

# **Bright Lights and Dark Money: How States Can De-Energize an Electric Utility’s Corrupting Power**

*Aspen-Jade Tucker*

*“No people is wholly civilized where a distinction is drawn between stealing an office and stealing a purse.”*

Theodore Roosevelt, President of the United States (1901-1909)

*“I’ve always believed when people give big money, they—maybe silently—expect something in return,”*

Bob Dole, former Kansas Senator (1969-1996), Senate Majority Leader, and Presidential Candidate

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## I. INTRODUCTION

On June 16<sup>th</sup>, 2021, the Ohio State House of Representatives voted to expel their colleague, and former Speaker of the House, Larry Householder.<sup>1</sup> It was a historical event, not only because it was the first expulsion from the Ohio House in 164 years but because Householder was at the center of arguably the largest bribery scandal in Ohio's history.<sup>2</sup> The basic idea of the scheme was as follows: FirstEnergy (the electric utility that supplies electricity to more than 6,000,000 people in Maryland, New Jersey, Ohio, Pennsylvania, West Virginia, and Virginia<sup>3</sup>) funneled over \$60 million through Generation Now, a nonprofit 501(c)(4) organization, to support Householder and FirstEnergy's broader policy agenda.<sup>4</sup> In return, Householder used his position in the Ohio House to pass legislation friendly to FirstEnergy, including a bill referred to as HB6. HB6 provided for a bailout to two of FirstEnergy's nuclear plants and two of its coal plants, in addition to enacting a rollback of Ohio's renewable and energy efficiency standards.<sup>5</sup> The immediate cost of HB6 was \$1.3 billion (the combined total of the bailouts and a rate increase), with the total cost to ratepayers estimated as high as \$2 billion in excess utility bills.<sup>6</sup> Additional healthcare costs are expected to total as much as \$7 billion due to increased pollution from the continued operation of FirstEnergy's coal plants and the other changes enacted by HB6.<sup>7</sup> Furthermore, FirstEnergy paid Sam Randazzo (at the time of the scandal a member of the Public Utilities Commission of Ohio, the regulatory body that governs FirstEnergy) \$22 million from 2010 to 2019 for his work assisting FirstEnergy's efforts to influence legislation, including helping to draft and pass HB6.<sup>8</sup> When the campaign to repeal HB6 began, Randazzo also worked to ensure

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<sup>1</sup> Michael Levenson, *Ohio House Expels Ex-Speaker Charged in \$60 Million Corruption Scheme*, THE NEW YORK TIMES (June 16, 2021), <https://www.nytimes.com/2021/06/16/us/larry-householder-expelled-ohio-house.html>.

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

<sup>3</sup> *About Us*, FIRST ENERGY, <https://www.firstenergycorp.com/about.html> (last visited Feb. 13, 2022).

<sup>4</sup> USA Today Network Ohio Bureau, *Selling Out in the Statehouse*, CINCINNATI.COM (June 3, 2021, 3:00 AM), <https://www.cincinnati.com/in-depth/news/politics/2021/06/03/ohio-corruption-house-bill-6-bribery-timeline-larry-householder/5248218001/>.

<sup>5</sup> David Roberts, *Ohio Just Passed the Worst Energy Bill of the 21st Century*, VOX (July 27, 2019, 12:00 PM), <https://www.vox.com/energy-and-environment/2019/7/27/8910804/ohio-gop-nuclear-coal-plants-renewables-efficiency-hb6>.

<sup>6</sup> Jena Brooker, *Ohio's Utility Bribery Scandal Could Cost the Public Billions More Than Previously Thought*, GRIST (Apr. 2, 2021), <https://grist.org/energy/ohio-hb6-utility-bribery-scandal-cost-ratepayers/>.

<sup>7</sup> *Id.*

<sup>8</sup> USA Today Network Ohio Bureau, *supra* note 4.

the failure of the repeal process.<sup>9</sup> Following these revelations and a trial, Former Speaker Householder was found guilty of racketeering and, as of the time of writing, is awaiting sentencing.<sup>10</sup>

Similarly, Illinois is also recovering from its own utility corruption scandal involving Michael Madigan (the longest-serving Speaker of the House in U.S. history<sup>11</sup>) and Commonwealth Edison (the self-proclaimed largest electric utility provider in the state).<sup>12</sup> The 22-count federal indictment brought against Madigan on March 2, 2022, alleged Commonwealth Edison (ComEd) gave jobs that required little to no work, contracts, and monetary payments to individuals associated with Madigan in exchange for favorable legislative decisions<sup>13</sup> between 2011 and 2019.<sup>14</sup> Legislation passed during the timeframe of the scheme included 2011's "smart grid" law, which allowed the utility to increase its rates to consumers while limiting the Illinois Commerce Commission's ability to change them. Another ComEd legislative victory was 2016's Future Energy Jobs Act, which gave ComEd a \$2.3 billion subsidy for its two nuclear plants.<sup>15</sup>

While the scope of the Ohio and Illinois scandals are striking, the corrupt actions of FirstEnergy and ComEd are far from unique. In 2014, the utility Arizona Public Service (APS) funneled more than \$3 million through Save Our Future Now and the Arizona Free Enterprise Club, both 501(c)(4) organizations, to the campaigns of Tom Forese and Doug Little, both of whom were running for seats on the Arizona Corporate Commission (Arizona's Public Utility Commission).<sup>16</sup> Both Forese and Little won their elections; five months later, the Commission voted in favor of hearing the utility's proposal to increase the

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<sup>9</sup> Jeremy Pelzer, *Emails Show ex-PUCO Chair Sam Randazzo Fought HB6 Repeal, Reluctantly ordered FirstEnergy probe*, CLEVELAND.COM (Feb. 15, 2022, 1:07 PM), <https://www.cleveland.com/news/2022/02/emails-show-ex-puco-chair-sam-randazzo-fought-hb6-repeal-reluctantly-ordered-firstenergy-probe.html>.

<sup>10</sup> Marty Schladen, *Former Ohio speaker, GOP chair both found guilty of racketeering*, OHIO CAPITAL JOURNAL (March 10, 2023), <https://ohiocapitaljournal.com/2023/03/10/former-ohio-speaker-gop-chair-found-guilty-of-racketeering/>.

<sup>11</sup> Austin Berg, *Madigan's Reign Ends as Longest Serving Legislative Leader in U.S. History*, ILLINOIS POLICY (Jan. 13, 2021), <https://www.illinoispolicy.org/madigans-reign-ends-as-longest-serving-legislative-leader-in-u-s-history/>.

<sup>12</sup> *Company Information*, COMED – AN EXELON COMPANY, <https://www.comed.com/AboutUs/Pages/CompanyInformation.aspx> (last visited Feb. 13, 2023).

<sup>13</sup> Jeff St. John, *ComEd Agreed to \$200M Fine on Federal Bribery Charge*, GREENTECH MEDIA (July 17, 2020), <https://www.greentechmedia.com/articles/read/comed-agrees-to-200m-fine-on-federal-bribery-charge>.

<sup>14</sup> *Gress v. Commonwealth Edison Co.*, 559 F. Supp. 3d 755, 762 (N.D. Ill. 2021).

<sup>15</sup> *Id.* See also *Gress*, at 762.

<sup>16</sup> Ryan Randazzo, *APS Acknowledges Spending Millions to Elect Corporation Commission Members, After Years of Questions*, AZCENTRAL (Mar. 29, 2019), <https://www.azcentral.com/story/money/business/energy/2019/03/29/arizona-public-service-admits-spending-millions-2014-corporation-commission-races/3317121002/>.

monthly fee paid by customers with solar panels from \$5 to \$21.<sup>17</sup> While APS eventually dropped the fee increase proposal,<sup>18</sup> the following year, the Commission voted four-to-one in favor of altering the compensation schemes for solar power by treating residential solar power separate from utility solar power, an outcome that was hugely beneficial to APS.<sup>19</sup> Little served on the Commission until 2017, when he was appointed as a deputy assistant secretary for intergovernmental and external affairs in the Trump Administration's Department of Energy,<sup>20</sup> while Forese continued to serve on the Commission until 2019.<sup>21</sup>

Taken together, these scandals demonstrate a larger attack on the modern system of utility regulation by the utilities meant to be regulated. In addition to the incidents discussed above, utilities have been caught paying actors to skew the appearance of public support for renewable energy,<sup>22</sup> crafting misleading ballot measures,<sup>23</sup> and lying to authorities about the construction progress of publicly funded power stations.<sup>24</sup> These utilities are exploiting weaknesses in the regulatory system to achieve their agenda possibly motivated by perceived threats to their profits, such as rooftop solar and increased reliance on other renewable forms of generation. For example, utilities are leveraging new precedent created by Supreme Court cases decisions such as *Citizens United*<sup>25</sup> and relying on astonishingly low penalties should a quid pro quo scheme even be proven against them.

California's regulator, the California Public Utility Commission (CPUC), has its own recent history of corruption. An investigation into the emails of the twelve-year-long head of the Commission, Michael Peevey, in 2014 resulted in

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<sup>17</sup> Rachel Leingang, *APS Drops Bid for Solar Fee Increase, Blames "Political Gamesmanship"*, ARIZONA CAPITOL TIMES (Sept. 25, 2015), <https://azcapitoltimes.com/news/2015/09/25/aps-drops-bid-for-solar-fee-increase/>.

<sup>18</sup> *Id.*

<sup>19</sup> Herman Trabish, *The Lurking Surprise for Solar in Arizona's Recent Ruling to end Net Metering*, UTILITY DIVE (Jan. 26, 2017), <https://www.utilitydive.com/news/the-lurking-surprise-for-solar-in-arizonas-recent-ruling-to-end-net-meteri/433555/>

<sup>20</sup> Ryan Randazzo, *Arizona Corporation Commission Member Appointed to Energy Department*, AZCENTRAL (Sept. 13, 2017, 1:53 PM), <https://www.azcentral.com/story/money/business/energy/2017/09/13/arizona-corporation-commission-doug-little-appointed-energy-department/662759001/>.

<sup>21</sup> Tom Forese, BALLOTPEDIA, [https://ballotpedia.org/Tom\\_Forese](https://ballotpedia.org/Tom_Forese) (last visited Feb. 13, 2023).

<sup>22</sup> Michael Isaac Stein, *Actors Were Paid to Support Entergy's Power Plant at New Orleans City Council Meetings*, THE LENS (May 4, 2018), <https://thelensnola.org/2018/05/04/actors-were-paid-to-support-entergys-power-plant-at-new-orleans-city-council-meetings/>.

<sup>23</sup> David Roberts, *Florida's Outrageously Deceptive Solar Ballot Initiative, Explained*, VOX, <https://www.vox.com/science-and-health/2016/11/4/13485164/florida-amendment-1-explained> (Nov. 8, 2016, 10:55 AM).

<sup>24</sup> Jeffery Collins, *Ex-CEO Who Oversaw Doomed Nuclear Project Sentenced*, AP NEWS (Oct. 7, 2021), <https://apnews.com/article/technology-business-columbia-south-carolina-courts-35d4d93771589a05741939739ccc2b8e>.

<sup>25</sup> *Citizens United v. Fed. Election Comm'n*, 558 U.S. 310, 365 (2010).

allegations of improper communications between Peevey and officials of both the utilities Pacific Gas & Electric (PG&E) and Southern California Edison (SCE).<sup>26</sup> The improper communications between the individuals numbered in the tens of thousands over a span of four years<sup>27</sup> and threw into question the CPUC's objectiveness in its decision to close the formerly SCE-operated San Onofre Nuclear Generation Station (which saw rate-payers on the hook for \$3.3 billion in costs)<sup>28</sup> and the CPUC's treatment of PG&E after a gas pipeline disaster that killed eight.<sup>29</sup> In exchange for the favorable treatment, Peevey allegedly used "PG&E funds to back favored causes."<sup>30</sup> The revelations from the email scandal arguably led Peevey to not seek reappointment as the head of the CPUC.<sup>31</sup> As for the utility companies involved, SCE was fined \$16.7 million in 2015<sup>32</sup> and in March of 2017, PG&E, which currently services approximately 16 million people in the state of California,<sup>33</sup> entered into an \$86.5 million settlement of the issue.<sup>34</sup>

The closest existing term to describe the category of utility actions detailed above is "utility corruption." Utility corruption is defined as "the illicit sale of political influence" and has many variations, including patronage arrangements, political extortion, and regulatory capture.<sup>35</sup> That concept, however, is too broad to describe the specific issue of this paper, as only regulatory capture is instigated by the utility.<sup>36</sup> Regulatory capture is defined as when a market actor expends

<sup>26</sup> Jaxon Van Derbeken, *Legislators Slam California Public Utilities Commission For Undermining Attorney's General Investigation*, NBC BAY AREA, <https://www.nbcbayarea.com/news/local/legislators-slam-california-public-utilities-commission-for-undermining-investigation/39106/> (Dec. 2, 2017, 12:36 PM).

<sup>27</sup> Jaxon Van Derbeken, *PG&E to Pay \$86.5 Million for Backdoor Lobbying of Regulators*, NBC BAY AREA, <https://www.nbcbayarea.com/news/local/pge-to-pay-865-million-for-backdoor-lobbying-of-regulators/48759/> (Mar. 28, 2017, 6:39 PM).

<sup>28</sup> *Southern California Edison Gets \$16.7M Fine Over San Onofre Talks*, CITY NEWS SERVICE (Dec. 3, 2015, 3:11 PM), <https://www.kpbs.org/news/environment/2015/12/03/southern-california-edison-gets-167m-fine-over-san>.

<sup>29</sup> Van Derbeken, *supra* note 26.

<sup>30</sup> Chris Rauber, *UPDATED: CPUC President Michael Peevey, under fire in PG&E email scandal, won't seek reappointment*, SAN FRANCISCO BUSINESS TIMES, <https://www.bizjournals.com/sanfrancisco/blog/2014/10/cpuc-president-michael-peevey-pg-e.html> (Oct 10, 2014, 12:16 PM).

<sup>31</sup> *Id.*

<sup>32</sup> CITY NEWS SERVICE, *supra* note 28.

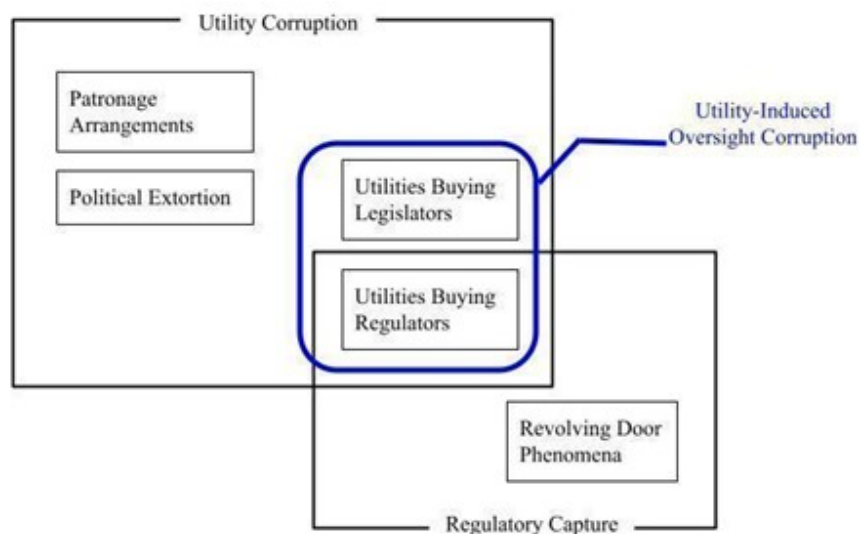
<sup>33</sup> *Company Profile*, PG&E, [https://www.pge.com/en\\_US/about-pge/company-information/profile/profile.page](https://www.pge.com/en_US/about-pge/company-information/profile/profile.page) (last visited Feb. 13, 2023).

<sup>34</sup> Van Derbeken, *supra* note 26.

<sup>35</sup> Werner Troesken, *Regime Change and Corruption: A History of Public Utility Regulation*, in *CORRUPTION AND REFORM: LESSONS FROM AMERICA'S ECONOMIC HISTORY* 259, 263 (Edward Glaeser and Claudia Goldin eds., 2006).

<sup>36</sup> Patronage arrangements are when "politicians buy votes by offering plum jobs at above-market wages" and political extortion is when politicians "extract bribes from private utility companies by threatening to impose confiscatory regulations and taxes." *Id.*

resources on those in regulatory positions in exchange for favorable policies.<sup>37</sup>



That is not to say that all forms of regulatory capture are examples of quid pro quo corruption. For example, the revolving door phenomenon is an example of regulatory capture without quid pro quo.<sup>38</sup> Additionally, regulatory capture only refers to the utility's effects on regulatory positions, meaning that the corruption of legislators is not covered by the definition. This paper focuses on the concept of utilities corrupting legislators *and* regulators to produce favorable laws, rules, and regulations, and terms that phenomenon "Utility-Induced Oversight Corruption." This distinction is visualized below.

This paper asserts that states have the power to prevent and dissuade electric utilities from corrupting the legislative and regulatory bodies that exist to govern them. Part II discusses both the history and current status quo of electrical utility regulation. Part III explains regulatory capture and how it is handled in the modern system. Part IV posits that states can change the system to better address utility-induced oversight corruption by making corruption more difficult to facilitate and by further deterring utilities from attempting corruption.

<sup>37</sup> *Id.*

<sup>38</sup> The revolving door phenomenon is a form of regulatory capture in which those who work in the regulated industry go on to work in the regulation of the industry and vice versa. This results in the values of the industry being used as the goal of legislation and the "capture" of the regulators. *See, Heather Payne, Game Over: Regulatory Capture, Negotiation, and Utility Rate Cases in an Age of Disruption*, 52 U.S.F. L. Rev. 75, 83 (2018).

## II. UNDERSTANDING REGULATORY STRUCTURE

Before detailing how utility-induced oversight corruption can be remedied, the structure of the regulatory regime must be understood. Part A explains the core concepts behind the regulation of utilities and its historical variations while Part B details key aspects of the modern system, including the current status of state deregulation of the energy system, the nature of the ratemaking process, and how members of PUCs obtain their positions.

### A. *The Regulatory Compact Over Time*

The American electricity system is generally broken up into three sectors: generation,<sup>39</sup> transmission,<sup>40</sup> and distribution.<sup>41</sup> For the majority of the existence of electric utilities, all three sectors were considered natural monopolies.<sup>42</sup> Legislatures in the late 1800s and early 1900s thought it would be economically inefficient for multiple electric utilities to operate in the same geographical area and relied on monopoly franchise agreements<sup>43</sup> to ensure minimal capital would be wasted on redundant infrastructure.<sup>44</sup> However, this grant of monopoly status brought its own concern, one well-known to legislatures at the turn of the century: the threat of monopoly pricing.<sup>45</sup>

To avoid the abuses of power already demonstrated by Standard Oil, US Steel, and their ilk, state legislatures subjected utilities that were granted monopoly licenses to price regulation in the form of Public Utility Commissions (PUCs).<sup>46</sup> PUCs set rates at a level that enabled utilities to recoup their costs and make enough profit to secure investors while ensuring that utilities were not abusing their granted monopoly status by charging offensively high prices.<sup>47</sup>

The rationale for this exchange between states and utility companies is known

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<sup>39</sup> Electricity generation is the process by which electricity is produced from sources of primary energy. See, JOEL B. EISEN ET AL., ENERGY, ECONOMICS AND THE ENVIRONMENT: CASES AND MATERIALS, 67 (Saul Levmore et al. eds., 5th ed. 2020).

<sup>40</sup> Electricity transmission is the process by which newly made electricity is transported from the location of generation to the location of distribution. *Id.*

<sup>41</sup> Electricity distribution is the process by which electricity is partitioned from the long-distance line and delivered to the consumer. *Id.*

<sup>42</sup> A natural monopoly is a term of art used to describe when, due to economies of scale, a single market actor can meet the total demand for a good at a lower cost than if there were competing actors. *Id.* at 73.

<sup>43</sup> A Monopoly franchise agreement is a contract given by the state to the utility, conveying exclusive rights to operate within a geographic area. *Id.* at 83.

<sup>44</sup> *Id.* at 71.

<sup>45</sup> Monopoly pricing describes when, due to a firm's complete control of the supply given to the market, the firm is able to charge whatever rate they want to a captive consumer base. *Id.*

<sup>46</sup> Monopoly franchise agreements are given to the firm in question by the state in which it operates. *Id.* at 82.

<sup>47</sup> *Id.* at 84.



as the “regulatory compact.”<sup>48</sup> Explained by the U.S. Supreme Court in *Munn v. Illinois*, the basic idea is “when private property is devoted to a public use, it is subject to public regulation.”<sup>49</sup> While *Munn* addressed the regulation of storage fees for a grain silo, the case focused more broadly on whether an agent with monopoly power could legally charge unreasonably high prices.<sup>50</sup> The Court’s support of government regulation in the holding of *Munn* is often attributed as the source of the legality of regulating electric utilities.<sup>51</sup>

This basic regulatory regime of price control was altered over the next century in order to meet the demands of the day. During the New Deal era and immediately after World War II, legislators amended the utility regulatory framework to ensure that electricity could be as accessible as possible to as many people as possible through the enactment of the Federal Power Act and the Atomic Energy Act.<sup>52</sup> Then, in the 1960s and early 1970s, the federal government became more involved in regulating the environmental impacts of the energy industry, passing the National Environmental Policy Act, Clean Water Act, Clean Air Act, Resource Control and Reclamation Act, and Oil Pollution Act.<sup>53</sup> During the late 1970s, 1980s, and 1990s, the focus turned to deregulation as Congress passed laws such as the Public Utilities Regulatory Policy Act (PURPA), which required utilities to transmit electricity generated by entities other than themselves without discrimination.<sup>54</sup> Continuing this deregulatory trend, the Federal Energy Regulatory Commission (FERC) passed orders like No. 888, which effectively separated a utility’s sale of electricity over its transmission network and prohibited discriminatory charges for using the transmission network.<sup>55</sup>

### B. Modern Utility Regulation

The modern era of utility regulation features two primary regulatory variants, depending on which state the utility operates in. Thirty states have deregulated at least some of their electricity generation.<sup>56</sup> In the remaining twenty states,

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<sup>48</sup> E.g., Heather Payne, *Private (Utility) Regulators*, 50 *Env’t L.* 999, 1001 (2020).

<sup>49</sup> *Munn v. Illinois*, 94 U.S. 113, 130 (1876).

<sup>50</sup> *Id.* at 127-29.

<sup>51</sup> See, e.g., RICHARD F HIRSH, *POWER LOSS: THE ORIGINS OF DEREGULATION AND RESTRUCTURING IN THE AMERICAN ELECTRIC UTILITY SYSTEM* 16 (1999).

<sup>52</sup> EISEN et al, *supra* note 39, at 8.

<sup>53</sup> *Id.* at 9.

<sup>54</sup> 18 C.F.R. § 35.28 (2022).

<sup>55</sup> EISEN ET AL, *supra* note 39, at 9.

<sup>56</sup> Oregon and Delaware have deregulated markets for electricity; Florida, Georgia, Tennessee, Kentucky, West Virginia, Indiana, Wisconsin, Kansas, Nebraska, South Dakota, Wyoming, and Nevada have deregulated gas markets; and California, Montana, Texas, Illinois, Michigan, Ohio, Virginia, Maryland, Pennsylvania, New Jersey, New York, Connecticut, Rhode Island, Massachusetts, New Hampshire, and Maine have deregulated both electricity and gas. *State-by-State Information*, AMERICAN COALITION OF COMPETITIVE ENERGY SUPPLIERS, <https://competitiveenergy.org/consumer-tools/state-by-state-links/> (last visited Mar. 28, 2023).

however, the traditional vertically integrated model in which generation, transmission, and distribution are considered natural monopolies still predominates.<sup>57</sup>

The centerpiece of state regulatory power, one to which PUCs and utilities must adhere regardless of the regulatory regime the state uses, is the ratemaking equation. The ratemaking equation is a literal, mathematical formula that determines how much profit a utility can make each year. In its simplest form, the ratemaking equation is  $R=(r*b)+O$ . The revenue requirement,  $R$ , is the total amount that may be recovered from the utility's customers. The rate of return,  $r$ , is the rate at which the utility may profit and is meant to be consistent with the risk the utility's investors are taking to provide the capital necessary to fund the utility. The ratebase,  $b$ , is the total amount of undepreciated capital that has been invested and considered used and useful, i.e., the amount of money the utility has invested in the generation, transmission, and distribution of energy. Thus, the ratebase is the amount the utility is allowed to derive profit from. The operating costs,  $O$ , are all other costs not in the ratebase that are necessary for the utility to stay in operation.<sup>58</sup> While the utility may recover these operational costs, the equation is set so the utility does not profit from them. There are a litany of cases in which utilities challenge the determinations of a PUC regarding what is and is not a reasonable rate of return as well as what is and is not considered a capital expense (and therefore capable of inclusion in the ratebase).<sup>59</sup> This ratemaking tension demonstrates how crucial PUC members are to the utility, as the PUC makes the initial—and often final—determinations regarding the rate of return and whether a specific expenditure can return a profit for the utility.

PUC members are appointed via differing means depending on the state. The most common method, followed in thirty-seven states, is through appointment by the governor.<sup>60</sup> The next most common method followed in eleven states, sees members elected by popular vote.<sup>61</sup> The least common method, only practiced in two states, has members of the PUC appointed by the state legislature.<sup>62</sup> No method is immune from utility interference.

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

<sup>58</sup> Some examples include fuel used to generate steam, cost of maintenance, and salaries of employees. EISEN ET AL, *supra* note 39, at 521.

<sup>59</sup> See, e.g., *Jersey Central Power & Light Co. v. FERC*, 589 F.2d 142 (3d Cir. 1978); *Duquesne Light Company v. Barasch*, 488 U.S. 299 (1989).

<sup>60</sup> Danielle S. Bymett & Daniel Shea, *Engagement Between Public Utility Commissions and State Legislatures*, NATIONAL COUNCIL ON ELECTRICITY POLICY 2 (2019), <https://pubs.naruc.org/pub/83C8367C-D538-F18E-A92F-DC638F5E07E9>.

<sup>61</sup> *Id.*

<sup>62</sup> *Id.*

### III. ISSUES IN THE REGULATORY REGIME

While the regulatory system is designed to prevent the utilities' abuse of their state-granted monopoly power, there are ways utilities can still take advantage of the system, such as utility-induced oversight corruption. Part A explains how and why utility-induced oversight corruption occurs. Part B details how the current regulatory regime attempts to prevent utility-induced oversight corruption and why those attempts are largely unsuccessful.

#### *A. Utility-Induced Oversight Corruption Explained*

Utilities are motivated to effectuate oversight corruption for one relatively straightforward reason: regulators and legislators determine utilities' profits. Regulators and legislators impact utilities' profits in several distinct ways. First, as mentioned above, PUCs directly determine what utilities can charge customers via the ratemaking process. Second, utilities are concerned about expanding renewable energy portfolios<sup>63</sup> adopted by state legislatures, as the transition from fossil fuels to renewables increases the possibility that utilities will see stranded costs. A stranded cost is when a market participant expends money on an asset under the assumption that they will see a return on that investment but, due to outside forces, they are no longer able to.<sup>64</sup> By influencing the legislators who make policy, utilities can slow, or even reverse the pace of renewable energy mandates and ensure that they can continue to profit off outdated and polluting energy sources. Third, utilities are concerned with the deregulation of power generation markets. In 1978, PURPA mandated that utilities buy electricity produced by outside parties so long as the cost of such electricity was lower than the cost the utility would have incurred to produce it themselves.<sup>65</sup> In 1996, FERC passed order 888, which unbundled the generation and transmission markets, allowing more entrants into the generation market. Order 888 also required that utilities operating transmission lines transport all generated electricity regardless of who generated it.<sup>66</sup> These laws, combined with the newfound viability of solar and wind energy,<sup>67</sup> mean that competition to sell electricity on the grid is fiercer

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<sup>63</sup> A renewable portfolio standard is a state-created standard requiring a specified amount of utility-sold electricity to be generated from renewable sources by a certain date. *See State Renewable Portfolio Standards and Goals*, NATIONAL COUNCIL ON ELECTRICITY POLICY (Aug. 13, 2021), [https://www.ncsl.org/research/energy/renewable-portfolio-standards.aspx#:~:text=Renewable%20Portfolio%20Standards%20\(RPS\)%20require,production%20and%20encourage%20economic%20development](https://www.ncsl.org/research/energy/renewable-portfolio-standards.aspx#:~:text=Renewable%20Portfolio%20Standards%20(RPS)%20require,production%20and%20encourage%20economic%20development)

<sup>64</sup> EISEN ET AL, *supra* note 39, at 774.

<sup>65</sup> *Id.* at 690.

<sup>66</sup> 18 C.F.R. § 35.28 (2022).

<sup>67</sup> As of 2019, renewable energy is often the cheapest source of electricity. *See* James Ellsmoor, *Renewable Energy Is Now the Cheapest Option – Even Without Subsidies*, FORBES (June 15, 2019),

than ever, including for utilities that generate electricity.

The economics of rooftop solar—a technology that heavily impacts utility business models—is also largely determined by policies adopted at the state PUC level.<sup>68</sup> More electricity generated by customers using rooftop solar decreases net electricity sales by utilities, which in turn causes utilities to raise rates per unit of energy sold to cover their fixed costs. This utility price increase, in turn, further incentivizes individuals to generate their own electricity, accelerating a cyclical problem that has been termed the “Utility Death Spiral”.<sup>69</sup> Therefore, by setting policy around rooftop solar, regulators, in effect, determine how much of a threat self-generation is to the utility business model. By capturing the regulators and legislators, utilities can attempt to keep the barriers to entry into the generation markets high and minimize the competition that they would otherwise face, ensuring that the old system of the utility having monopoly power over the entire electric utility industry remains, from a practical standpoint, in place.

In all the instances of utility-induced oversight corruption discussed previously, the utility’s resources were given to 501(c)(4) nonprofit organizations, which then donated to the political campaigns of the individuals the utility sought to corrupt. This method became especially popular in the immediate aftermath of the Supreme Court’s holding in *Citizens United v. Federal Election Commission* for two reasons. First, the *Citizens* court held there can be no limit on how much an individual or corporation can donate to one of these nonprofit organizations.<sup>70</sup> Second, 501(c)(4) organizations are not required to disclose the donors of the money that is used to fund the campaigns.<sup>71</sup> This allows utilities an air of plausible deniability and makes it more difficult to identify if regulators or legislators performing a utility oversight function have been corrupted.

### B. Current Roadblocks to Utility-Induced Oversight Corruption

The issue discussed in this paper is not unforeseeable. Legislatures and regulatory bodies have long been aware that utility regulation is fraught with the possibility that the utilities may attempt to influence regulation.<sup>72</sup> There are two

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2:39 PM), <https://www.forbes.com/sites/jamesellsmoor/2019/06/15/renewable-energy-is-now-the-cheapest-option-even-without-subsidies/?sh=338647ed5a6b>.

<sup>68</sup> See Heather Payne, *A Tale of Two Solar Installations: How Electricity Regulations Impact Distributed Generation*, 38 U. HAW. L. REV. 135, 140 (2016).

<sup>69</sup> Eric Hopf, *Mitigating an Energy Utility Death Spiral in the United States: Applying Lessons from Germany* (May, 2017) (Master’s Paper, Clark University) (on file with the Clark Digital Commons).

<sup>70</sup> *Citizens United v. Fed. Election Comm’n*, 558 U.S. 310, 365 (2010).

<sup>71</sup> *Dark Money Basics*, OPEN SECRETS, <https://www.opensecrets.org/darkmoney/dark-money-basics.php> (last visited Feb. 13, 2023).

<sup>72</sup> See, generally, Werner Troesken, *Regime Change and Corruption: A History of Public Utility Regulation*, in *CORRUPTION AND REFORM: LESSONS FROM AMERICA’S ECONOMIC HISTORY* (Edward Glaeser & Claudia Goldin eds., 2006) (discussing how legislators have attempted to counteract the

general ways to prevent utility-induced oversight corruption from occurring: 1) make it harder for utilities to capture regulators and legislators; and 2) make the penalties more significant for parties involved in utility-induced oversight corruption to deter parties from committing such acts in the first place. In the context of utility-induced oversight corruption, the former is generally accomplished through campaign finance restrictions, as utilities use campaign funds to bribe regulators and legislators,<sup>73</sup> while the latter is accomplished via altering the repercussions imposed upon utilities that get caught attempting corruption.

### 1. Current Campaign Finance Restrictions

In Justice Kennedy's majority opinion in *Citizens United*, the Court stated that the only governmental interest sufficient to justify a limitation on political campaign contributions is preventing the existence or appearance of quid pro quo corruption.<sup>74</sup> In doing so, the holding overruled *Austin v. Michigan Chamber of Commerce*,<sup>75</sup> which had held the government also had a sufficiently justifiable interest in preventing the "distortion effects" that a corporation's mass accumulation of wealth placed on the political process.<sup>76</sup> At the same time, the *Citizens United* holding reaffirmed there can be no "restrict[ion] [of] political speech based on the speaker's corporate identity."<sup>77</sup> *Citizens United* also held all independent expenditure bans<sup>78</sup> unconstitutional by reasoning that, because there may be no coordination between campaigns and those who expend money on behalf of campaigns, categorically banning independent expenditures is an impermissible means of limiting the risk of quid pro quo corruption or its appearance.<sup>79</sup>

Four years after *Citizens United*, the Court once again entered the campaign

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corruption of the regulation of utilities throughout American history).

<sup>73</sup> See, e.g., USA Today Network Ohio Bureau, *supra* note 4; David Anderson et al., *Strings Attached: How Utilities Use Charitable Giving to Influence Politics and Increase Investor Profits*, ENERGY AND POLICY INSTITUTE (Dec. 2019), <https://www.energyandpolicy.org/wp-content/uploads/2019/12/Strings-Attached-how-utilities-use-charitable-giving-to-influence-politics-and-increase-investor-profits.pdf>.

<sup>74</sup> *Citizens United*, 558 U.S. at 365.

<sup>75</sup> *Id.*

<sup>76</sup> *Austin v. Michigan Chamber of Commerce*, 494 U.S. 652 (1990).

<sup>77</sup> *Citizens United*, 558 U.S. at 347, 365.

<sup>78</sup> An independent expenditure limit is a restriction on how much money an individual can spend on a "communication expressly advocating the election or defeat of a clearly identified candidate that is not made in cooperation, consultation, or concert with, or at the request or suggestion of, a candidate, a candidate's authorized committee, or their agents, or a political party committee or its agents." 11 C.F.R. §100.16 (2022). For example, if one were to take out ads in a newspaper advocating for the election of a specific candidate, and neither the candidate nor their campaign had any knowledge of the ads, then the money spent on them would be considered an independent political expenditure.

<sup>79</sup> *Citizens United*, 558 U.S. at 361.

finance fray in *McCutcheon v. Federal Election Commission*.<sup>80</sup> In *McCutcheon*, the Court considered whether aggregate campaign contribution limits<sup>81</sup> were a constitutionally supported method of combating corruption or its appearance given the prevalence of base limits,<sup>82</sup> which had the same stated purpose.<sup>83</sup> The Court in *McCutcheon* held all aggregate campaign contribution limits unconstitutional, stating they were “poorly tailored to the Government’s interest in preventing circumvention of the base limits” and therefore “impermissibly restrict[ed] participation in the political process.”<sup>84</sup>

Although the trend in recent Supreme Court jurisprudence is to roll back the reach of campaign finance restrictions, some restrictions still maintain the support of the Court. One form of campaign finance restriction widely accepted by the Court is mandatory disclosure. The Court explicitly supported the idea of mandatory disclosures in *Citizens United*,<sup>85</sup> upheld their constitutionality in *John Doe v. Reed*,<sup>86</sup> and touted disclosure requirements as a valid alternative to the aggregate limits in *McCutcheon*.<sup>87</sup> Additionally, the Court has upheld base limits as a constitutional method of serving the government’s anti-corruption interest discussed ad nauseam in all campaign finance cases.<sup>88</sup>

While the Court has preserved a narrow set of campaign finance limitations, its holdings loosening other restrictions have had an impact. Since *Citizens United* was decided in 2010, the amount of money spent in political campaigns has ballooned from \$5.2 billion spent in the combined Congressional and Presidential races of 2008 to \$14.4 billion in the combined Congressional and Presidential races of 2020.<sup>89</sup> Another impact of the Court’s rollback is in the volume of small donations compared to large donations. In 2010, large donations amounted to

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<sup>80</sup> *McCutcheon v. Fed. Election Comm’n*, 572 U.S. 185 (2014).

<sup>81</sup> An aggregate campaign contribution limit is a restriction on the total amount of monetary donations that an individual can give to all campaigns in an election cycle combined, regardless of the number of campaigns. *Id.* at 193.

<sup>82</sup> Contrary to an aggregate limit, a base limit is a restriction on the amount of donations that an individual is allowed to give to each campaign in an election cycle, but allows the individual to donate that amount to as many campaigns as they wish. *Id.*

<sup>83</sup> *Id.* at 192-93.

<sup>84</sup> *Id.* at 218.

<sup>85</sup> *Citizens United v. Fed. Election Comm’n*, 558 U.S. 310, 366 (2010) (citing *Buckley v. Valeo*, 424 U.S. 1, 64 (1976) and *McConnell v. Fed. Election Comm’n*, 540 U.S. 93, 201 (2003)).

<sup>86</sup> *Doe No. 1 v. Reed*, 561 U.S. 186, 191 (2010).

<sup>87</sup> *McCutcheon*, 572 U.S. at 223.

<sup>88</sup> See, e.g., *Buckley v. Valeo*, 424 U.S. 1, 85 (1976), *McConnell v. Fed. Election Comm’n*, 540 U.S. 93, 201 (2003), *Citizens United v. Fed. Election Comm’n*, 558 U.S. 310, 358-59 (2010), and *McCutcheon v. Fed. Election Comm’n*, 572 U.S. 185, 224 (2014).

<sup>89</sup> These figures are not adjusted for inflation. As of 2023, inflation adjusted spending totals are \$7.1 billion in 2008 and \$16.4 billion in 2020. *Total Cost of Election (1998-2020)*, OPEN SECRETS, <https://www.opensecrets.org/elections-overview/cost-of-election?cycle=2020&display=T&infl=N> (last visited Feb. 13, 2023).

62.6% of all donations but by 2018, they rose to comprise 71%.<sup>90</sup> Viewed from the perspective of a utility company that desires the constant profit margin of a regulated monopoly, the Court's recent changes to campaign finance law would undoubtedly open a door to allow the utility to project their opinions into the political arena.

## 2. Current Deterrents

The other primary way to prevent utility-induced oversight corruption is deterrence. There are multiple ways a utility could be deterred from attempting to corrupt legislators or regulators. First, there could be remedies in civil court that would see the disgorgement of ill-gotten gains back to the ratepayers who were harmed by utility-induced oversight corruption, thus removing any benefit the utility realized from the scheme. Second, there could be criminal charges that make utility executives consider the penalties of being found guilty not worth the risk of additional profit. However, the existing deterrents, as they currently stand, are insufficient to properly deter utility-induced oversight corruption in a number of ways. As discussed below, ratepayers' ability to civilly recover ill-gotten utility profit is severely limited by other doctrines, and, therefore rarely acts as a meaningful deterrent. Furthermore, as with the civil penalties, the current potential criminal sanctions for utility-induced oversight corruption are also too weak to act as a viable deterrent.

### a. Deterrents in Civil Law

On the civil side, even if a clear quid pro quo is established, methods for recourse are almost nonexistent under current law. This issue is best exemplified in *Gress v. Commonwealth Edison Company*, in which ratepayers brought suit in an attempt to rectify the wrongs committed in the aforementioned Illinois ComEd corruption scheme.<sup>91</sup> Prior to the complaint being filed, ComEd entered into a deferred prosecution agreement with federal prosecutors in which the company's former Senior Vice President for Legislative Affairs admitted to the bribery scheme, the company agreed to pay a fine of \$200 million, and all agreed that the fraud and corruption gave the company "reasonably foreseeable anticipated benefits" of at least \$150 million.<sup>92</sup> Given this admission of guilt, plaintiffs—customers of the regulated utility—sued the company under the doctrine of unjust enrichment, stating that ComEd benefitted to an amount of more than \$5 billion by taking excess money from ratepayers due to legislation passed in accordance

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<sup>90</sup> William Horncastle, *The Scale of US Election Spending Explained in Five Graphs*, THE CONVERSATION (Oct. 5, 2020, 7:15 AM), <https://theconversation.com/the-scale-of-us-election-spending-explained-in-five-graphs-130651>.

<sup>91</sup> *Gress v. Commonwealth Edison Company*, 559 F.Supp.3d 755, 59 (N.D.Ill., 2021).

<sup>92</sup> *Id.* at 762.

with the scheme.<sup>93</sup> However, even with ComEd's admission of guilt, evidence of ComEd's financial gain, and a discernable impact on ratepayers due to the scheme, the case was dismissed for failure to state a claim.<sup>94</sup>

First, while the District Court in *Gress* declined to consider the issue in the motion to dismiss, they stated that the affirmative defense of the filed-rate doctrine would “be a slam dunk” for the defense and would preclude any damages from being paid out to ratepayers for financial harm caused by the corruption scheme.<sup>95</sup> Created by the Supreme Court in the 1922 case *Keogh v. Chicago & N.W. Ry. Co.*,<sup>96</sup> the filed-rate doctrine states that once a new rate is filed with the appropriate regulatory body, no court can award damages for an alleged overcharge.<sup>97</sup> Originally intended to “preserve the regulating agency’s authority to determine the reasonableness of the rates” and “ensure that regulated entities charge only those rates that the agency has approved or been made aware of,”<sup>98</sup> the filed-rate doctrine has also consistently been used to prevent the collection of damages by customers of the regulated entity.<sup>99</sup> Furthermore, there is no fraud exception to the filed-rate doctrine.<sup>100</sup> This means that even if the rate is higher than it would be in a competitive market—and it is proven to only be that high due to the bribery of the regulatory officials who make the rate by the entities meant to be regulated—there is still no judicial recourse for ratepayers to reclaim the entities’ ill-gotten profit.

The District Court in *Gress* also found that because the rate increases were enacted by legislation,<sup>101</sup> the Supreme Court case *Fletcher v. Peck*<sup>102</sup> prohibited the contemplation of legislators’ motive in voting for the bill, thus preempting any claim brought by the plaintiffs under the Racketeer Influenced and Corrupt Organizations (RICO) Act.<sup>103</sup> In order for a plaintiff to successfully state a RICO claim, they must prove that the defendant’s actions were not only the actual, “but-for” cause of the harm felt by the plaintiff, but that their actions were also the proximate cause of the harm as well.<sup>104</sup> While the former was properly alleged in

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<sup>93</sup> *Id.*

<sup>94</sup> *Id.* at 767.

<sup>95</sup> *Id.* at 763.

<sup>96</sup> *Keogh v. Chicago & N. W. RY. Co.*, 260 U.S. 156, 163-65 (1922).

<sup>97</sup> *Id.*

<sup>98</sup> *Sancom, Inc. v. Qwest Communications Corp.*, 643 F.Supp.2d 1117, 1124 (D.S.D., 2009).

<sup>99</sup> *See, e.g., Arkansas Louisiana Gas Co. v. Hall*, 453 U.S. 571 (1981); *Central Office Tel., Inc. v. AT&T Corp.*, 524 U.S. 214 (1998).

<sup>100</sup> *See Coll v. First American Title Ins. Co.*, 642 F.3d 876, 889 (2011).

<sup>101</sup> *See Gress*, 559 F.Supp.3d at 761 (stating that in exchange for the money obtained from ComEd, former Speaker Madigan “stewarded” the 2011 Energy Infrastructure and Modernization Act (EIMA), the 2013 amendments to the EIMA, and the 2016 Future Energy Jobs Act, each of which gave ComEd economic benefits).

<sup>102</sup> *See generally Fletcher v. Peck*, 10 U.S. 87 (1810).

<sup>103</sup> *Gress*, 559 F.Supp.3d at 768-70.

<sup>104</sup> *Id.* at 765.



the complaint, the latter would have needed a claim that former Speaker of the House Michael Madigan put “improper pressure on lawmakers” in garnering support for the bills in question, which the plaintiffs did not allege.<sup>105</sup> Normally, failing to plead a necessary element of a claim would not be an issue, as the plaintiffs could just amend the complaint. However, the Court in *Gress* stated they were prohibited from interpreting the motives of individual legislators in voting to pass the three bills at issue.<sup>106</sup> Based on that rationale, even if the complaint was properly pleaded in the first instance, the case would still have been dismissed.

Decided by the Supreme Court in 1810, *Fletcher v. Peck* involved a transfer of land from Peck to Fletcher, which the former had obtained in part due to a bill that had passed largely because of corruption (and had since been voided by the state legislature).<sup>107</sup> Fletcher argued that the sale of the land was invalid, as the original claim to the land was not good law when the contract between Fletcher and Peck was made.<sup>108</sup> The Supreme Court decided that the contract was still valid and that even though the original bill was only passed due to corruption and had since been repealed, it had been passed under lawful means, and any contract that was lawfully made under the bill was valid.<sup>109</sup> In applying that core concept to the increased payments the ratepayers made, the District Court in *Gress* stated that the rates were essentially akin to the contract in *Fletcher*. Even if the underlying law was only in effect due to bribery, the bill and its associated rates were nevertheless put into effect pursuant to the legal process used for all bills and rates.<sup>110</sup>

Applying the combined effect of the filed-rate doctrine and *Fletcher*, there are no realistic remedies for individuals harmed by increased rates due to corruption under civil law. If a rate is decided in a normal ratemaking proceeding overseen by the PUC of the state, the filed-rate doctrine precludes rectification. If a rate is decided in legislation passed due to corruption, the lack of proximate cause precludes rectification, as courts are prohibited from ascertaining the motives of individual legislators under *Fletcher*.

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<sup>105</sup> *Id.* at 767. It is currently unclear whether the facts would have supported a claim by Madigan asserting “undue pressure” on the other lawmakers. See Brenden Moore, *How Mike Madigan Maintained an Iron Grip on Lawmakers for Four Decades*, THE PANTAGRAPH (Mar. 9, 2022), [https://pantagraph.com/news/state-and-regional/govt-and-politics/how-mike-madigan-maintained-an-iron-grip-on-lawmakers-for-four-decades/article\\_a9c558cb-8ccc-5aa9-9802-8c1953892276.html](https://pantagraph.com/news/state-and-regional/govt-and-politics/how-mike-madigan-maintained-an-iron-grip-on-lawmakers-for-four-decades/article_a9c558cb-8ccc-5aa9-9802-8c1953892276.html).

<sup>106</sup> *Gress*, 559 F.Supp.3d at 769-70.

<sup>107</sup> *Fletcher*, 10 U.S. 87 at 129.

<sup>108</sup> *Id.*

<sup>109</sup> *Id.* at 131.

<sup>110</sup> *Gress*, 559 F.Supp.3d at 769-70.

b. Deterrents in Criminal Law

Unlike civil law, criminal law proscribes consistent penalties for acts of corruption. However, in the context of utility-induced oversight corruption, these penalties are woefully inadequate and, therefore, ineffective in deterring corrupt actions. First, there are almost no crimes guaranteed to apply to quid pro quo schemes. Honest services wire fraud<sup>111</sup> seems like a good fit at first glance but ultimately falls short because it requires the use of instrumentalities of the mail in order to apply.<sup>112</sup> This is an issue as prior instances of utility-induced oversight corruption demonstrate that utilities will avoid the use of the mail in an effort to avoid criminal charges. In Louisiana, when the utility company Entergy paid private citizens to feign support for a natural gas plant instead of renewables in order to sway a PUC decision, the actors were literally paid in cash under the table.<sup>113</sup> Additionally, the Supreme Court has “substantially limit[ed] the breadth of honest-services fraud.”<sup>114</sup> Thus, the only consistently applicable crime quid pro quo schemes would be bribery. In fact, this was the very idea that the Court in *Citizens United* referred to when they struck down expenditure limits as unconstitutional; stating that “with regard to large direct contributions, *Buckley* reasoned that they could be given ‘to secure a political *quid pro quo*’” and these practices, if proven, “would be covered by bribery laws.”<sup>115</sup>

Federal law defines bribery, in relevant part, as when someone:

“directly or indirectly, corruptly gives, offers or promises anything of value to any public official or person who has been selected to be a public official, or offers or promises any public official or any person who has been selected to be a public official to give anything of value to any other person or entity, with intent . . . to influence any official act”<sup>116</sup>

This definition theoretically applies to every instance of regulatory or legislative corruption undertaken by a utility. In the instance of corrupting a regulator, utilities attempt to influence the regulator’s official act of determining the correct result of the ratemaking procedure. In the instance of corrupting a legislator, utilities are attempting to influence the legislator’s official act of passing legislation. While the bribery charge would apply to every instance of

<sup>111</sup> Honest services wire fraud is “a scheme or artifice to deprive another of the intangible right of honest services.” 18 U.S.C. §1346 (2022).

<sup>112</sup> See *Skilling v. U.S.*, 561 U.S. 358, 399-400 (2010).

<sup>113</sup> Stein, *supra* note 22.

<sup>114</sup> See Mark Sweet, *Honest-Services Fraud – The Supreme Court Whittles away Prosecutors’ Big Stick*, WILEY (July 2010), <https://www.wiley.law/newsletter-3417> (summarizing the history of honest-services fraud and stating that “the statute can no longer be used to prosecute executives, fiduciaries and public officials merely for undisclosed self-dealing, or taking official action to further their own interests while purporting to act in the interests of those owed a fiduciary duty”).

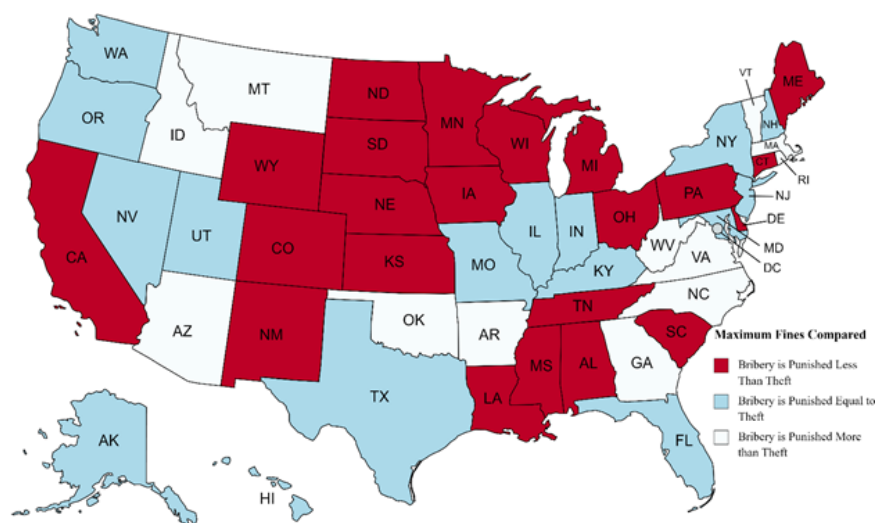
<sup>115</sup> *Citizens United v. Fed. Election Comm’n*, 558 U.S. 310, 356 (2010).

<sup>116</sup> 18 U.S.C. § 201(b)(1)(A) (2022).

bribery, the punishment for being found guilty is an insufficient deterrent to stop utilities (and their executives) from attempting bribery anyway.

To better understand the relative severity of bribery penalties, the penalties for a similar crime should be compared. For the purposes of this paper, larceny serves as a comparable crime because when a utility successfully alters the rate consumers pay for electricity via bribery, it is essentially theft from those consumers. When comparing the penalties for bribery and larceny, this paper considers only the maximum incarceration and fines for larceny,<sup>117</sup> as the threshold amounts for even those crimes are miniscule in comparison to the amount of money that utilities can gain through corruption schemes.<sup>118</sup> Additionally, there are two punitive aspects of criminal punishments: fines and incarceration. By comparing each of these individually, one can get a clearer picture of the differences in how states treat theft from individuals instead of theft from ratepayers via a corruption scheme.

On average, compared to theft, the maximum fine for bribery is 11.68% less.<sup>119</sup> The national average maximum fine for theft is \$52,708.33, while the national



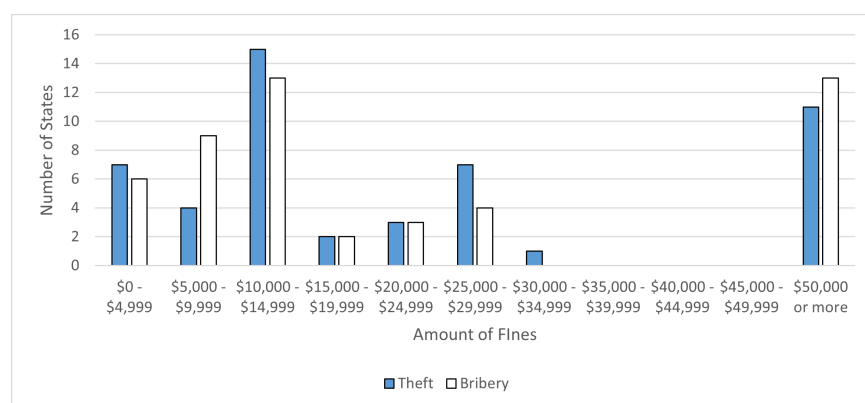
<sup>117</sup> This paper does not consider certain aggravating factors that often increase the penalties of theft partly because such factors typically only marginally increase penalties and partly because basic theft and bribery are the most apt for comparison. *E.g.*, Ga. Code Ann. § 16-8-20 (West 2022) (explaining the theft of livestock valued at more than \$100 in Georgia elevates the crime above a misdemeanor).

<sup>118</sup> In Ohio, for example, state larceny laws cite \$1.5 million or more as the highest offense. *See* Ohio Rev. Code Ann. § 2913.02 (West 2022). Keeping in mind that \$1.3 billion was given to FirstEnergy in the corruption scandal in the same state (solely through a single bill) it becomes clear that the threshold amounts for the highest degrees of theft are easily met. *See* Brooker, *supra* note 6 (estimating the true cost of the Ohio scandal is much higher than \$1.3 billion due to energy savings lost by Ohio utility customers).

<sup>119</sup> *See* tables *infra* Appendix 1 & 2.

average maximum fine for bribery is \$46,546.93. A plurality of states—twenty-two—treat theft more harshly than bribery. Sixteen states treat bribery and theft the same, and only twelve treat bribery more harshly than theft.<sup>120</sup> A visualization of this state-by-state breakdown is as follows:

However, simply demonstrating that states fine bribery less than theft does not convey the full story. Hypothetically, if a state fined theft an unreasonably large amount and fined bribery slightly less, the comparison would be characterized the same in the map above as if the state fined bribery an unreasonably low amount. Therefore, a more detailed examination of the penalties is in order. The chart below examines the fines for bribery and theft, with the states grouped according



to how much the maximum fine for each crime is and sectioned off in increments of \$5,000.<sup>121</sup> The fine penalties under each state's theft and bribery laws are as follows:

While the chart above does appear to show bribery and theft on similar footing (in fact there are even more states in the "\$50,000 or more" category for bribery than theft) there are a few points of note regarding the differences. First, while the nationwide average fine for bribery is at \$43,985.71, twenty-eight states punish bribery with a maximum fine of less than \$15,000, compared to twenty-six states for theft. Additionally, only nine states have maximum fines between \$15,000 and \$49,999 for bribery, compared to thirteen for theft.<sup>122</sup>

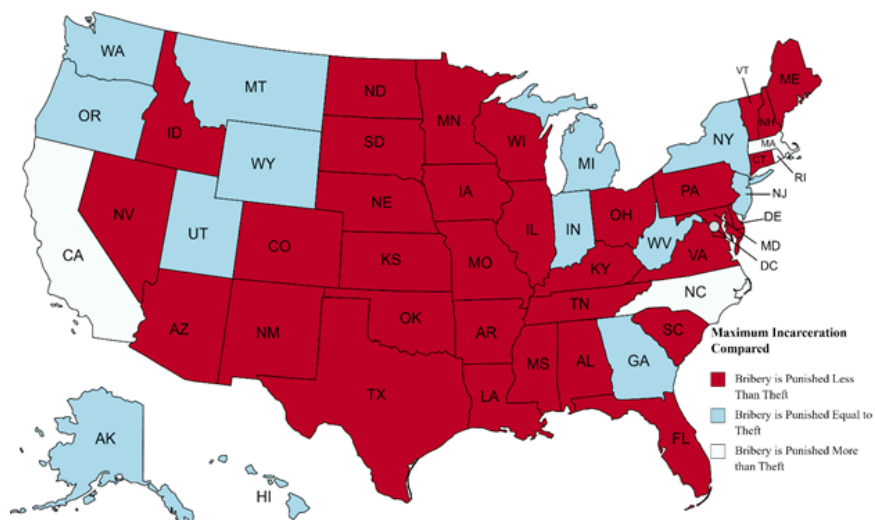
Although the fine penalties for bribery and theft offer some indication that bribery is punished less than theft, assessing the maximum incarceration penalties for these crimes removes all doubt. Taken as a whole, the maximum periods of incarceration for bribery are a whopping 49.4% lower than their theft

<sup>120</sup> *Id.*

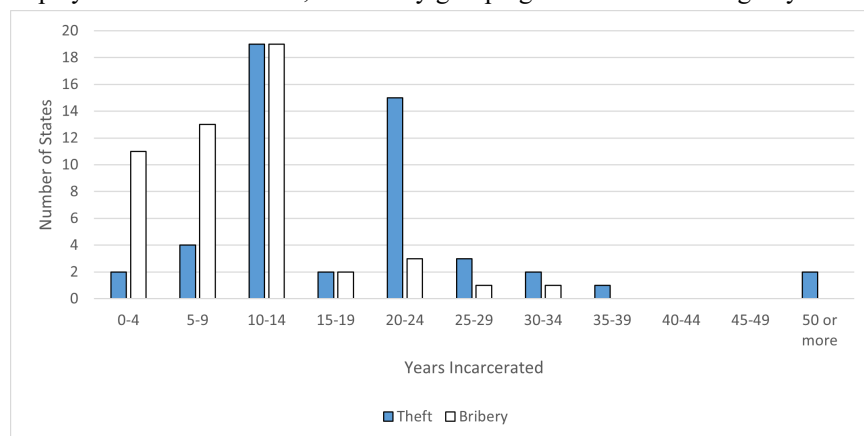
<sup>121</sup> *Id.*

<sup>122</sup> *Id.*

counterparts, with the average maximum for bribery standing at 8.8 years as opposed to theft's average maximum of 17.8 years.<sup>123</sup> The graphic below shows just how many states have longer maximum incarceration periods for theft than bribery:



Only four states have longer periods of incarceration for bribery, while thirteen have them equal, and the remaining thirty-three states set the maximum incarceration penalty for bribery lower than the maximum incarceration penalty for theft. Again, as with the fines, this does not tell the entire story. If a state had an unreasonably long punishment for theft, or if the difference was minuscule, it would be potentially mischaracterized by the graphic. However, when the data is displayed in another format, such as by grouping the states according to years of



<sup>123</sup> *Id.*

incarceration, the theme of under-penalizing bribery holds true.

As demonstrated above, twenty-four states have set the maximum period of incarceration for bribery at less than ten years, compared to six states for theft. Additionally, while both crimes have the highest concentration of states between ten and fourteen years, there are only seven states that punish bribery with a longer period of incarceration, compared with twenty-five states for theft. Also, the longest period of incarceration for bribery is only thirty years, less than one-third of the ninety-nine-year maximum for theft.<sup>124</sup> Viewed as a whole, states punish theft with far more vigor than they punish bribery.

When examining the state maximums for both fines and incarceration in distinct cases, the discrepancies between state treatments produce some rather striking scenarios. For example, the maximum periods of incarceration for theft in both South Carolina and Delaware are ten and twenty-five years, respectively, and the maximum fine in either state is limited only by judicial discretion. The punishment for bribery, however, is *at most* a fine of \$2,300 in Delaware and merely \$500 in South Carolina, with a maximum period of incarceration of one year in both states.<sup>125</sup> In Texas, should an individual steal \$300,000 or more from one person and be charged with theft, the individual could be sentenced to ninety-nine years of incarceration. But should that individual steal \$300,000 from ratepayers through a corruption scheme and be charged with bribery, the maximum sentence is only twenty years. In Louisiana, theft can be penalized with twenty years' incarceration and a fine of \$50,000, whereas bribery can only be penalized with five years' incarceration and a fine of \$1,000. Arkansas has the maximum penalty for theft at twenty years' incarceration and a \$1,500 fine, but bribery is only at one year incarcerated and a \$2,500 fine. Nebraska has the maximum penalties for theft at twenty years' incarceration and a \$25,000 fine, but for bribery, they drop to two years and \$10,000.<sup>126</sup>

Compared to the rest of the nation, California is one of the states that has a higher maximum period of incarceration for bribery than theft. But they also have one of the lowest maximum fines for bribery, a mere \$5,000, which is half that of theft's maximum fine of \$10,000.<sup>127</sup> Considering that SCE, in the email scandal detailed above, put ratepayers on the line for an estimated \$3.3 billion, the maximum punishment of a \$5,000 fine and four years' incarceration seems woefully inadequate.

All told, there are only three states that have longer incarceration periods and higher fines for bribery than theft and only seven states that punish bribery and theft equally. Meanwhile, there are twenty states that have both lower

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

<sup>125</sup> *Id.*

<sup>126</sup> *Id.*

<sup>127</sup> *Id.*

incarceration periods and lower fines for bribery than theft.<sup>128</sup> When one considers that bribery is the only charge that will reliably be brought upon utilities (and their executives and employees) when they attempt to corrupt regulators and legislators, this discrepancy is absurd. Especially when combined with a lack of recourse for ratepayers in civil court. As a representative example, the utility in Ohio is on track to net billions of dollars over the next decade from the favorable treatment they received from legislation secured through bribery. And yet the penalties for being found guilty of corruption are mostly irrelevant compared to the possible rewards for successfully capturing legislators and regulators.

Even putting the differential treatment of theft and bribery aside, the sheer disparity between the maximum fines for both theft and bribery are minuscule compared to the potential windfall utilities might get from a successful corruption of oversight. The maximum penalty for either crime, other than judicial discretion, is \$1 million.<sup>129</sup> While this may appear to be a large sum, the potential gain for a utility is in the billions.

#### IV. HOW STATES CAN PREVENT AND DETER UTILITY-INDUCED OVERSIGHT CORRUPTION

While the current state of utility-induced oversight corruption is grim, it is not without hope. There are two paths that states could take to rectify the situation. Due to both the long history of states serving as the main regulatory force governing utilities and the relative speed at which states could enact these proposed changes, this paper's recommendations are focused on the states. States are more prepared to act and state actions are less likely to raise constitutional issues than the same actions undertaken by the federal government.

First, state legislatures should enact changes to their campaign finance regulations that make it harder for utilities to induce oversight corruption. Second, laws and regulations serving as methods of deterrence should be strengthened; the potential cost of attempting to corrupt regulatory and legislative officials (or actually corrupting them) should offset the benefits gained by doing so. If states are serious about preventing and deterring utility-induced oversight corruption, they should act on either of these proposals.

##### *A. Campaign Finance Laws Should be Altered*

The first way states could combat the bribery of public officials by utilities would be to amend state campaign finance laws and thus hinder the favored method by which the utilities effectuate bribery. The proposals within are broken into three tiers. At the bare minimum, states that hold elections for members of

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<sup>128</sup> *Id.*

<sup>129</sup> *Id.*

their PUCs should require the disclosure of donations to regulatory campaigns. One step more stringent towards hindering bribery would be for states to set universal base limits for both regulatory and legislative donations while also mandating their disclosure. Finally, ideally, states should altogether prohibit utilities from contributing to political campaigns of legislators or regulators as well as 501(c)(4) organizations.

#### 1. The Minimum: The Disclosure of Campaign Donations

As stated previously, mandating the disclosure of campaign contributions is considered fully constitutional by the Supreme Court.<sup>130</sup> Requiring disclosure would remove the curtain utilities hide behind when they give the *quid* for the *quo* in some of their corruption schemes. Disclosure puts candidate donations on display, granting government officials and the public the ability to investigate transactions and possibly even gather enough incriminating material to bring a bribery case. Disclosure also gives states flexibility in that they could apply it to regulatory campaigns or legislative campaigns, or both.

Still, mandating disclosure would not necessarily solve the corruption issue, or even put a sizable dent in it. First and foremost, this solution is exceptionally limited in scope. As mentioned above, only eleven states elect the members of their PUCs,<sup>131</sup> so if states only elect to apply this to regulatory campaigns, utilities would be open to continue donating to all legislative and gubernatorial campaigns, candidates that in the remaining thirty-nine states have the power to appoint the members of PUCs. Also, even if legislators choose to disclose their own campaign contributions, such disclosure would not necessarily effectuate change or raise public alarm. Even if someone does pick up on a pattern that corroborates corruption, it is not certain that the information will be disseminated broadly. More importantly, even if the information is disseminated broadly, that does not guarantee that anything will be done to remedy the situation. For example, even after APS was caught funding the campaigns of Tom Forese and Doug Little, the utility has yet to face significant consequences.<sup>132</sup> Arguably the only punishments APS faced—the disclosure of their books in the future and the abandonment of the funding practice—were self-inflicted.<sup>133</sup>

Mandating the disclosure of contributions to regulatory and legislative campaigns would be a start for states. This solution is, without a doubt, better than

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<sup>130</sup> See *Buckley v. Valeo*, 424 U.S. 1, 60 (1976); *McCormick v. Fed. Election Comm'n*, 540 U.S. 93, 201 (2003); *Citizens United v. Fed. Election Comm'n*, 558 U.S. 310, 371 (2010); *McCutcheon v. Fed. Election Comm'n*, 572 U.S. 185, 224 (2014).

<sup>131</sup> Byrnett & Shea, *supra* note 60.

<sup>132</sup> Elizabeth Witman, *APS Documents Revealing Millions in Spending Leave Many Questions Unanswered*, PHOENIX NEW TIMES (Apr. 4, 2019, 7:00 AM), <https://www.phoenixnewtimes.com/news/dark-money-disclosures-aps-questions-utility-spending-forese-little-11263984/>.

<sup>133</sup> *Id.*



nothing. But if the only means to dissuade utilities from attempting oversight corruption were disclosure, it would largely be ineffective in stemming the issue. If states want to be more effective in preventing the bribery of regulators and legislators by utilities, they should implement at least one of the next two proposals.

## 2. The Intermediate: Universal Base Limits for Regulatory and Legislative Donations and Mandatory Donation Disclosure

An intermediate proposal would require states to impose universal base limits for regulatory and legislative campaign contributions and mandate the disclosure of these donations. These regulations would not only enable the public sphere to track donations to candidates (as in the previous proposal) but would actually amplify donation information and therefore limit the effectiveness of campaign contributions as bribes. The reason that universal base limits are proposed instead of a narrower limitation on utility donations is a matter of jurisprudence. The narrow limitation, which discriminates based on who is donating the money, would invite a strict scrutiny analysis instead of the otherwise used intermediate scrutiny analysis.<sup>134</sup>

Base limits, as mentioned above, are limits on the amount of money that an individual can donate to a single candidate in an election cycle.<sup>135</sup> These limitations have repeatedly been found constitutional by the Supreme Court.<sup>136</sup> By limiting the amount of money utilities can inject into campaigns, states can limit utilities' corrupting power. The Court has held that state limits on political contributions as low as \$1,600 are constitutional.<sup>137</sup> Such a restriction would ensure far less buying power than the \$63 million seen in the Ohio scandal and would likely decrease public officials' temptation to take bribes. Lower contribution limits may also decrease the vigor with which officials would attempt to effectuate the change the utility is bribing for.

There are still issues with this proposal, however. First, as demonstrated by the Louisiana "cash under the table" scheme, utilities are resourceful and it is entirely possible they could evade restrictions by creating multiple entities to funnel money to campaigns of public officials. Utilities could also simply support campaigns through independent expenditure by funding advertisements or leaflets on behalf of the campaign without coming to an express agreement with the campaign itself. Absent proof that a utility has made a deal with an official sufficient to support a bribery charge, under this proposal, nothing is stopping a

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<sup>134</sup> *Citizens United v. Fed. Election Comm'n*, 558 U.S. 310, 312 (2010).

<sup>135</sup> *McCutcheon v. Fed. Election Comm'n*, 572 U.S. 185, 192 (2014).

<sup>136</sup> *Id.* at 192-93.

<sup>137</sup> *See Thompson v. Hebdon*, 140 S.Ct. 348, 350 (2019) (citing *Nixon v. Shrink Missouri Government PAC*, 528 U. S. 377 (2000) (explaining the court upheld a limit of \$1,075, which translates to over \$1,600 in present day value)).

utility from expending the \$63 million in campaign ads in exchange for favorable actions. With those issues in mind, states would ideally enact the next proposal.

### 3. The Ideal: Prohibition on Utilities Making Political Donations

Ideally, states should prohibit utilities from making any political contributions to the campaigns of candidates and 501(c)(4) organizations. While this may sound like an unrealistic idea, especially given the recent trend of campaign finance cases, it is not as far-fetched as it may seem. The justification for total donation prohibition is that a public utility is an entirely different entity than the average, modern corporation. With that distinction in mind, donation restrictions would likely pass the Court's First Amendment strict scrutiny analysis.

When there is governmental activity in the industry a firm engages in, the Court applies a different First Amendment analysis than if there was not governmental activity. In *Red Lion Broadcasting Co. v. F.C.C.*, the Supreme Court upheld a statute requiring broadcasters to address both sides of news issues covered on their programs.<sup>138</sup> The Court reasoned the restriction was necessary to ensure fairness given the scarcity of the frequencies available to broadcast, the government's role in handing out those frequencies, and the lack of access for outside parties to the frequencies.<sup>139</sup> This rationale for allowing heightened restrictions when there is an uncommon level of governmental involvement has also been recognized by the Court in schools,<sup>140</sup> prisons,<sup>141</sup> the military,<sup>142</sup> and the federal government in general.<sup>143</sup>

The type of corporation contemplated in *Citizens United* is of a different breed altogether than a public utility. While laws passed by state legislatures undoubtedly influence the business of normal corporations, the CEO of Apple, Inc. need not go before a regulatory board to justify why Apple should make more money in the next year. Amazon does not need to acquire a license from each municipality to deliver packages to local houses. Nor do state governments divide up their municipalities to ensure McDonalds, Burger King, and Wendy's all service distinct areas with no overlap. There are also foundational discrepancies due to the nature of electric power. For example, just as DoorDash can deliver items to your house; UberEATS and the local pizza chain can also deliver there just fine without wasting resources. On the other hand, only one electric company can run an active power line to your house. These differences show how much interaction occurs between utilities and their supervising regulators and legislators

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<sup>138</sup> *Red Lion Broadcasting Co. v. F.C.C.*, 395 U.S. 367 (1969).

<sup>139</sup> *Id.* at 400-01.

<sup>140</sup> *See Bethel School Dist. No. 403 v. Fraser*, 478 U.S. 675 (1986).

<sup>141</sup> *See Jones v. North Carolina Prisoners' Labor Union, Inc.*, 433 U.S. 119 (1977).

<sup>142</sup> *See Parker v. Levy*, 417 U.S. 733 (1974).

<sup>143</sup> *See U.S. Civ. Serv. Comm'n v. Nat'l Association of Letter Carriers*, 413 U.S. 548 (1973).

and demonstrate how critical these oversight bodies are.

The Court has recognized the differences between most modern corporations and utility corporations. In *Central Hudson Gas v. Public Service Commission*, the Court determined whether a public utility's advertisements could be restricted due to the then ongoing oil crisis.<sup>144</sup> While the case was decided on commercial speech grounds (the statute in question blocked speech, which had nothing to do with the governmental justification), Justice Rehnquist's dissent asserts that the First Amendment should be applied differently to public utilities than general corporations.<sup>145</sup>

Extensive regulations governing decision making by public utilities suggest that for purposes of first amendment analysis, a utility is far closer to a state-controlled enterprise than is an ordinary corporation. Accordingly, I think a state has broad discretion in determining the statements that a utility may make in that such statements emanate from the entity created by the state to provide important and unique services.<sup>146</sup>

This distinction between the utility corporation and the modern corporation has also been applied to the discussion on limitations of political speech. In his concurrence to *Citizens United*, countering the dissenting opinion's argument that the founders would not have thought corporations should not be given the same First Amendment protections that are given to natural citizens,<sup>147</sup> Justice Scalia pointed out that the corporations of old and their modern counterparts are two exceptionally different entities.<sup>148</sup> Harnessing his powers of interpreting original intent, Justice Scalia stated "the Founders' resentment towards corporations was directed at the state-granted monopoly privileges that individually chartered corporations enjoyed."<sup>149</sup> He went on to reason that the lack of those privileges implies that the Founders would in fact not have supported restrictions on the modern day corporations proposed in the law at issue in the case.<sup>150</sup> It is not unreasonable, to extrapolate from his concurrence, that if the statute in *Citizens United* had been restricting the political speech of a substantially regulated corporation such as a utility, the case may have been decided the opposite way, as Justice Scalia may have cast the deciding vote on the side upholding the restriction.<sup>151</sup>

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<sup>144</sup> *Central Hudson Gas & Elec. Corp. v. Public Service Comm'n of New York*, 447 U.S. 557 (1980).

<sup>145</sup> *Id.* at 587 (Rehnquist, J., dissenting).

<sup>146</sup> *Id.*

<sup>147</sup> *Citizens United v. Fed. Election Comm'n*, 558 U.S. 310, 427-28 (2010) (Stevens, J., dissenting).

<sup>148</sup> *Id.* at 387-88 (Scalia, J., concurring).

<sup>149</sup> *Id.*

<sup>150</sup> *Id.*

<sup>151</sup> *Citizens United* was a 5-4 decision. *Id.* at 318.

Having established that campaign finance precedent would likely not apply to public utilities, discussing how the Court would examine the restriction is necessary. Strict scrutiny would no doubt apply, as the restriction still covers political speech and discriminates based on who is speaking.<sup>152</sup> In order for a restriction to pass strict scrutiny it must: 1) be justified by a compelling governmental interest; and 2) be narrowly tailored to that interest.<sup>153</sup> While this is the highest degree of scrutiny the Court could use to examine a restriction, there is reason to believe that this proposal would be found constitutional.

The Supreme Court stated in *Buckley v. Valeo* that the avoidance of corruption, or the avoidance of the appearance of corruption, is a sufficiently compelling governmental interest for limitations on political speech.<sup>154</sup> Then, in *Citizens United*, the Court clarified this interest only extends to quid pro quo corruption,<sup>155</sup> which requires “a direct exchange of an official act for money”<sup>156</sup> or, more succinctly put, “dollars for political favors.”<sup>157</sup> In all the instances of utility corruption discussed in this paper there is *at least* the appearance of and potentially actual quid pro quo corruption.

In the Ohio scandal, FirstEnergy gave money to then-Speaker Householder allegedly in exchange for his support in passing favorable legislation.<sup>158</sup> The utility also allegedly paid *other* officials close to the legislature in exchange for the further benefit of FirstEnergy.<sup>159</sup> In March, 2023, a federal jury found Householder and former Chairman of the Ohio Republican Party Matt Borges guilty of racketeering conspiracy for their roles in the FirstEnergy scheme.<sup>160</sup>

In Arizona, the utility APS donated to the campaigns of two state PUC members who ended up winning;<sup>161</sup> subsequently, these members voted in favor of hearing an argument that the fee individuals paid to APS when those

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<sup>152</sup> *Id.* at 340.

<sup>153</sup> *E.g.*, Fed. Election Comm’n v. Wisconsin Right to Life, Inc., 551 U.S. 449, 464 (2007).

<sup>154</sup> *Buckley v. Valeo*, 424 U.S. 1, 66-68 (1976).

<sup>155</sup> *Citizens United v. Fed. Election Comm’n*, 558 U.S. 310, 359-61 (2010).

<sup>156</sup> *McCutcheon v. Fed. Election Comm’n*, 572 U.S. 185, 192 (2014) (citing *McCormick v. United States*, 500 U.S. 257, 266 (1991)).

<sup>157</sup> *Fed. Election Comm’n v. Nat’l Conservative Political Action Comm.*, 470 U.S. 480, 497 (1985).

<sup>158</sup> This is probably the most definitive example, as FirstEnergy admitted to that being the purpose. *See*, Jessie Balmert and Jackie Borchardt, *Ohio Bribery Probe: FirstEnergy Corp. Says Subsidiary Gave \$56.6 Million to Nonprofit that Pleaded Guilty*, CINCINNATI ENQUIRER (Mar. 13, 2021), <https://www.cincinnati.com/story/news/politics/2021/03/12/ohio-bribery-probe-firstenergy-admits-gave-millions-generation-now-pleaded-guilty/4673740001/>.

<sup>159</sup> USA Today Network Ohio Bureau, *supra* note 4.

<sup>160</sup> April Rubin, *Former Ohio Legislator Found Guilty of Racketeering in \$60 Million Scheme*, THE NEW YORK TIMES (Mar. 9, 2021), <https://www.nytimes.com/2023/03/09/us/politics/ohio-householder-borges-bribery.html>.

<sup>161</sup> Mary Jo Pitzl, *Outside Money Played Huge Role in Arizona Elections Increase*, ARIZONA REPUBLIC, <https://www.azcentral.com/story/news/arizona/politics/2014/11/09/election-outside-money-campaign-funding/18751133/> (Nov. 8, 2014, 10:27 PM).

individuals installed rooftop solar should be increased by 400%,<sup>162</sup> outside of a ratemaking proceeding.<sup>163</sup> While APS ultimately dropped this specific proposal,<sup>164</sup> concern over the commissioners' bias toward APS persisted.<sup>165</sup> In the APS and FirstEnergy cases, there is at least the appearance of quid pro quo corruption.

A law is narrowly tailored when it is the least restrictive means to serve the compelling governmental interest, while still preventing the harm that it was designed to do.<sup>166</sup> In *McCutcheon v. Federal Election Commission*, the Court examined if aggregate limits to campaign donations were violations of the First Amendment. While the Court recognized the stated governmental interest of avoiding corruption or its appearance, the Court held the rule on aggregate limits was not sufficiently tailored to serve that interest, because the restriction affected donations that were not corrupting and therefore was overbroad in scope.<sup>167</sup>

By wording the statute only to cover utilities, the restriction would not be overbroad in scope in that it would only affect the donations to campaigns that would appear to corrupt the regulation of the donor. Additionally, no other entities would be restricted in their political speech, only those who stand to gain from the corruption of the current regulatory regime.

One could find further support for this proposal in the Public Utilities Holding Company Act of 1935 (PUHCA). Passed after the disclosure of reports from the Federal Trade Commission and the House of Representatives' Committee on Interstate and Foreign Commerce, the foundational theory of PUHCA was that, when left unregulated, public utilities and their holding companies were a detriment to U.S. society.<sup>168</sup> Specifically concerning campaign finance, Section 12(h) of the act states, in relevant part:

It shall be unlawful for any registered holding company, or any subsidiary company thereof, by use of the mails or any means or instrumentality of interstate commerce, or otherwise, directly or indirectly . . . to make any contribution whatsoever in connection with the candidacy, nomination,

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<sup>162</sup> *Motion to Reset in the Matter of the Application of Arizona Public Service Company for Approval of Net Metering Cost Shift Solution*, Docket No. E-01345A-13-0248, at 2 (Apr. 2, 2015).

<sup>163</sup> Rachel Leingang, *APS Expected to Seek 400% Solar Fee Increase*, ARIZONA CAPITOL TIMES (Mar. 13, 2015), <https://azcapitoltimes.com/news/2015/03/13/arizona-public-service-expected-to-see-400-solar-fee-increase/>.

<sup>164</sup> Ryan Randazzo, *APS Gives Up Fight for Higher Solar Rates – For Now*, ARIZONA REPUBLIC, <https://www.azcentral.com/story/money/business/energy/2015/09/25/aps-gives-up-fight-higher-solar-rates-now/72828054/>.

<sup>165</sup> Krysti Shallenberger, *Arizona Regulators Will Not Recuse Themselves from Controversial APS Case*, UTILITY DIVE, (OCT. 7. 2015) <https://www.utilitydive.com/news/arizona-regulators-will-not-recuse-themselves-from-controversial-aps-case/406952/>.

<sup>166</sup> *Buckley*, 424 U.S. at 44.

<sup>167</sup> *McCutcheon v. Fed. Election Comm'n*, 572 U.S. 185, 227 (2014).

<sup>168</sup> Public Utility Holding Company Act of 1935, ch. 687, Title 1, 49 Stat. 803, § 1(b)-(c) (codified as 15 U. S. C. section 79(a)) (repealed by Energy Policy Act of 2005, 42 U.S.C. § 13201 et seq.)

election or appointment of any person for or to any office or position in the Government of the United States, a State, or any political subdivision of a State, or any agency, authority, or instrumentality of any one of more of the foregoing; or . . . to make any contribution to or in support of any political party or any committee or agency thereof.<sup>169</sup>

It would be difficult to overstate the reach of this legislation. Not only did it affect utility companies, but Section 2(7) defined a holding company as any company that controls 10% or more of a utility company, as well as any *person* that the Commission deemed to exercise a “controlling influence over the management or policies of any public-utility.”<sup>170</sup> Furthermore, PUHCA was in effect until 2005, when the Energy Policy Act of 2005 repealed and replaced it.<sup>171</sup> The longstanding status of PUHCA is a testament to its constitutionality. Should states enact similar legislation prohibiting the ability of utilities to contribute to political campaigns and 501(c)(4)s, they would severely inhibit how they corrupt legislators and regulators.

#### *B. Laws and Regulations that Deter Corruption Should be Altered*

The second-way states could combat the bribing of public officials by utilities would be to increase the ramifications of a utility being caught and thus deter corrupt actions. Unlike the proposals for campaign finance reform, these proposals could both be implemented at the same time. First, states should raise the maximum penalties for bribery to match the maximum penalties for theft. Second, states should add a fraud exception to the filed-rate doctrine.

##### 1. The Minimum: Raising the Penalties for Bribery to Match the Highest Level Penalties for Theft

At a minimum, states should alter their statutes to ensure bribery has matching maximum penalties to theft, thus rectifying the current flawed system. By having the state maximums for bribery so much lower than for theft, states are currently signaling that the more people you steal from—the more ambitious your scheme—the less you will be punished. In raising maximum bribery penalties, states would simply be recognizing the reality on the ground: the theft of money through a successful bribery scheme potentially affecting millions of people is at least as harmful as the theft of money from a single individual. Arguably, bribery is worse since corruption also erodes public confidence in the democratic system.

Raising the maximum state punishment for bribery to match the maximum state

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<sup>169</sup> *Id.* at § 12(h).

<sup>170</sup> *Id.* at § 2(a)(7)

<sup>171</sup> Energy Policy Act of 2005, P.L. No. 109-58, §§ 1261-77, 119 Stat. 594, 972-8 (codified at 42 U. S. C. § 15801).

punishment for theft could produce some beneficial impact. However, the more important change involves the maximum period of incarceration. As previously discussed, the average maximum fine for bribery is only 11.68% lower than the average maximum fine for theft (\$52,708.33 for theft and \$46,546.93 for bribery).<sup>172</sup> However, the discrepancy for the average maximum period of incarceration for bribery is 49.4% lower than that for theft (17.8 years for theft to 8.8 for bribery). The purpose of raising state bribery incarceration periods is to deter corporate executives and public officials who may otherwise be incentivized to participate in corruption schemes. By risking nearly an additional decade of imprisonment, individuals who would otherwise be tempted to commit bribery may second-guess that decision more than under current maximum sentence laws.

While increasing incarceration penalties for individuals implicated in bribery schemes would be a step in the right direction, it does not fix the lack of deterrents preventing utilities and their executives from attempting the corruption of regulatory or legislative officials. The plausible deniability that utility executives retain could potentially shield them from any bribery charge. For example, in the Ohio scheme, it was not until March 23, 2022 (nearly two years after the scandal initially broke) that FirstEnergy CEO Chuck Jones was publicly implicated for his role.<sup>173</sup> While FirstEnergy agreed to pay a \$230 million criminal penalty as a part of a deferred prosecution agreement, Jones has yet to face criminal charges.<sup>174</sup>

A state may raise its maximum penalties, but this provides no guarantee prosecutors will have enough evidence to convict, even when a scandal seems apparent to the public. Additionally, even if there were a guilty verdict in a bribery case or other types of criminal verdicts against the utility itself, the utility may still be incentivized to pursue corruption because the ratemaking profits of the corruption scheme substantially outweigh any indirect penalties associated with the scheme's execution. For example, while FirstEnergy ultimately paid a major criminal penalty for wire fraud, the financial benefit the utility derived from the broader corruption scheme was arguably much greater.<sup>175</sup> That issue is where the following proposal comes into play.

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<sup>172</sup> See discussion *supra* Section III.B.2.b.

<sup>173</sup> John Seewer, *Attorneys: FirstEnergy ex-CEO Planned Payments in Bribery Scandal*, WKYC STUDIOS (Mar. 23, 2022), <https://www.wkyc.com/article/news/local/ohio/firstenergy-ex-ceo-planned-payments-in-ohio-scandal/95-2b4b0399-63e0-4fd6-9b03-35fa43b4053a#:~:text=Attorneys%3A%20FirstEnergy%20ex%2DCEO%20planned%20payments%20in%20Ohio%20scandal,role%20in%20the%20bribery%20scheme>.

<sup>174</sup> Jake Zuckerman, *Ousted FirstEnergy CEO Chuck Jones Again Asserts His Innocence, After Householder Guilty Verdict*, CLEVELAND.COM (Mar. 11, 2023, 8:00 AM), <https://www.cleveland.com/open/2023/03/ousted-firstenergy-ceo-chuck-jones-again-asserts-his-innocence-after-householder-guilty-verdict.html>

<sup>175</sup> See Brooker, *supra* note 6.

## 2. Fixing the Filed-Rate Doctrine

Perhaps the most effective method to deter a utility from attempting to corrupt public officials and alter the ratebase for profit would be for states to enact laws that create a fraud exception within the filed-rate doctrine. As it currently stands, there is no such exception, and therefore once a rate is filed with the relevant agency, no lawsuit brought by a ratepayer harmed due to bribery can disgorge utility profits.<sup>176</sup> It is worth noting that courts may consider the filed-rate doctrine not to apply where legislation—such as HB6 in the case of FirstEnergy—overrides the normal regulatory ratemaking process, thus exposing the utility to otherwise barred claims.<sup>177</sup> However, this distinction is a novel case law development with an uncertain future and potentially limited application.

The public's lack of opportunity to challenge and recover improperly set rates starkly contrasts the extensive procedural options afforded utilities. For example, if a utility disagrees with the decided rate, it is entitled to appeal the decision.<sup>178</sup> Given that the filed-rate doctrine is court-made, state legislators may explore passing new legislation to produce more just outcomes. By adopting a carefully crafted fraud exception, for example, states would remove the vast majority of the incentive utilities have to attempt to corrupt regulatory and legislative officials, as utilities would recognize that if they are caught in a bribery scheme, they can expect to lose all profit they have gained due to the scheme. This incentive would be contrary to the current status quo, which amounts to a slap on the utility's wrist and essentially enables utilities to keep all ill-gotten gains.

## V. CONCLUSION

When utility companies successfully corrupt the public servants who regulate them, the democratic system is threatened. By paying for favorable legislation or PUC decisions, utilities not only upend the regulatory compact but steal from the very customers they are supposed to serve. Under the modern utility regulatory system, there is more reason than ever for utility, legislative and regulatory officials to attempt utility-induced oversight corruption, as there are laughably inadequate penalties for utilities should anyone be caught. Even when individuals are caught, utilities may face little or no consequences.

However, states are not powerless to fester in the dimly lit status quo. States could alter their campaign finance laws to require disclosure, set base limits, or prohibit utilities from contributing to political campaigns, all of which would

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<sup>176</sup> See *Coll v. First American Title Ins. Co.*, 642 F.3d 876, 889 (2011) (detailing that there is no fraud exception to the filed-rate doctrine). *E.g.*, *Wegoland Ltd. V. NYNEX Corp.*, 27 F.3d 17, 20-22 (2d Cir. 1994).

<sup>177</sup> See, *e.g.*, *Smith v. FirstEnergy Corp.*, 518 F.Supp.3d 1118, 1128 (S.D. Ohio, 2021).

<sup>178</sup> See, *e.g.*, *Jersey Central Power & Light Co. v. FERC*, 589 F.2d 142 (3d Cir. 1978); *Duquesne Light Company v. Barasch*, 488 U.S. 299 (1989).



lessen utilities' ability to corrupt public officials. States could also increase the punishment for bribery to the maximum amount recognized by that state's theft statute or require the publication of statements of guilt after a guilty bribery verdict. Finally, states could create a fraud exception to the filed-rate doctrine to deter utilities from attempting corrupt acts. Should states take these actions, there may yet be hope for a brighter future without the worry of utilities corrupting the political system.

## APPENDIX 1

## Theft

	Maximum Incarceration (Years)	Maximum Fine	Citation
Alabama	20	\$30,000.00	ALA. CODE § 13A-8-3 (2022).
Alaska	10	\$ 100,000.00	ALASKA STAT. ANN. § 11.45.120 (West 2022).
Arizona	35	\$ 2,500.00	ARIZ. REV. STAT. ANN. § 13-1802 (2022).
Arkansas	20	\$ 1,500.00	ARK. CODE ANN. § 5-36- 103 (West 2022).
California	1.33	\$10,000.00	CAL. PENAL CODE § 487 (West 2022).
Colorado	24	\$1,000,000.00	COLO. REV. STAT. ANN. § 18-1.3-401 (West 2022).
Connecticut	20	\$15,000.00	CONN. GEN. STAT. ANN. § 53a-122 (West 2022).
Delaware	25	Judicial Discretion	DEL. CODE ANN. tit. 11, § 841 (West 2022).
Florida	30	\$10,000.00	FLA. STAT. ANN. § 812.014 (West 2022).
Georgia	20	\$ 1,000.00	GA. CODE ANN. § 16-8-12 (West 2022).
Hawaii	10	\$25,000.00	HAW. REV. STAT. ANN. § 708-830.5 (West 2020).
Idaho	14	\$ 5,000.00	IDAHO CODE ANN. § 18- 2403 (West 2020).
Illinois	30	\$25,000.00	720 ILL. COMP. STAT. ANN. 5/16-1 (West 2022).
Indiana	6	\$10,000.00	IND. CODE ANN. § 35-43- 4-2 (West 2022).
Iowa	10	\$10,000.00	IOWA CODE ANN. § 714.2 (West 2022).
Kansas	11	\$ 300,000.00	KAN. STAT. ANN. § 21- 5801 (West 2022).
Kentucky	20	\$10,000.00	KY. REV. STAT. ANN. § 514.030 (West 2022).
Louisiana	20	\$50,000.00	LA. STAT. ANN. § 14:67 (West 2022).

Maine	10	\$10,000.00	ME. REV. STAT. ANN. tit. 17-A, § 353 (West 2022).
Maryland	20	\$25,000.00	MD. CODE ANN. CRIM. LAW § 7-104 (West 2022).
Massachusetts	5	\$25,000.00	MASS. GEN. LAWS ANN. ch. 266, § 30 (West 2022).
Michigan	10	\$15,000.00	MICH. COMP. LAWS ANN. § 750.356 (West 2022).
Minnesota	20	\$ 100,000.00	MINN. STAT. ANN. § 609.52 (West 2022).
Mississippi	20	\$10,000.00	MISS. CODE ANN. § 97-17-41 (West 2022).
Missouri	10	\$10,000.00	MO. ANN. STAT. § 570.030 (West 2022).
Montana	10	\$10,000.00	MONT. CODE ANN. § 45-6-301 (West 2022).
Nebraska	20	\$25,000.00	NEB. REV. STAT. ANN. § 28-518 (West 2022).
Nevada	20	\$10,000.00	NEV. REV. STAT. ANN. § 205.0835 (West 2022).
New Hampshire	15	\$ 4,000.00	N.H. REV. STAT. ANN. § 637:11 (2022).
New Jersey	10	\$150,000.00	N.J. STAT. ANN. § 2C:20-2 (West 2022).
New Mexico	9	\$10,000.00	N.M. STAT. ANN. § 30-16-1 (West 2022).
New York	25	\$ 5,000.00	N.Y. PENAL LAW § 155.42 (McKinney 2022).
North Carolina	0.66	\$10,000.00	N.C. GEN. STAT. ANN. § 14-70 (West 2022).
North Dakota	20	\$20,000.00	N.D. CENT. CODE ANN. § 12.1-23-05 (West 2022).
Ohio	11	\$20,000.00	OHIO REV. CODE ANN. § 2913.02 (West 2022).
Oklahoma	8	\$1,000.00	OKLA. STAT. ANN. tit. 21, § 1705 (West 2022).
Oregon	10	\$250,000.00	OR. REV. STAT. ANN. § 164.055 (West 2022).
Pennsylvania	20	\$25,000.00	18 PA. STAT. AND CONS. STAT. ANN. § 3903 (West 2022).

Rhode Island	10	\$5,000.00	11 R.I. Gen Laws Ann. § 11-41-5 (West 2022).
South Carolina	10	Judicial Discretion	S.C. CODE ANN. § 16-13-30 (2020).
South Dakota	25	\$50,000.00	S.D. CODIFIED LAWS § 22-30A-17.1 (2022).
Tennessee	60	\$50,000.00	TENN. CODE ANN. § 39-14-105 (West 2022).
Texas	99	\$10,000.00	TEX. PENAL CODE ANN. § 31.03 (West 2022).
Utah	15	\$10,000.00	UTAH CODE ANN. § 76-6-412 (West 2022).
Vermont	10	\$5,000.00	VT. STAT. ANN. tit. 13, § 2501 (West 2022).
Virginia	20	\$2,500.00	VA. CODE ANN. § 18.2-95 (West 2022).
Washington	10	\$20,000.00	WASH. REV. CODE ANN. § 9A.56.030 (West 2022).
West Virginia	10	\$2,500.00	W.VA. CODE ANN. § 61-3-13 (West 2022).
Wisconsin	12.5	\$25,000.00	WIS. STAT. ANN. § 943.20 (West 2022).
Wyoming	10	\$10,000.00	WYO. STAT. ANN. § 6-3-411 (West 2022).

## APPENDIX 2

## Bribery

	Maximum Incarceration (Years)	Maximum Fine	Citation
Alabama	10	\$15,000.00	ALA. CODE § 13A-10-61 (2022).
Alaska	10	\$100,000.00	ALASKA STAT. ANN. § 11.56.100 (West 2022).
Arizona	3.75	\$150,000.00	ARIZ. REV. STAT. ANN. § 13-2602 (2022).
Arkansas	1	\$2,500.00	ARK. CODE ANN. § 5-52-105 (West 2022).
California	4	\$5,000.00	CAL. PENAL CODE § 67.5 (West 2022).
Colorado	12	\$750,000.00	COLO. REV. STAT. ANN. § 18-8-302 (West 2022).
Connecticut	10	\$10,000.00	CONN. GEN. STAT. ANN. § 53a-147 (West 2022).
Delaware	1	\$2,300.00	DEL. CODE ANN. tit. 11, § 1102 (West 2022).
Florida	15	\$ 10,000.00	FLA. STAT. ANN. § 838.015 (West 2022).
Georgia	20	\$5,000.00	GA. CODE ANN. § 16-10-2 (West 2022).
Hawaii	10	\$25,000.00	HAW. REV. STAT. ANN. § 710-1040 (West 2022).
Idaho	5	\$50,000.00	IDAHO CODE ANN. § 18-1352 (West 2022).
Illinois	7	\$25,000.00	720 ILL. COMP. STAT. ANN. 5/33-1 (West 2022).
Indiana	6	\$10,000.00	IND. CODE ANN. § 35-44.1-1-2 (West 2022).
Iowa	5	\$7,500.00	IOWA CODE ANN. § 722.2 (West 2022).
Kansas	2.83	\$100,000.00	KAN. STAT. ANN. § 21-6001 (West 2022).
Kentucky	10	\$10,000.00	KY. REV. STAT. ANN. § 521.020 (West 2022).
Louisiana	5	\$1,000.00	LA. STAT. ANN. § 14:118 (West 2022).

Maine	5	\$5,000.00	ME. REV. STAT. ANN. tit. 17 § 602 (West 2022).
Maryland	12	\$25,000.00	MD. CODE ANN. CRIM. LAW § 9-201 (West 2022).
Massachusetts	10	\$100,000.00	MASS. GEN. LAWS ANN. ch. 268A, § 2 (West 2022).
Michigan	10	\$5,000.00	MICH. COMP. LAWS ANN. § 750.117 (West 2022).
Minnesota	10	\$20,000.00	MINN. STAT. ANN. § 609.42 (West 2022).
Mississippi	10	\$5,000.00	MISS. CODE ANN. § 97-11-11 (West 2022).
Missouri	4	\$10,000.00	MO. ANN. STAT. § 576.010 (West 2022).
Montana	10	\$50,000.00	MONT. CODE ANN. § 45-7-101 (West 2022).
Nebraska	2	\$10,000.00	NEB. REV. STAT. ANN. § 28-918 (West 2022).
Nevada	5	\$10,000.00	NEV. REV. STAT. ANN. § 197.010 (West 2022).
New Hampshire	7	\$4,000.00	N.H. REV. STAT. ANN. § 640:2 (2022).
New Jersey	10	\$150,000.00	N.J. STAT. ANN. § 2C:27-2 (West 2022).
New Mexico	3	\$5,000.00	N.M. Stat. Ann. § 30-24-3 (West 2022).
New York	25	\$5,000.00	N.Y. PENAL LAW § 200.04 (McKinney 2022).
North Carolina	3.416	Judicial Discretion	N.C. GEN. STAT. ANN. § 14-217 (West 2022).
North Dakota	5	\$10,000.00	N.D. CENT. CODE ANN. § 12.1-12-01 (West 2022).
Ohio	3	\$10,000.00	OHIO REV. CODE ANN. § 2921.02 (West 2022).
Oklahoma	5	\$3,000.00	OKLA. STAT. ANN. tit. 21 § 381 (West 2022).
Oregon	10	\$250,000.00	OR. REV. STAT. ANN. § 162.015 (West 2022).
Pennsylvania	7	\$15,000.00	18 PA. STAT. AND CONS. STAT. ANN. §4701 (West 2022).
Rhode Island	20	\$50,000.00	11 R.H. GEN. LAWS. ANN.

			§ 11-7-5 (West 2022).
South Carolina	1	\$500.00	S.C. CODE ANN. § 16-17-540 (2022).
South Dakota	10	\$20,000.00	S.D. CODIFIED LAWS § 22-12A-6 (2022).
Tennessee	30	\$25,000.00	TENN. CODE ANN. § 39-16-102 (West 2022).
Texas	20	\$10,000.00	TEX. PENAL CODE ANN. § 36.02 (West 2022).
Utah	15	\$10,000.00	UTAH CODE ANN. § 76-8-103 (West 2022).
Vermont	5	\$10,000.00	VT. STAT. ANN. tit. 13, § 1101 (West 2022).
Virginia	10	\$100,000.00	VA. CODE ANN. § 18.2-449 (West 2022).
Washington	10	\$20,000.00	WASH. REV. CODE ANN. § 9A.68.010 (West 2022).
West Virginia	10	\$50,000.00	W. VA. CODE ANN. § 61-5-4 (West 2022).
Wisconsin	6	\$10,000.00	WIS. STAT. ANN. § 946.10 (West 2022).
Wyoming	10	\$5,000.00	WYO. STAT. ANN. § 6-5-102 (West 2022).