Settlement in \$11 Million Arizona Contribution Case (Oct. 24, 2013) (on file with the *McGeorge Law Review*) [hereinafter FPPC Press Release, Oct. 24, 2013].

37. Order Granting Preliminary Injunction, *supra* note 13, at 1.

38. Stipulation for Entry of Judgment at 3, 10, Fair Political Practices Comm'n v. Americans for Responsible Leadership, No. 34-2012-00131550-CU-PT-GDS, (Cal. Super. Ct. Oct. 24, 2013) [hereinafter

final payment from the Center, ARL made an \$11 million payment to the Small Business Action Committee-PAC (SBAC-PAC),³⁹ a committee formed primarily to oppose Proposition 30 and support Proposition 32.⁴⁰ Under existing FPPC regulations prohibiting contributions made on behalf of another party, the Center was required to disclose itself to SBAC-PAC as the true source of the funds;⁴¹ however, the Center made no such disclosure.⁴²

After receiving a complaint regarding the \$11 million payment from ARL to SBAC-PAC, the FPPC opened an investigation into ARL's finances.⁴³ ARL refused to disclose the true source of the funds paid to SBAC-PAC because "[t]here [was] no record of ARL making contributions in the State of California prior to the contribution in question"⁴⁴ Since it had not contributed \$1,000 in California during the current calendar year or any of the previous four calendar years, ARL's donors (including the Center) were presumed not to have reason to know that the organization would use any donations to influence California politics.⁴⁵ Thus, ARL only needed to disclose donors who requested that their donations be used for political purposes in California or whose donations were expressly solicited for that purpose.⁴⁶ To determine whether these criteria were met, and thus whether ARL was required to file a campaign report disclosing its source, the FPPC obtained a preliminary injunction in Sacramento County Superior Court ordering ARL to comply with the FPPC audit.⁴⁷ After a failed attempt to appeal the trial court's order,⁴⁸ ARL disclosed that the Center had been

Settlement Agreement].

39. *Id.* at 10–11.

40. *Id.* at 8.

41. CAL GOV'T CODE § 84302 (West 2005) (prohibiting the making of "a contribution on behalf of another, or while acting as the intermediary or agent of another, without disclosing to the recipient of the contribution both his own full name and street address, occupation, and the name of his employer").

42. Settlement Agreement, *supra* note 38, at 10–11.

43. *Id.* at 11. California Common Cause filed the complaint that initiated the investigation of ARL. Telephone Interview with Sarah Swanbeck, Policy and Legislative Affairs Advocate, California Common Cause (July 2, 2014) (notes on file with the *McGeorge Law Review*).

44. Order Granting Preliminary Injunction, *supra* note 13, at 1.

45. *Id.*; see CAL. CODE REGS. tit. 2, § 18215(b)(1) (2014) ("There shall be a presumption that the donor does not have reason to know that all or part of the payment will be used to make expenditures or contributions, unless the person or organization has made expenditures or contributions of at least \$1,000 in the aggregate during the calendar year in which the payment occurs, or any of the immediately preceding four calendar years.")

46. See CAL. CODE REGS. tit. 2, § 18215(b)(1) (2014) (defining "contribution" in a way that requires disclosure of donors if the organization has made contributions or expenditures in California totaling \$1,000 in the current calendar year or previous four calendar years); see *id.* § 18412(a)–(c) (requiring nonprofit organizations and out-of-state political committees to disclose contributions from donors who "request[] or know[] that the payment will be used by the organization to make a contribution or an independent expenditure to support or oppose a candidate or ballot measure in California"). Since ARL was not required to disclose donors under § 18215(b)(1), it was only required to disclose donors under § 18412. See *id.* § 18412(c)(2) (allowing organizations to attribute to themselves whatever donations are not accounted for under sections 18215(b)(1) and 18412).

47. Order Granting Preliminary Injunction, *supra* note 13, at 1.

48. Supreme Court Minutes, Fair Political Practice Comm'n v. Americans for Responsible Leadership,

the true source of the funds donated to SBAC-PAC.⁴⁹ The failure of the Center to disclose itself to SBAC-PAC violated FPPC regulations against making political contributions on another's behalf.⁵⁰ However, because of the protection offered by the one-bite rule, this violation was difficult to bring to light.⁵¹ The day before the November 6th election, ARL disclosed the Center and an organization known as Americans for Job Security (AJS) as the true sources of the \$11 million.⁵² The FPPC later brought a civil action against ARL and the Center for their respective violations, resulting in a record \$1 million fine.⁵³

Though the *ARL* case was a clear victory for the FPPC, it became apparent that existing campaign disclosure laws created a significant window for nonprofit organizations to make anonymous political contributions in California.⁵⁴ The fines against ARL and the Center were actually based on the violation of law against campaign money laundering, not those requiring the disclosure of donors.⁵⁵ Because the Center and AJS had not previously contributed money to California politics, the FPPC could not require the organizations to disclose the names of their donors under the one-bite rule.⁵⁶ Thus, on Election Day in 2012, California voters may have been aware that a series of undisclosed transactions had occurred, but they did not know the identities of the individual donors behind the funds in question.⁵⁷ The law's failure to require disclosure generated wide support for the strengthening of campaign finance disclosure laws.⁵⁸

No. S206407 (Cal. Sup. Ct. Nov. 4, 2012). The California Supreme Court vacated the Third District Court of Appeal's stay of the order compelling ARL to comply with the FPPC audit. *Id.*

49. *Americans for Responsible Leadership Admits Campaign Money Laundering, Discloses \$11 Million Donor*, FAIR POLITICAL PRACTICES COMM'N, <http://www.fppc.ca.gov/index.php?id=346> (last visited June 17, 2014) (on file with the *McGeorge Law Review*); Settlement Agreement, *supra* note 38, at 11–12.

50. Settlement Agreement, *supra* note 38, at 14.

51. *See id.* at 11 (indicating that the FPPC opened a discretionary audit, initiated proceedings in state court, and negotiated a settlement with ARL in order to compel the organization to disclose the Center as the source of ARL's political contributions).

52. FPPC Press Release, Oct. 24, 2013, *supra* note 36.

53. *Id.*

54. *See* Nicholas Confessore, *Group Linked to Kochs Admits to Campaign Finance Violations*, N.Y. TIMES, Oct. 24, 2013, http://www.nytimes.com/2013/10/25/us/politics/group-linked-to-kochs-admits-to-campaign-finance-violations.html?_r=0 (on file with the *McGeorge Law Review*) (stating that the fine negotiated by the FPPC is “one of the largest penalties ever assessed on a political group for failing to disclose donations”); ALEXANDER, *supra* note 29, at 6 (“[I]f an entity is donating in a California election for the first time, it is exempt from having to form a committee and is not required to disclose its donors.”).

55. Settlement Agreement, *supra* note 38, at 12–17.

56. Order Granting Preliminary Injunction, *supra* note 13, at 1 (stating that there was no record of ARL previously making a political payment in California); *see also* note 46 *supra*.

57. Skelton, *supra* note 5 (“No one still can say with certainty who actually forked out the millions, but the secretive network of nonprofits had ties to right-wing billionaires Charles and David Koch. So virtually everyone assumes it was the out-of-state Koch brothers who were secretly playing in California politics.”).

58. *See, e.g.*, Letter from Melissa Mikesell, Alliance for Justice, to Mike Gatto, Chair, California State Assembly Committee on Appropriations (Aug. 22, 2013) (on file with the *McGeorge Law Review*) (urging the passage of SB 27); Skelton, *supra* note 5 (encouraging lawmakers to compromise in order to pass SB 27).

III. CHAPTER 16

Chapter 16 expands upon the Political Reform Act of 1974⁵⁹ by implementing heightened reporting requirements for both nonprofit organizations⁶⁰ and primarily formed committees,⁶¹ as well as increasing the availability of information regarding campaign finance to voters.⁶²

A. *Reporting Requirements for Multipurpose Organizations*

Chapter 16 defines a previously undefined type of organization: the multipurpose organization (MPO).⁶³ MPOs include any “association or group of persons acting in concert, that is operating for purposes other than making contributions or expenditures.”⁶⁴ This new category encompasses both nonprofit organizations and political groups based outside of California.⁶⁵ Perhaps most importantly, it includes “social welfare organizations” created under section 501(c)(4) of the Internal Revenue Code.⁶⁶ If an MPO qualifies as a *recipient committee*, a political organization that receives and distributes money for political purposes,⁶⁷ it will be subject to heightened reporting requirements.⁶⁸ Chapter 16 describes four possible situations when a multipurpose organization qualifies as a recipient committee for purposes of the Act:⁶⁹ (1) it spends \$1,000 or more on political contributions and is registered out-of-state as a political committee;⁷⁰ (2) it solicits donations for the express purpose of making political

59. 2014 Cal. Stat. ch. 16, § 11 (finding that Chapter 16 “furthers the purposes of the Political Reform Act of 1974”).

60. CAL. GOV'T CODE § 84222 (enacted by Chapter 16).

61. *Id.* § 84223 (enacted by Chapter 16). A primarily formed committee is “[a] committee primarily formed to support or oppose a state ballot measure or state candidate . . .” *Id.*

62. *Id.* § 88001 (amended by Chapter 16).

63. *Id.* § 84222(a) (enacted by Chapter 16).

64. *Id.* Specific examples of multipurpose organizations include religious, trade, professional, civic, and fraternal organizations, educational institutions, out-of-state political organizations, and nonprofit organizations falling under sections 501(c)(3)–(10) of the Internal Revenue Code. *Id.* Individuals, business entities, and authorized candidate committees are not MPOs. *Id.*

65. *Id.* (stating that “a federal or out-of-state political organization” and “an organization described in sections 501(c)(3) to 501(c)(10), inclusive, of the Internal Revenue Code” are both MPOs under Chapter 16).

66. *Id.* (defining MPOs to include “an organization described in sections 501(c)(3) to 501(c)(10), inclusive, of the Internal Revenue Code”). 501(c)(4) organizations must maintain the promotion of social welfare as their primary purpose. 26 U.S.C. § 501(c)(4)(A) (2012). Such organizations do not need to disclose their donors to the federal government. Donny Shaw, “Social Welfare” Groups Dominate Dark Money Spending on Congressional Elections, MAPLIGHT, <http://maplight.org/content/73410> (last visited July 13, 2014). See *infra* Part IV.A (discussing the role of 501(c)(4) organizations in the proliferation of anonymous political contributions).

67. GOV'T § 84222(c) (enacted by Chapter 16).

68. *Id.* § 84222(d)–(e) (enacted by Chapter 16).

69. *Id.* § 84222(c) (enacted by Chapter 16).

70. *Id.* § 84222(c)(1) (enacted by Chapter 16); *Id.* § 82013 (West 2005) (setting a \$1,000 threshold for qualification as a recipient committee). Out-of-state political committees include those registered with the

contributions and receives \$1,000 or more;⁷¹ (3) it receives \$1,000 or more from donors who know that the funds will be used for political purposes;⁷² or (4) it spends \$50,000 during a twelve-month period or \$100,000 over a period of four years for political purposes.⁷³

MPOs that qualify as recipient committees must register with the California Secretary of State and report the sources of any funds used to make political contributions or expenditures in California.⁷⁴ Qualifying MPOs must first report all donors who earmark their contributions for political purposes.⁷⁵ If this reporting fails to account for all funds spent on contributions and expenditures in California, then the multipurpose organization must disclose all donations of \$1,000 or more in reverse chronological order until an amount equal to its contributions and expenditures is accounted for.⁷⁶ This second method of disclosure is carried out with no reference to whether the organization has made political payments in the past.⁷⁷ Organizations need not disclose donors who affirmatively request that their donations not be used for political purposes.⁷⁸

B. Reporting Requirements for Primarily Formed Committees

Chapter 16 also sets new reporting requirements for committees formed primarily to support or oppose a particular candidate or ballot measure.⁷⁹ Any such committee that raises \$1 million or more must maintain a list of its ten largest financial contributors⁸⁰ and must submit the list to the FPPC for posting on the FPPC web site.⁸¹ The committee must update the list any time there is a

Federal Election Commission (FEC) or in another state. *Id.* § 84222(c)(1) (enacted by Chapter 16).

71. *Id.* § 84222(c)(2) (enacted by Chapter 16); *id.* § 82013 (West 2005) (setting a \$1,000 threshold for qualification as a recipient committee).

72. *Id.* § 84222(c)(3) (enacted by Chapter 16). If a donor gives \$1,000 or more to a multipurpose organization and only later agrees that the funds may be used for contributions or expenditures, the multipurpose organization will still be considered a recipient committee. *Id.* § 84222(c)(4) (enacted by Chapter 16); *id.* § 82013 (West 2005) (setting a \$1,000 threshold for qualification as a recipient committee).

73. *Id.* § 84222(c)(5) (enacted by Chapter 16). The multipurpose organization will not be considered a recipient committee if the contributions were made with nondonor funds, which include income from the provision of services, sale of goods, and capital gains. *Id.* § 84222(c)(5)(A)–(B) (enacted by Chapter 16).

74. *Id.* § 84222(d)–(e) (enacted by Chapter 16). A multipurpose organization which qualifies as a recipient committee because of its federal or out-of-state registration as a political committee is not required to report information regarding its donors. *Id.* § 84222(d) (enacted by Chapter 16).

75. *Id.* § 84222(e)(1)(C) (enacted by Chapter 16). Only donors who have given a cumulative amount of \$100 or more must be disclosed. *Id.* § 84211(f) (West 2005).

76. *Id.* § 84222(e)(1)(C) (enacted by Chapter 16).

77. *See id.* § 84222(c)(1)–(5) (enacted by Chapter 16) (making no reference to an organization's past contributions).

78. *Id.* § 84222(e)(2)(A)–(B) (enacted by Chapter 16).

79. *Id.* § 84223 (enacted by Chapter 16).

80. *Id.* § 84223(a) (enacted by Chapter 16). An organization need only include donors who have contributed \$10,000 or more. *Id.* § 84223(b)(4) (enacted by Chapter 16).

81. *Id.* § 84223(a), (c) (enacted by Chapter 16).

change in the identity,⁸² relative ordering,⁸³ or contribution level of any of the committee's ten largest donors.⁸⁴ If one of the committee's ten largest contributors is itself a recipient committee, the FPPC can request that the list identify that committee's ten largest contributors as well.⁸⁵ Committees must make reasonable efforts to identify the actual sources of funds received.⁸⁶

C. Publication of Top Ten Lists

In addition to listing contributors to primarily formed committees, the FPPC must "compile, maintain, and display on its Internet Web site a current list of the top [ten] contributors supporting and opposing each state ballot measure"⁸⁷ In its official ballot pamphlet, the Secretary of State's office must explain the contributor lists and describe where voters may view the lists.⁸⁸ All provisions of Chapter 16 went into effect on July 1, 2014.⁸⁹

IV. ANALYSIS

Chapter 16 attempts to reduce the prevalence of anonymous political payments in California elections.⁹⁰ Part A examines the rise of dark money, both in the State of California and in the United States generally. Part B explains the current controversy surrounding dark money in politics. Part C discusses the effects of Chapter 16 on dark money in California, particularly its elimination of the one-bite rule. Part D describes some commentators' reactions to Chapter 16.

A. The Rise of Dark Money

Anonymous contributions have regularly occurred in federal and California elections.⁹¹ Until the passage of Chapter 16, California law permitted anonymous contributions through the one-bite rule, a feature of the California Code of Regulations;⁹² Federal law continues to allow anonymous contributions after a

82. *Id.* § 84223(c)(2)(A) (enacted by Chapter 16).

83. *Id.* § 84223(c)(2)(C) (enacted by Chapter 16).

84. *Id.* § 84223(c)(2)(B) (enacted by Chapter 16).

85. *Id.* § 84223(b)(1) (enacted by Chapter 16).

86. *Id.* § 84223(d) (enacted by Chapter 16).

87. *Id.* § 84223(e) (enacted by Chapter 16).

88. *Id.* § 88001(m) (amended by Chapter 16); ELEC. § 9084(m) (amended by Chapter 16).

89. 2014 Cal. Stat. ch. 16, § 10.

90. *Id.* § 1(e).

91. *See, e.g.,* ALEXANDER, *supra* note 29, at 7 (describing several anonymous contributions in recent California ballot measure campaigns); Malloy, *supra* note 4, at 433.

92. *See* CAL. CODE REGS. tit. 2, § 18215(b)(1) (2014) (requiring disclosure of the sources of a contribution when the contributing entity has made political donations of \$1,000 or more in the past).

2007 decision by the FEC greatly expanded the ability of corporations and labor unions to donate anonymously to political campaigns.⁹³

1. *Dark Money in Federal Elections*

Recent federal elections have seen a notable rise in anonymous political spending by nonprofit organizations.⁹⁴ This phenomenon is primarily attributable to two recent changes in federal law: the 2007 amendment of title 11, section 104.20 of the Code of Federal Regulations and the U.S. Supreme Court's 2010 ruling in *Citizens United v. Federal Election Commission*.⁹⁵

The FEC is the governmental body responsible for promulgating and enforcing regulations on federal election financing.⁹⁶ In 2007, the FEC amended the disclosure requirements for corporations and labor organizations that make electioneering communications, which are media communications that clearly identify a candidate for office and target the candidate's electorate.⁹⁷ Such organizations must file a report that discloses the identity of any contributor who gives \$1,000 or more "for the purpose of furthering electioneering communications."⁹⁸ Essentially, the contributor must earmark the payment to be used toward a political communication in order for the recipient to be required to disclose the identity of the contributor.⁹⁹ This shift in campaign finance reporting significantly narrowed the scope of donations that must be disclosed and resulted in only a small percentage of the contributions behind electioneering communications being reported to the FEC.¹⁰⁰

93. See Trevor Potter & Bryson B. Morgan, *The History of Undisclosed Spending in U.S. Elections & How 2012 Became the "Dark Money" Election*, 27 NOTRE DAME J.L. ETHICS & PUB. POL'Y 383, 453–54 (2013) (describing the FEC's decision to narrow disclosure requirements for corporations and labor unions); FED. ELECTION COMM'N, MINUTES OF AN OPEN MEETING OF THE FEDERAL ELECTION COMMISSION 4 (Nov. 20, 2007), available at <http://www.fec.gov/agenda/2007/approve07-79.pdf> (on file with the *McGeorge Law Review*) (narrowing the scope of when a party making an electioneering communication must disclose the sources of its funds).

94. Malloy, *supra* note 4, at 433. "In 2006, only about 1% of independent spending in the election was undisclosed; by contrast, in 2010, approximately 47% of all independent electoral spending was made through groups that did not disclose their donors." *Id.*

95. *Id.* *Citizens United v. Fed. Election Comm'n* held unconstitutional a federal statute limiting the amount that corporations may spend on independent expenditures and electioneering communications. 130 S. Ct. 876, 896–99 (2010).

96. *About the FEC*, FED. ELECTION COMM'N, <http://www.fec.gov/about.shtml> (last visited July 12, 2014) (on file with the *McGeorge Law Review*).

97. FED. ELECTION COMM'N, *supra* note 93; Potter & Morgan, *supra* note 93, at 453–54; Malloy, *supra* note 4, at 437. An electioneering communication is "any broadcast, cable, or satellite communication that . . . [r]efers to a clearly identified candidate for Federal office . . . [i]s publicly distributed within 60 days before a general election . . . or within 30 days before a primary . . . and . . . [i]s targeted to the relevant electorate." 11 C.F.R. § 100.29(a)(1)–(3) (2014).

98. 11 C.F.R. § 104.20(c)(9) (2014).

99. Malloy, *supra* note 4, at 437–48.

100. Potter & Morgan, *supra* note 93, at 457. "In 2010, persons (including corporations and unions) disclosed the sources of the funds used to air electioneering communications for less than ten percent of the

Another reason for the rise of dark money in federal elections was the 2010 case *Citizens United v. Federal Elections Commission*.¹⁰¹ The Supreme Court ruled that the federal statute prohibiting corporations from making independent expenditures and electioneering communications from their general treasuries was unconstitutional.¹⁰² Accordingly, corporations no longer needed to make political expenditures through PACs, but could make them through nonprofit organizations as well.¹⁰³ Until *Citizens United*, “non-profit corporations were . . . barred from using treasury funds to make campaign-related contributions or expenditures unless . . . they did not accept contributions from business corporations or unions.”¹⁰⁴ *Citizens United* eliminated this constraint on the political activities of nonprofit organizations, allowing them to receive limitless contributions from business corporations while continuing to make political payments directly from their general treasuries.¹⁰⁵

The ability of corporations and nonprofit organizations to make unlimited expenditures with limited donor disclosure requirements creates a golden opportunity for donors to make anonymous contributions.¹⁰⁶ By contributing to a nonprofit organization without earmarking the donation for a specific political purpose, a donor can easily evade disclosure.¹⁰⁷ Under *Citizens United*, the nonprofit organization is then free to use the donation to make political expenditures,¹⁰⁸ so long as political expenditures on behalf of candidates do not become the organization’s primary purpose.¹⁰⁹ There is no consensus on when candidate-based election spending becomes an organization’s primary purpose, but some experts argue that an organization can contribute 49.9% of its budget to candidates while still maintaining its 501(c)(4) status.¹¹⁰ A nonprofit organization can be set up with an ambiguous name that does not reveal the true identity of its backers nor the organization’s actual intentions.¹¹¹ Donors can then use the

total \$79.9 million spent during that election cycle on such communications.” *Id.*

101. Malloy, *supra* note 4, at 427–29.

102. *Citizens United v. Fed. Election Comm’n*, 130 S. Ct. 876, 913 (2010) (invalidating 2 U.S.C. § 441(b) as an unconstitutional prohibition of speech by a particular class of speakers).

103. Malloy, *supra* note 4, at 428–29.

104. *Id.* at 430 n.22.

105. Potter & Morgan, *supra* note 93, at 458; Malloy, *supra* note 4, at 427–29.

106. Potter & Morgan, *supra* note 93, at 477–78.

107. Ciara Torres-Spelliscy, *Safeguarding Markets from Pernicious Pay to Play: A Model Explaining Why the SEC Regulates Money in Politics*, 12 CONN. PUB. INT. L.J. 361, 394–95 (2013).

108. Malloy, *supra* note 4, at 430 n.22.

109. Organizations created under § 501(c)(4) must make social welfare their primary purpose. 26 U.S.C. § 501(c)(4)(A) (2012). Political expenses on behalf of candidates are not considered to be in furtherance of social welfare. 26 C.F.R. § 1.501(c)(4)(a)(2)(ii) (2013).

110. Paul Blumenthal, *What You Need to Know About the Obama Administration’s Proposed ‘Dark Money’ Rules*, HUFFINGTON POST (Nov. 27, 2013, 4:07 PM), http://www.huffingtonpost.com/2013/11/27/dark-money_n_4351186.html (on file with the *McGeorge Law Review*).

111. See *Interest Group Advertising Pours into Senate Races*, WESLEYAN MEDIA PROJECT, <http://mediaproject.wesleyan.edu/2014/04/29/interest-group-advertising-pours-into-senate-races/> (last visited July 13, 2014) (on file with the *McGeorge Law Review*) (observing that ads are effective “especially . . . when

resulting “shell” organization as a vehicle for channeling political funds, while remaining anonymous themselves.¹¹²

Following these developments, the nonprofit organization quickly became the predominant entity for the disbursement of political funds.¹¹³ Powerful interest groups established 501(c) affiliates to accommodate backers who wished to remain anonymous.¹¹⁴ Political contributions by 501(c) organizations grew from nearly nothing in 2006 to over 40% of all independent spending in 2010.¹¹⁵ Social welfare organizations created under 501(c)(4) “increased spending on congressional elections from \$84 million in 2010 to \$133 million in 2012.”¹¹⁶ Early data on the 2014 midterm election has shown that 59% of television advertisements for U.S. Senate races are funded by outside political groups and 59% of these groups are 501(c) organizations that do not report the sources of their funds.¹¹⁷ Consequently, over one-third of the advertisements currently aired concerning senatorial candidates are paid for anonymously.¹¹⁸ Since 2007, an extensive system of nonprofit organizations has come into existence, exerting an unprecedented level of anonymous influence on political races in the U.S.¹¹⁹

2. *Dark Money in California Elections*

Dark money has appeared in California elections in recent years, although resulting from a different set of disclosure laws.¹²⁰ Under the one-bite rule, a nonprofit or out-of-state political organization may make political contributions without disclosing its donors if it has not made political contributions in

people know very little about the group except that it has a nice name”). Studies show that voters are actually more accepting of advertisements paid for by organizations than those funded by candidates. *Id.*

112. Potter & Morgan, *supra* note 93, at 461–62.

113. *See* Malloy, *supra* note 4, at 432–33 (“In the 2006 midterm election 501(c) groups conducted virtually no independent spending, whereas in 2010, 501(c) groups accounted for approximately 42% of independent spending. Indeed, in 2010, the largest two spenders were the U.S. Chamber of Commerce, a 501(c)(6) group, and American Action Network, a 501(c)(4) group, spending \$32.9 and \$26.1 million respectively.”).

114. *See, e.g.,* Potter & Morgan, *supra* note 93, at 463–64 (describing Karl Rove’s creation of Crossroads GPS, a 501(c)(4) spin off of his American Crossroads super PAC). “Democrats took advantage of this dual-entity strategy as well, forming the pro-Obama super PAC Priorities USA Action and creating a 501(c)(4) counterpart, Priorities USA.” *Id.* at 464.

115. Malloy, *supra* note 4, at 432.

116. Shaw, *supra* note 66.

117. *Interest Group Advertising Pours into Senate Races*, *supra* note 111.

118. *See id.* (stating that 59% of current advertisements for U.S. Senate races are paid for by outside groups, and 59% of these groups do not disclose their donors’ identities). Thus, 34.81% of advertisements in Senate races are paid for anonymously. *Id.*

119. *See* Malloy, *supra* note 4, at 457–58 (“[C]itizens must now . . . contend with . . . an unprecedented lack of transparency in federal elections . . .”).

120. *See, e.g.,* ALEXANDER, *supra* note 29, at 7 (describing several anonymous contributions in recent California ballot measure campaigns).

California in the past and the funds that it receives are not earmarked for political purposes.¹²¹

This rule has allowed for millions of dollars to be spent on anonymous political contributions in the state.¹²² For example, Proposition 23, a 2010 ballot measure, would have overturned legislation requiring a statewide reduction in greenhouse gas emissions.¹²³ Groups, including several 501(c) organizations, spent over \$36 million on campaigns to support and oppose Proposition 23, and much of this money was contributed anonymously.¹²⁴ This is because certain groups that spent money for or against Proposition 23 were “first-time major donors,” and such groups did not need to disclose their financial sources under the one-bite rule.¹²⁵ The existence of dark money in California elections received increased public attention during the 2012 general election when the FPPC brought its enforcement action against ARL.¹²⁶

The influence of 501(c)(4) “social welfare” organizations in California is broadened by the fact that the IRS does not consider expenditures on ballot measure campaigns to be political spending.¹²⁷ In order to maintain its 501(c)(4) status, an organization must be “operated exclusively for the promotion of social welfare.”¹²⁸ “[S]ocial welfare does not include direct or indirect participation or intervention in political campaigns on behalf of or in opposition to any candidate for public office.”¹²⁹ Conspicuously absent from this limitation on the activities of 501(c)(4) organizations is the provision of funds to support ballot measure campaigns.¹³⁰ Furthermore, a 501(c)(4) organization can maintain its nonprofit status so long as political spending on candidate races does not become the

121. See *supra* Part II.C (discussing the one-bite rule in depth).

122. See ALEXANDER, *supra* note 29, at 7 (listing contributors to Proposition 23 in 2010, including \$3 million of spending by the National Wildlife Federation, for which no donors were reported).

123. CALIFORNIA ATTORNEY GENERAL, PROPOSITION 23: OFFICIAL TITLE AND SUMMARY (2010), available at <http://vig.cdn.sos.ca.gov/2010/general/pdf/english/23-title-sum-analysis.pdf> (on file with the *McGeorge Law Review*).

124. ALEXANDER, *supra* note 29, at 7.

125. *Id.* The Adam Smith Foundation spent \$498,000 to support Proposition 23, and the group did not need to report its donors. *California Prop. 23—Campaign Contributions—Nov. 2010*, MAPLIGHT, <http://maplight.org/content/california-prop-23-nov-2010> (last updated Nov. 4, 2010) (on file with the *McGeorge Law Review*). The National Wildlife Federation spent \$3 million opposing the measure and was not required to report either. *Id.*

126. See, e.g., Kevin Yamamura, *FCCP Says Arizona Nonprofit Laundered Money to CA Campaign*, SACRAMENTO BEE, Nov. 5, 2012, <http://blogs.sacbee.com/capitolalertlatest/2012/11/fppc-accuses-arizona-nonprofit-of-money-laundering.html> (on file with the *McGeorge Law Review*) (describing the events of the ARL case as they unfolded shortly before the 2012 election).

127. *Ballot Measure Money Not Political Under IRS Loophole*, NEWS10.NET (Nov. 11, 2013, 5:34 PM), <http://www.news10.net/news/article/262992/2/Ballot-measure-money-not-political-under-IRS-loophole> (on file with the *McGeorge Law Review*).

128. 26 U.S.C. § 501(c)(4)(A) (2012).

129. 26 C.F.R. § 1.501(c)(4)(a)(2)(ii) (2013).

130. See *id.* (referring only to contributions “on behalf of or in opposition to any candidate” when setting limitations on what 501(c)(4) groups may do).

organization's primary purpose.¹³¹ This feature of the law allows social welfare groups to offset their "political" spending (on races for elective office) by simply spending a slightly greater amount on ballot measure races.¹³² Thus, 501(c)(4) groups can devote all of their resources to political purposes while still withholding the identities of their backers.¹³³ This effect is especially pronounced in California where ballot measures play a greater role than in any other state in the nation.¹³⁴

The \$11 million that ARL and the Center spent toward two California ballot measures is an example of how the rise of dark money on the national stage has had a direct impact on California elections.¹³⁵ The donation originated from the Center,¹³⁶ an organization at the hub of the network of nonprofit organizations tied to David and Charles Koch.¹³⁷ The Koch Brothers' network is comprised of nonprofit organizations, including the Center, Americans for Job Security, and America Future Fund, none of which disclose their financial backers.¹³⁸ The Koch network raised and spent approximately \$407 million during the 2012 election cycle, making it one of the largest sources of political money in the nation.¹³⁹ Thus, the \$11 million spent to influence voting in California was inextricably tied to the larger phenomenon of dark money in federal elections across the country.¹⁴⁰ The numerous 501(c)(4) organizations that were established to take advantage of a particular feature of federal law could, by exploiting the one-bite rule, focus their influence on California elections.¹⁴¹

131. Potter & Morgan, *supra* note 93, at 465 (stating that the U.S Department of the Treasury has created the primary purpose test to determine whether 501(c)(4) organizations are operating to promote social welfare).

132. *Ballot Measure Money Not Political Under IRS Loophole*, *supra* note 127.

133. *See id.* (explaining how an IRS loophole allows nonprofit social welfare groups to spend 100% of their funds on politics by ensuring that slightly more is spent on ballot measures than candidates); *supra* Part II.C (explaining the one-bite rule that allows nonprofits to withhold the names of their donors).

134. *Ballot Measure Money Not Political Under IRS Loophole*, *supra* note 127.

135. *See supra* Part II.D (explaining how ARL and the Center were able to keep the sources of the \$11 million contribution secret).

136. Letter from Kirk Adams, President, Americans for Responsible Leadership, to James V. Lacy, Treasurer, Small Business Action Committee PAC (Nov. 5, 2012) (on file with the *McGeorge Law Review*).

137. Viveca Novak, *Americans for Responsible Leadership Wholly Funded by Koch-Linked Group*, OPENSECRETS.ORG (Dec. 13, 2013), <https://www.opensecrets.org/news/2013/12/americans-for-responsible-leadership-wholly-funded-by-koch-linked-group/> (on file with the *McGeorge Law Review*); Confessore, *supra* note 54 (including a chart of the Koch Brothers' nonprofit network, in which the Center plays a central role).

138. Confessore, *supra* note 54.

139. Matea Gold, *Koch-Backed Political Network, Built to Shield Donors, Raised \$400 Million in 2012 Elections*, WASH. POST, Jan. 5, 2014, http://www.washingtonpost.com/politics/koch-backed-political-network-built-to-shield-donors-raised-400-million-in-2012-elections/2014/01/05/9e7cfd9a-719b-11e3-9389-09ef9944065e_story.html (on file with the *McGeorge Law Review*).

140. *See* Letter from Kirk Adams, *supra* note 136 (noting that the Center was the source of the \$11 million contribution to influence two California ballot measure races); Confessore, *supra* note 54 (stating that the Center is an integral part of the Koch Brothers' nationwide network of nonprofit organizations).

141. *See* Potter & Morgan, *supra* note 93, at 462–63 (describing how interest groups have formed 501(c)(4) groups to make anonymous political contributions in various U.S. elections); Laurel Rosenhall, *California FPPC Issues Record Fine for Failure to Disclose Source of Mystery Money*, SACRAMENTO BEE, Oct. 24, 2013, <http://www.sacbee.com/2013/10/24/5850790/california-fppc-issues-record.html> (on file with the

B. *Dark Money: Liberty or Liability?*

Opponents of anonymous political contributions and expenditures argue that such payments are detrimental to the transparency that should exist in elections.¹⁴² The disclosure of political donors has the ability to educate voters about who is advocating a certain position, allowing voters to more fully evaluate political viewpoints.¹⁴³ Further, all campaign finance rules, even those not related to disclosure itself, are more easily enforced if donations are openly reported.¹⁴⁴

The U.S. Supreme Court has expressed its support for disclosure on multiple occasions.¹⁴⁵ In *Citizens United*, Justice Kennedy displayed strong support of disclosure requirements, stating “[t]he First Amendment protects political speech; and disclosure permits citizens and shareholders to react to the speech of corporate entities in a proper way.”¹⁴⁶ Referring to the practice of disclosing the identity of donors, Justice Brandeis famously stated that “[s]unlight is said to be the best of disinfectants”¹⁴⁷ In the post-*Citizens United* world, disclosure is gaining traction as a tool to limit the influence of money in politics.¹⁴⁸

However, supporters of anonymous contributions claim that anonymity is part of the freedoms of speech and association guaranteed by the First Amendment.¹⁴⁹ They argue that disclosure has a chilling effect on political contributions,¹⁵⁰ which are a form of constitutionally protected speech.¹⁵¹

McGeorge Law Review) (explaining how the Center and ARL utilized the one-bite rule to make an anonymous donation in California).

142. See, e.g., Ravel, *supra* note 5 (“Dark money undermines trust in elections and contributes to disengagement from government.”).

143. *Buckley v. Valeo*, 424 U.S. 1, 66–67 (1976) (“[Disclosure] allows voters to place each candidate in the political spectrum more precisely than is often possible solely on the basis of party labels and campaign speeches”); Ravel, *supra* note 5.

144. *Buckley*, 424 U.S. at 67–68; see also Settlement Agreement, *supra* note 38, at 12 (“In general, failure to disclose the true source of contributors deprives the public of important knowledge about who is funding campaigns and how it impacts the campaign messages they receive.”). It was not at first apparent that ARL was violating rules against campaign money laundering because the organization was claiming the right not to disclose its sources under the one-bite rule. *Id.* ARL’s and the Center’s violations of anti-laundering rules were eventually uncovered, but only after a hard-fought court battle. *Id.* at 11–12.

145. *Buckley*, 424 U.S. at 67–68 (stating that disclosure “aid[s] the voters in evaluating those who seek federal office”); *Citizens United v. Fed. Election Comm’n*, 130 S. Ct. 876, 916 (2010) (“[P]rompt disclosure of expenditures can provide shareholders and citizens with the information needed to hold corporations and elected officials accountable for their positions and supporters.”).

146. *Citizens United*, 130 S. Ct. at 916.

147. LOUIS D. BRANDEIS, *OTHER PEOPLE’S MONEY AND HOW THE BANKERS USE IT* 92 (Frederick A. Stokes Co. 2nd prtg. 1914) (1913).

148. See Adam Liptak, *A Blockbuster Case Yields an Unexpected Result*, N.Y. TIMES, Sept. 19, 2011, <http://www.nytimes.com/2011/09/20/us/disclosure-may-be-real-legacy-of-citizens-united-case.html?module=Search&mabReward=relbias%3Ar> (on file with the *McGeorge Law Review*) (highlighting the disclosure requirements upheld in *Citizens United*).

149. Monica Youn, *Proposition 8 and the Mormon Church: A Case Study in Donor Disclosure*, 81 GEO. WASH. L. REV. 2108, 2132 (2013).

150. *Id.* at 2110.

151. *Buckley v. Valeo*, 424 U.S. 1, 16 (1976).

Contributors may fear the consequences of public disapproval resulting from the disclosure of their political contributions.¹⁵² For example, on April 3, 2014, Brendan Eich, the CEO and cofounder of Mozilla, resigned his position with the tech company in response to public outcry over his \$1,000 contribution in support of Proposition 8, the 2008 California ballot initiative to prohibit gay marriage.¹⁵³ Other supporters of the controversial measure have reported negative reactions stemming from the disclosure of their donations to the “Yes on 8” campaign, including boycotts and death threats.¹⁵⁴ Additionally, there is concern that the complexity of reporting forms and deadlines serves to discourage organizations from political participation because of the possibility of inadvertently violating disclosure laws.¹⁵⁵

C. Chapter 16: Reducing Dark Money and Increasing the Availability of Campaign Finance Information

Chapter 16 will limit the amount of dark money spent in California elections by eliminating anonymous contributions by MPOs under the one-bite rule¹⁵⁶ and requiring the publication of new types of data regarding political contributions.¹⁵⁷

1. Elimination of the One-Bite Rule

Chapter 16 adds section 84222 to the Government Code, which effectively ends the reporting loophole that allowed one-time anonymous contributions in California.¹⁵⁸ Section 84222 requires that if an MPO spends a certain amount of money on California politics, then that organization must report the sources of the funds spent.¹⁵⁹ The new law requires qualifying MPOs to disclose their sources, regardless of whether the organization has made political contributions

152. See Youn, *supra* note 149, at 2126–28 (detailing the public backlash against supporters of California’s Proposition 8 in 2008).

153. *FAQ on CEO Resignation*, MOZILLA BLOG (Apr. 5, 2014), <https://blog.mozilla.org/blog/2014/04/05/faq-on-ceo-resignation/> (on file with the *McGeorge Law Review*).

154. Youn, *supra* note 149, at 2126–28.

155. Mikesell, *supra* note 58; E-mail from Nayantara Mehta, Senior Counsel, Alliance for Justice, to Hyla Wagner, Senior Staff Counsel, Fair Political Practices Comm’n (June 17, 2014, 8:50 AM), available at http://fppc.ca.gov/IPmeetings/2014/20140617_IP_Meeting_Comment_Letters2.pdf (on file with the *McGeorge Law Review*) (urging the FPPC to enact regulations that do “not unduly burden legitimate nonprofit multipurpose organizations influencing ballot measures in California”).

156. See CAL. GOV’T CODE § 84222(c)(5), (e) (enacted by Chapter 16) (requiring MPOs to disclose their sources after making any political contributions totaling \$50,000 in one year or \$100,000 in four years).

157. See *id.* § 84223 (enacted by Chapter 16) (requiring the FPPC to publish a list of the top ten contributors to each committee formed primarily to support or oppose a ballot measure or candidate).

158. See *id.* § 84222(c)(5), (e) (enacted by Chapter 16) (requiring MPOs to report the names of donors if the organization makes political payments totaling \$50,000 in a single year, regardless of whether the organization had made any political payments in California in the past).

159. *Id.* § 84222(c)(5), (e) (enacted by Chapter 16).

in the past.¹⁶⁰ This is a dramatic shift from prior law, which protected a donor's identity if the recipient organization had not made prior political contributions in California.¹⁶¹ Under Chapter 16, an organization may only avoid disclosing individual donors by affirmatively showing that a donor did not intend his contribution to be used for political purposes.¹⁶² Thus, Chapter 16 shifts the burden of proof from the government to MPOs: rather than the FPPC having to compel disclosure by proving a donor's knowledge of an organization's political purposes, the MPO must prove the donor's lack of such knowledge in order to avoid disclosure.¹⁶³ Chapter 16 requires expanded disclosure by MPOs and eliminates the one-bite rule.¹⁶⁴

2. Greater Availability of Campaign Finance Information

Chapter 16 also contains provisions to provide voters with more information regarding the financing of campaigns in California.¹⁶⁵ The top ten donor lists that recipient committees must submit will serve as an easily digestible format through which voters can learn which interests are supporting a given candidate or ballot measure.¹⁶⁶ Though campaign finance information was already available to the public online,¹⁶⁷ this information was voluminous and difficult for the lay voter to interpret quickly.¹⁶⁸ The top ten lists condense the most important information into a simple list.¹⁶⁹ They will be available online, and the Secretary of State's official ballot pamphlet will inform voters as to where the lists may be accessed.¹⁷⁰ This feature of Chapter 16 will ensure that the information disclosed

160. *See id.* (requiring the disclosure of donors once an MPO makes political payments totaling \$50,000 in one year, or \$100,000 in a period of four years).

161. *Compare* CAL. CODE REGS. tit. 2, § 18215(b)(1) (2014) (requiring organizations to disclose donors only if the organization had made prior political payments in California or the donor had earmarked the contribution) *with* GOV'T § 84222(c)(5), (e) (enacted by Chapter 16) (requiring the disclosure of donors to any MPO that spends \$50,000 in a single year on California politics).

162. GOV'T § 84222(e)(2)(A)–(B) (enacted by Chapter 16) (creating an exception that MPOs need not disclose donors who specifically request that their contributions not be used for making political expenditures or contributions).

163. *See id.* § 84222(c)(5), (e) (enacted by Chapter 16) (requiring the disclosure of donors to any MPO that spends \$50,000 in a single year on California politics but creating an exception for donors who specifically request that their contributions not be used for making political expenditures or contributions).

164. *See id.* (enacted by Chapter 16) (creating a presumption that will no longer allow MPOs to resist disclosure by arguing that it had not made political payments in California in the past).

165. *See Id.* § 84223 (enacted by Chapter 16) (requiring primarily formed committees to report their top ten donors for publication by the FPPC); *id.* § 88001(m) (amended by Chapter 16) (requiring the California Secretary of State to publish information on the top ten lists in the official state ballot pamphlet).

166. Telephone Interview with Kim Alexander, President and Founder, California Voter Foundation (July 1, 2014) (notes on file with the *McGeorge Law Review*).

167. *Raw Data for Campaign Finance and Lobbying Activity*, CAL. SEC'Y OF STATE, <http://www.sos.ca.gov/prd/cal-access/> (last visited July 13, 2014) (on file with the *McGeorge Law Review*).

168. Interview with Kim Alexander, *supra* note 166.

169. *Id.*

170. GOV'T § 84223 (enacted by Chapter 16); *id.* § 88001(m) (amended by Chapter 16).

will be available and comprehensible to voters who want to learn about a campaign's financial supporters.¹⁷¹

D. Reactions to Chapter 16

Various groups active in California politics have expressed that the elimination of the one-bite rule will be beneficial for California elections.¹⁷² Supporters believe that the law closes a loophole in California's disclosure requirements and will prevent organizations from making anonymous contributions in the state.¹⁷³ Supporters of Chapter 16 see the abandonment of the one-bite rule as a move toward greater transparency in elections.¹⁷⁴

Opponents of Chapter 16 claim that it is unnecessary in a state that already has an "expansive and onerous" system of campaign finance rules.¹⁷⁵ A report by the California Senate Republican Caucus also claims that political operatives can use the information that comes from disclosure for the purpose of harassing donors.¹⁷⁶ The specter of retribution has and continues to be one of the primary rationales for political anonymity.¹⁷⁷ However the Senate Republican Caucus offers a more pragmatic basis for opposing the requirements of Chapter 16: it is more likely to have an adverse effect on business interests than on labor unions and other typically left-leaning groups.¹⁷⁸

V. CONCLUSION

Chapter 16 marks a significant shift in campaign finance disclosure requirements in the State of California.¹⁷⁹ Groups making large contributions to

171. Interview with Kim Alexander, *supra* note 166.

172. See ALEXANDER, *supra* note 29, at 6 (stating that the one-bite rule is "[t]he primary obstacle to full disclosure of all funders in initiative campaigns . . ."); interview with Sarah Swanbeck, *supra* note 43.

173. FPPC Press Release, May 14, 2014, *supra* note 7; Interview with Sarah Swanbeck, *supra* note 43; *Refreshing Developments: The Legislature Has Productive Week*, *supra* note 7 ("With SB 27, California has unmasked those secretive donors.").

174. Chris Carson, *California League Wins Fight Against Dark Money in California*, SAN DIEGO FREE PRESS, June 14, 2014, http://sandiegofreepress.org/2014/06/california-league-wins-fight-against-dark-money-in-california/#.U8O98_ldWSq (on file with the *McGeorge Law Review*); Interview with Sarah Swanbeck, *supra* note 43.

175. *Republican Caucus Report*, *supra* note 6.

176. *Id.*

177. See NAACP v Alabama, 357 U.S. 449, 462 (1958) (holding that the NAACP was not required to disclose lists of its members, for fear of retribution by segregationists); Thomas B. Edsall, *In Defense of Anonymous Political Giving*, N.Y. TIMES, Mar. 18, 2014, http://www.nytimes.com/2014/03/19/opinion/edsall-in-defense-of-anonymous-political-giving.html?_r=0 (on file with the *McGeorge Law Review*) (quoting Koch Industries spokesman Rob Tappan: "The rationale behind donor anonymity, which is a form of First Amendment speech, is to protect against the threat of retaliation when someone or some group takes a stand, espouses their point of view or articulates a position on issues that may (or may not) be popular with the general public or the political party in majority power.>").

178. *Republican Caucus Report*, *supra* note 6.

179. Compare CAL. CODE REGS. tit. 2, § 18215(b)(1) (2014) (requiring organizations to disclose donors

California politics will no longer be able to utilize the one-bite rule to avoid disclosing their financial sources.¹⁸⁰ While there are currently no signs that the FEC intends to restrict the availability of dark money in federal elections,¹⁸¹ the California legislature has taken a markedly different position toward the presence of dark money in the State of California.¹⁸² Given the ever-increasing prevalence of dark money in the United States, the success or failure of the policies enacted by Chapter 16 could help to inform the larger debate on anonymous political contributions.¹⁸³

only if the organization had made prior political payments in California or the donor had earmarked the contribution) with CAL. GOV'T CODE § 84222(c)(5), (e) (enacted by Chapter 16) (requiring the disclosure of donors to any MPO that spends \$50,000 in a single year on California politics).

180. See GOV'T § 84222(c)(5), (e) (enacted by Chapter 16) (requiring the disclosure of donors if the recipient organization makes political payments totaling \$50,000 in one year or \$100,000 in four years).

181. Potter & Morgan, *supra* note 93, at 478–79.

182. *Id.* at 453–54; compare FED. ELECTION COMM'N, *supra* note 93 (enacting regulations that allow 501(c)(4) groups to not disclose their donors) with GOV'T § 84222(c)(5), (e) (requiring the disclosure of donors under specified circumstances).

183. Malloy, *supra* note 4, at 432 (describing the present increase in dark money contributions); Potter & Morgan, *supra* note 93, at 479 (exploring various methods by which dark money could be restricted).